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Studies in the Law of Naval Warfare:

Submarines in General and Limited Wars

by

W. T. Mallison, Jr.

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FOREWORD

The study of International Law has been an important part of the curriculum at the Naval War College since its founding in 1884. From 1894 to 1900, certain lectures given on International Law together with the situations studied were compiled and printed, but with very limited distribution. Commencing in 1901, however, the first formal volume of the Naval War College's "Blue Book" series was published.

This book represents the fifty-ninth volume in the series as numbered for cataloging and reference purposes. The present volume is written by Professor William T. Mallison, Jr. of The George Washington University National Law Center who occupied the Charles H. Stockton Chair of International Law at the Naval War College during the 1960-1961 academic year. It is considered that Professor Mallison's book presents an orderly, objective and concise discussion of the laws of naval warfare with special emphasis on submarines.

The opinions expressed in this volume are those of the author and are not necessarily those of the United States Navy or the Naval War College. The fact of publication does not imply endorsement of content but indicates merely that the subject treated is one which merits attention.

JOHN T. HAYWARD
Vice Admiral, U.S. Navy
President, Naval War College

PREFACE

The historic function of the laws of war has been to impose restraints upon international violence in the common interest of the community of the states. This study provides analysis of some of the more important juridical issues arising in naval warfare. These issues concern the submarine, but the significance of a number of them extends beyond the juridical control of submarine warfare.

The major claims arise in four principal categories in Chapters II through V: the lawfulness of particular combatants, areas of operation, objects and methods of attack, and weapons. In each functional category a central object is to focus juridical analysis upon some of the actual fact situations in warfare where the laws of war are applicable. The issues concerning the long-distance surface naval blockade considered in Chapter III provide context for the appraisal of submarine operational areas. The problems concerning the lawfulness of particular objects and methods of attack in Chapter IV are relevant also to surface and aerial naval warfare. Some of the weapons juridically appraised in Chapter V transcend naval warfare and raise issues concerning the juridical control of strategic aerial bombardment.

The writer believes that this study will perform a constructive task if it assists naval officers in understanding the practical importance of the laws of war and, in particular, the basic consistency between considerations of humanity and those of military efficiency. In the same way, the writer hopes there will be a constructive role for the study in assisting international lawyers to appreciate the capacity of the laws of war to at least minimize the destruction of human and material values in situations of international coercion.

In order to determine the modern adequacy of the laws of war in performing their humanitarian functions, certain future projections must be made. A dichotomy projecting general and limited wars appears to cover the two principal alternatives in a world where international coercion has not yet been eliminated. The two World Wars provide the principal general war experience in which the juridical control of submarines has been attempted. Since 1945 the only actual experience concerning international coercion has been with limited war or hostilities. It seems probable that such limited coercion is of future as well as contemporary signifi-

cance. Its effective control through law, consequently, is likely to be of continuing importance. For these reasons the systematic attempt to appraise the principal claims categories in the context of contemporary and future limited war seems necessary.

Even if it is concluded that the laws of war can be used to provide some significant protection for humanity under modern conditions, it seems clear that additional steps must be taken to achieve humanitarian objectives by improving world order. The contemporary minimum world public order system may be described as one which simply prohibits coercion for aggressive purposes while retaining the right to employ it for national and collective defense. An optimum world public order system may be conceived as retaining the elements of the minimum system and also involving a peaceful and democratic environment in which each individual may seek values without regard to discriminations which are irrelevant to his worth and capacity as an individual.

The instability and general inadequacy of the contemporary minimum system based in substantial part upon nuclear deterrence when compared with a possible optimum order based upon improved institutions and sanctions is obvious. Although beyond the scope of the present study, it is clear that effectively sanctioned disarmament would provide a practical means of building optimum world order. Modest steps have already been taken including the establishment of the Washington-Moscow "hot-line" communications system in 1963, to promote the prevention of an accidental triggering of world holocaust, and the Limited Nuclear Test Ban Treaty (1963). An additional constructive step would be the implementation of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies drafted in the United Nations in 1966. In taking the further steps which are necessary to improve the world order system, it should be recognized that the historic failures of disarmament in earlier times and under different conditions are of reduced relevance today.

Finally, it may be suggested that the contemporary minimum order system, although inadequate in many respects, is consistent with and indeed the indispensable first step toward the objective of achieving an optimum world order. Because of this, the laws of war will continue to have a practical humanitarian role until all international coercion is effectively eliminated.

W. T. Mallison, Jr.
Professor of Law
The George Washington University
Washington, D. C.

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The author has benefited from the assistance of many individuals. Vice Admiral Oswald S. Colclough, USN (Ret.), former President of The George Washington University and Dr. Louis H. Mayo, the Vice President of The George Washington University for Advanced Policy Studies, have contributed interest and support. Dr. Lloyd H. Elliott, President of The George Washington University, and Dean Robert Kramer of the National Law Center have assisted through their support of research and writing in the Law Center. Other friends and colleagues have assisted the work in various ways.

Four Presidents of the Naval War College, Vice Admirals S. H. Ingersoll, B. L. Austin, C. L. Melson, and J. T. Hayward, have facilitated the research and writing of the study. The interest of Admiral Hayward and of Rear Admiral F. H. Schneider, the Chief of Staff of the War College, in the subject of limited war is particularly appreciated. Captains G. S. Bogart and E. R. Schwass, the Director and Assistant Director of the School of Naval Command and Staff have assisted the writer in many ways. A portion of the research for the book was done during the academic year 1960-61 at the Naval War College and the writer was assisted by his colleagues at that time and particularly Rear Admiral E. E. Colestock, Captain C. R. Davis, Captain P. R. Schratz, and Commander B. I. Amman.

For collegial cooperation and valued assistance in the preparation of the typescript for the printer the writer is indebted to Commander H. S. Palau. Colonel T. C. Dutton, USMC, Director of the Correspondence School of the Naval War College and the entire staff of that School assisted in many ways.

The Judge Advocate General of the Navy, Rear Admiral W. A. Hearn, and his predecessor, Rear Admiral W. C. Mott, have provided interest and support. Captain J. R. Brock, Director of the International Law Division of the Office of the Judge Advocate General and his staff including Dr. Liselotte B. Watson effectively aided the study. Captain G. E. Carlisle, formerly Director of the International Law Division and now Legal Officer of the Thirteenth Naval District, made a particular contribution through his constructive comments concerning the typescript. Helpful comments were received from Lieut. Comdr. C. Paul Ake.

Rear Admiral E. M. Eller, the Director of Naval History, assisted the study by obtaining the declassification of relevant Department of the Navy documents. The writer is indebted to Rear Admiral H. A. Renken for thoughtful help in formulating basic problem areas.

Efficient assistance was received from the staffs of the following libraries: Mahan Library at the Naval War College and particularly Mrs. Lucille Rotchford, the Reference Librarian; The George Washington University Library and Law Library and particularly Professor Hugh. Y. Bernard, Mrs. Vera Taborsky, and Mr. William Hilleary; the Department of the Navy Library and particularly Mr. Frederick S. Meigs, the Assistant Librarian; the Department of the Army Library; the Library of Congress and particularly Dr. Sung Y. Cho; the Law Library of the Department of State; and the Librarian and staff of the Yale Law School Library. Mr. D. A. Peterson of the Department of State and Major N. P. Thorpe, USAF, also assisted in obtaining necessary sources.

Mr. Robert J. Patton, Jr. of the Board of Editors of the *George Washington Law Review* prepared the index and assisted effectively in other ways. The Rockport Fund of the National Law Center provided financial assistance in preparing the book for the printer.

Students in both lecture and seminar groups at the Naval War College and at The George Washington University Law Center contributed much to the work. Those students at George Washington enrolled in the seminar entitled "Legal Regulation of International Coercion" (formerly entitled "Legal Problems in Modern Methods of Warfare") should be mentioned particularly. Mr. Peter Heidenberger of the Washington, D. C. Bar has assisted concerning German language documents.

The writer has a deep and continuing obligation to Myres S. McDougal, Sterling Professor of Law at Yale University, for his interest, encouragement, and professional stimulation extending over a period of many years. Professor McDougal has made many constructive suggestions concerning the present study.

This book would not have been written without the participation of the writer's wife, Sally Vynne Mallison.

The analyses and conclusions of the study are those of the author alone.

W. T. Mallison, Jr.

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SHORT FORMS OF REFERENCES CITED

A.J.I.L.	= American Journal of International Law
Brit. Y.B.I.L.	= British Year Book of International Law
Buehrig	= Buehrig, Woodrow Wilson and the Balance of Power (1955)
Cagle & Manson	= Cagle & Manson, The Sea War in Korea (1957)
Colombos	= Colombos, The International Law of the Sea (5th rev. ed. 1962)
F.E.I.M.T. Judg.	= Judgment of the International Military Tribunal for the Far East (1948)
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Garner	= Garner, International Law and the World War (2 vols. 1920)
Garthoff	= Garthoff, Soviet Strategy in the Nuclear Age (rev. ed. 1962)
Geneva Sea Convention	= The Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (1949)
Grotius Trans.	= Transactions of the Grotius Society
Hackworth	= Hackworth, Digest of International Law (8 vols. 1940–1944)
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Hyde	= 3 Hyde, International Law: Chiefly as Interpreted and Applied by the United States (2nd rev. ed. 1945)
I.M.T.	= Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg (42 vols. 1947–1949)

J. Royal United Serv. Inst.	= Journal of the Royal United Service Institution
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Law of Land Warfare	= Department of the Army, The Law of Land Warfare (FM 27–10, 1956)
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Smith	= H. A. Smith, The Law and Custom of the Sea (3rd ed. 1959)
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Stone	= Stone, Legal Controls of International Conflict (Rev. with supp. 1959)

Submarine Protocol or article 22 of the London Naval Treaty of 1930	= Full citations appear in Chapter III, note 114
Trials of War Crims.	= U.S. Government, Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 (15 vols. 1946–1949)
Tucker	= Tucker, The Law of War and Neutrality at Sea (U.S. Naval War College, International Law Studies 1955) (1957)
Wash. Conf.	= [Washington] Conference on the Limitation of Armament [1921–1922], S. Doc. No. 126, 67th Cong., 2d Sess. (1922)
Whiteman	= Whiteman, Digest of International Law (5 vols. through March 1967)

CHAPTER I

SUBMARINE WARFARE AND INTERNATIONAL LAW

This study is within the subject of public international law. More specifically, it concerns the laws of war which are designed to promote humanitarianism by mitigating the destruction of human and material values which is involved in war. At the outset, it should be stated that it would be far better to abolish war in the present highly interdependent world community than merely to control it. Until it can be abolished, however, it is necessary to control it as effectively as possible because of the tremendous destructiveness of contemporary weapons and the crucial importance of the values to be protected.[1]

In view of the large number of limited wars which have taken place since the conclusion of the Second World War, the juridical regulation of war is a practical matter in the world community both now and in the foreseeable future. Limited wars reflect the common interest of the community of states in minimizing the extensity and intensity of the coercion employed.[2] If limited wars are to be kept limited rather than be "escalated" into general wars it is essential to apply the insights of public international law to this task.

This study focuses attention upon that part of the laws of war which regulate naval warfare, and more particularly, submarine warfare. During the World Wars two of the most important groups of juridical issues in naval warfare have related to the long-distance naval blockade enforced by surface warships and to submarine warfare. By using submarine warfare as an organizing principle it is not necessary to give consideration to many of the traditional and routine juridical issues of naval warfare which are covered adequately elsewhere.[3]

The present study employs both customary international law (the implicit agreement of states) and treaty or conventional international law

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[1] Not all international lawyers agree with the text. See, e.g., Professor Fenwick: "The laws of war belong to a past age and except for a few minor matters of no consequence, it is futile to attempt to revive them. . . . War has got beyond the control of law. . . ." 43 *Proc. A.S.I.L.* 110 (1949).

[2] See generally Osgood *passim* and Halperin, *Limited War in the Nuclear Age* (1963).

[3] Tucker is a text which considers the traditional laws of war at sea.

(the explicit agreement of states), rather than being restricted to traditional judicial materials. Judicial materials, including the war crimes trials, will be considered and applied in the inquiry where they are relevant.

A. THE SUBMARINE IN NAVAL WARFARE

In examining the law of submarine warfare one may profit from some knowledge of the submarine and its role in warfare. The object of naval warfare is sometimes stated to be the obtaining of control of the sea for one's own purposes while denying its use to the enemy.[4] Submarines, like other warships, may be used to achieve this objective. The unique ability of the submarine warship to submerge enables it to operate independently in high seas areas where the enemy maintains general control over the surface of the sea.[5]

The history of submarine warfare, or of warfare submerged, may be traced in Herodotus to the famous feat of Scyllias of Scion and his diving daughter who, we are told, swam under the ships of Xerxes and cut their anchor chains.[6] Submarine warships were employed in war prior to the First World War.[7] It was not until their extended use in that war, however, that their military significance as warships was recognized.[8] Before that war the principal projected use of submarines was against surface warships rather than against merchant ships.[9]

1. The Dual-Powered Submarine

a. *PERFORMANCE CHARACTERISTICS*

Other than its submergibility, the most striking characteristic of

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[4] See Potter & Nimitz 2.

[5] "[T]he submarine still remains the only type of ship—and here I include aircraft in the term 'ship'—that can maintain itself unsupported for long periods in the face of a distant enemy." Barry, "The Development of the Submarine," 80 *J. Royal United Serv. Inst.* 126, 138 (1935).

[6] Herodotus, Book VIII *Urania* 584–85 (Isaac Taylor transl. 1829). See also Field, "The Beginnings of Submarine Warfare," 64 *J. Royal United Serv. Inst.* 382, 383 (1919).

[7] See e.g. Bolander, "The *Alligator,* First Federal Submarine of the Civil War," 64 *Nav. Inst. Proc.* 845 (1938); Von Kolnitz, "The Confederate Submarine," 63 *Nav. Inst. Proc.* 1453 (1937). See generally Lake, *The Submarine in War and Peace* (1918) and Fyfe, *Submarine Warfare, Past and Present* (2nd ed. 1904).

[8] "The way in which Germany used her submarines in the very earliest stages of the war showed that she had little or no idea as to the immense power of the weapon lying in her hands." Gibson & Prendergast, *The German Submarine War 1914–1918* 350 (1931).

[9] Nimitz, "Military Value and Tactics of Modern Submarines," 38 *Nav. Inst. Proc.* 1193 (1912). It may be noted that the same officer who recommended use against warships served as Commander in Chief of the U.S. Pacific Fleet during World War II when U.S. Navy submarines were used primarily against Japanese merchant ships.

the prenuclear submarine was its dependence upon two separate propulsion systems, one for use on the surface and the other for use submerged.[10] A wide variety of surface propulsion systems were employed until the development of the diesel engine which shortly became the standard for surface propulsion. The dual-powered submarine was essentially the surface torpedo boat conjoined with a limited submergence capability. Its operational range and its speed on the surface were considerably greater than its range and speed submerged. Storage batteries were uniformly employed for underwater propulsion and this resulted in drastically limited submerged speeds and endurance. The German oceangoing submarine of the First World War had an endurance of from twenty-four to thirty-two hours underwater at a speed of about five knots. If the submarine operated for even a very short period of time at maximum underwater speed it greatly reduced its underwater range. The oceangoing submarine of World War I typically had a cruising range of from 5,000 to 8,000 miles on the surface. During both World Wars submarines were armed with torpedoes, mines, and guns. The guns, of course, could only be used on the surface.

There was only a small improvement effected in underwater speeds between the First and Second World Wars. During the First World War most oceangoing submarines had a maximum surface speed of from ten to fourteen knots. During the Second World War the maximum surface speeds were raised to perhaps seventeen to twenty knots. These speeds were low in comparison with the maximum speed of destroyers which was twenty-eight to thirty knots during World War I and at least a few knots higher during World War II.

In both World Wars the dual-powered submarine required relatively long periods between sea operations for repairs and overhaul. In addition, submarines typically required a voyage of some duration before reaching the area of actual operations. Consequently, the number of submarines engaged in war operations at a particular time was no more than a fraction of the total submarines in a particular navy.

A technical listing of submarine types has included arctic, aircraft carrier, cargo, midget, and minelayer among others.[11] Submarine merchant vessels, best known through the German *Deutschland* which cruised to the

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[10] The technical information in the present subsection is based upon Kuenne 9–31 and upon the naval encyclopedias, *Jane's Fighting Ships* (Blackman ed.; annual) and *Les Flottes de Combat* (Le Masson ed.; biennial).

[11] Committee on Undersea Warfare of the U.S. National Academy of Sciences, *An Annotated Bibliography of Submarine Technical Literature, 1557–1953* 96–104 (1954).

United States carrying cargo during the First World War,[12] are not usually armed. [13]

b. *COMBAT CAPABILITIES*

The characteristics of submarines imposed limitations upon their combat capabilities. At the beginning of the First World War the German Navy contemplated use of submarines against warships rather than against merchant ships.[14] In spite of some success in sinking surface warships,[15] the submarine was soon redirected toward merchant shipping. In the First World War, German submarines sank more than 11 million tons of Allied and neutral merchant shipping.[16] It was well known that the German submarine war brought the United Kingdom to the brink of defeat before the United States entered the First World War.[17] Finally, the use of convoys to protect merchant shipping combined with drastic and comprehensive antisubmarine measures brought about the Allied victory.[18]

Admiral Jellicoe has described the antisubmarine effort as it existed in November 1917 when he was the First Sea Lord of the British Admiralty.

> On the German side were some 178 submarines. On the British side the forces in use to overcome these 178 submarines included approximately:
>
> 277 Destroyers
> 30 Sloops
> 44 "P" Boats
> 338 Motor Launches
> 65 Submarines
> 68 Coastal Motor-boats
> 49 Yachts
> 849 Trawlers
> 867 Drifters
> 24 Paddle Mine-sweepers
> 50 Airships
> 194 Air-craft
> 77 Decoy ships

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[12] 7 Hackworth 459–61. See also Duncan, *"Deutschland"—*Merchant Submarine," 91 *Nav. Inst. Proc.* No· 4, 68 (1965); Hershey, "The *Deutschland,"* 9 *A.J.I.L.* 852 (1916).

The use of nuclear submarines as commercial tankers is recommended in Gallatin, "The Future of Nuclear-Powered Submarines," 84 *Nav. Inst. Proc.* No. 6, 23 (1958).

[13] Twenty-seven submarines or submersibles for undersea research purposes are described in U.S. Interagency Committee on Oceanography, *Undersea Vehicles for Oceanography* 21 (1965).

[14] Spindler, "The Value of the Submarine in Naval Warfare," 52 *Nav. Inst. Proc.* 835, 837 (1926).

[15] The best known example is the sinking of the British cruisers *Aboukir, Hogue,* and *Cressy* on Sept. 22, 1914 by the German *U–9.* Gibson & Prendergast, *The German Submarine War 1914–1918* 7–10 (1931).

[16] Anderson, "The Protection of Commerce in War," 78 *Nav. Inst. Proc.* 881, 883 (1952).

[17] Jellicoe, *The Crisis of the Naval War* (1920); Sims, *The Victory at Sea* (1920).

[18] *Ibid.*

> In addition to this great fleet of vessels engaged in the war against the 178 German submarines we laid over 10,000 mines in the last three months of 1917 in the Heligoland Bight and the Straits of Dover, solely for the purpose of destroying some of these submarines, whilst in 1918, in addition to further very extensive mining in the Heligoland Bight and Straits of Dover, some 100,000 mines were laid in the North Sea Barrage. Can any better proof be afforded of the difficulty of anti-submarines warfare, than is given by these figures? They show clearly the immense effect on Naval warfare, and Naval policy, of the introduction of a completely new offensive weapon. [19]

The decoy ships referred to by Admiral Jellicoe are the Q-ships of fame or infamy depending upon the acceptance of the British or German viewpoint.[20] These ships appeared to be innocent merchantmen but were actually heavily armed warships manned by Royal Navy personnel. Their function was to lure German submarines to the surface and to destruction. When a submarine attempted to carry out the time-honored procedures of visit and search it became a nearly helpless object of attack.[21]

Submarine warfare cannot be considered apart from what has been, thus far, the submarine's principal object of attack, the merchant ship. The solitary merchantman, unarmed and unescorted, was no match for the submerged submarine assuming, of course, that it was not actually a Q-ship. A convoy consisting of merchant ships and an adequate group of naval escort vessels was usually more than a match for a single submarine.[22] In addition, a merchant ship could seriously damage or sink a submarine by ramming.

In the Second World War, German submarines sank more than 23 million tons of Allied and neutral merchant shipping.[23] In the Pacific war United States submarines sank approximately sixty percentum of the 9 million tons of Japanese merchant shipping which were destroyed by the end of the war.[24] It seems clear that the destruction of the Japanese merchant marine was a major factor in obtaining victory in the Pacific. United States submarines were also used in support of fleet operations and against Japanese warships.[25]

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[19] Jellicoe, *The Submarine Peril: The Admiralty Policy in 1917* 183 (1934).

[20] British views appear in Campbell, *My Mystery Ships* (1928) and Chatterton, *"Q" Ships and their Story* (1922). The German view appears in Tzschirner, *Die Baralong-Bestialitat* (1918).

[21] See generally Potter & Nimitz 462.

[22] Potter & Nimitz 466–70; Cooke, "The Atlantic Convoys," 76 *Nav. Inst. Proc.* 863 (1950).

[23] Anderson, *supra* note 16 at 881.

[24] *Id.* at 887.

[25] Forrestel, *Admiral Raymond A. Spruance, USN: A Study in Command* 79, 135–42 (1966); Roscoe, *United States Submarine Operations in World War II* 361–72 (Ch. 25 entitled "Submarine Support of Fleet Operations") (1949).

Japanese submarines enjoyed no comparable success in attacking Allied merchant shipping. One reason for the success of United States submarines directed at Japanese merchant shipping was that the Japanese Navy never gave a major role to the protection of merchant shipping or to antisubmarine measures.[26] Such activities were considered contrary to the Japanese Navy doctrine of the offensive which regarded United States warships as its most important targets.[27] In spite of a few notable successes the Japanese submarines were not able to combat adequately the U.S. Navy surface warships. In addition, there is considerable evidence that the Japanese submarine power was dissipated in militarily inefficient operations. Professor Kuenne has summarized:

> [Japanese] submarine resources were squandered on futile searches for Allied men-of-war, on quixotic land bombardments, and on hopeless supply operations for lost garrisons. These employments are evidence of a total bankruptcy of strategic doctrine concerning the submarine, and the record of the Japanese in these respects constitutes the most shameful avoidable waste of a military resource in World War II.[28]

Nonpowered cargo submarines or submersibles which are towed by powered submarines may be regarded as a future method of sea transport both in peace and in war. The Japanese built such submarines and employed them in the Second World War in attempting to supply isolated and bypassed Japanese Army garrisons.[29] In addition, it is interesting to note that the Japanese Army, probably because of a lack of interservice cooperation and confidence, built and operated submarines which were manned by army personnel and used to supply Japanese Army garrisons.[30]

2. The Nuclear-Powered Submarine

a. *PERFORMANCE CHARACTERISTICS*

The contemporary nuclear-powered and nuclear-armed submarines

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[26] Atsushi Oi, "Why Japan's Anti-submarine Warfare Failed," 78 *Nav. Inst. Proc.* 587 (1952).

[27] Hashimoto, *Sunk: The Story of the Japanese Submarine Fleet, 1941–1945* 62 (1954).

[28] Kuenne 4, 5.

[29] Such a submarine is described briefly in Bulkley, *At Close Quarters: PT Boats in the United States Navy* 216–17 (1962). Technical description of this type of vessel termed "cargo carrying pipe" appears in Shizuo Fukui (ex-Constructor Lieut. Comdr., Japanese Navy), *Japanese Naval Vessels at the End of War* 205, 206 (1947, published in cooperation with U.S. occupation authorities in Japan) (copy in Mahan Library, U.S. Naval War College, Newport, R.I.).

[30] U.S. Strategic Bombing Survey (Pacific) Naval Analysis Division, 2 *Interrogations of Japanese Officials—Submarine Warfare* OPNAV–P–03–100, Nav No. 72, USSBS No. 366 (10 Oct. 1945). Technical descriptions of the Army "transport submarines" appear in Fukui, *op. cit. supra* note 29 at 217.

are very different warships from their predecessor submarines of both World Wars.[31] The use of a single high-power system for both submerged and surface cruising has eliminated the limitations of a dual-powered system. Perhaps the most striking feature of nuclear power is that the submarine is now truly a submersible. When it comes to the surface it does so because of tactical considerations and not because of inability to cruise submerged for great distances. Its hull is streamlined and designed for submerged rather than surface cruising.

The nuclear-powered submarine is one of the fastest warships and has the capability of maintaining high speeds for long periods of time. Since it is designed for submerged rather than surface cruising it is typically capable of a higher underwater than surface speed. In 1955 the *Nautilus*, the first of the United States nuclear submarines, traveled at an average submerged speed of sixteen knots maintained for over 1300 miles. The *Nautilus* does not have the streamlined hull designed to increase underwater speed which the later nuclear submarines have. Accurate official information on contemporary speeds is not available. One civilian authority, however, has stated: "Speeds of at least 30 knots submerged are now taken for granted, and indeed targets of 50 knots are talked of by some as possible in the future." [32]

The increase in the operational range of submarines is even more striking than the speeds now obtainable. Using the *Nautilus* as an example again, its "second reactor [core] was pulled and replaced in 1959 during routine overhaul after 26 months and steaming 93,000 miles of which 78,885 was [*sic*] underwater." [33] The *Triton,* a newer nuclear submarine, "circumnavigated the globe submerged in 1960 for 83 days and 41,500 miles at an average speed of 18 kts. She refuelled in mid-1962 after steaming 110,000 miles." [34]

The newer nuclear submarines operate at great depths. One authority has suggested a depth of 900 feet for contemporary submarines.[35] If this figure represents a safe operational depth, it is probable that these submarines could occasionally operate at greater depths on an emergency basis.

The contemporary emphasis on nuclear submarines in the U.S. Navy is demonstrated by the existence of sixty nuclear submarines out of a

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[31] The technical information in the present subsection is based in substantial part upon the following sources: *Jane's Fighting Ships 1965–66; Les Flottes de Combat 1966;* and Kuenne 177–92.

[32] Kuenne 180.

[33] *Jane's Fighting Ships 1965–66* 372.

[34] *Id.* at 370. See Beach, *Around the World Submerged* (1962).

[35] Kuenne 181.

total of 140 submarines.[36] The respective figures for the Soviet Navy are thirty-five and 390 [37] and for the British Navy, two and 42.[38]

b. *COMBAT CAPABILITIES*

Nuclear energy has also equipped the nuclear-powered submarine with the most awesome and devastating weapons of mass destruction. The latest United States fleet ballistic missile submarines each carry sixteen Polaris type A–3 missiles, each of which can project a warhead of approximately .75 megatons for a distance of approximately 2800 miles.[39] These missiles are regarded as being capable of high precision aiming considering the distances involved. In summary, a single fleet ballistic missile submarine carries approximately twelve megatons of TNT explosive equivalent. This is greater than the explosive equivalent of the entire Allied aerial bombing operations during the Second World War.[40] These basic energy weapons with their rapid missile delivery systems will be appraised juridically in Chapter V concerning weapons of attack.

The fleet ballistic missile submarine with its strategic bombardment function comprises one of the two principal types of nuclear submarines. The other is the nuclear attack submarine and it apparently has approximately the same functions of attack against merchant ships and warships as did the traditional submarine of the two World Wars.[41] Both types have weapons which are designed for submerged firing and the deck guns, typical of the earlier submarines, are not mounted on the nuclear ones. The nuclear attack submarine is equipped with nuclear weapons of the type usually described as tactical. These weapons include very high-speed homing torpedoes which may be directed at either surface ships or other submarines.[42] They also include an antisubmarine rocket, "SUBROC," which is launched from a submerged submarine's torpedo tube and operates underwater-to-air-to-underwater.[43] In short, the offensive capability of the new attack submarine is vastly greater than that of its predecessors during the World Wars.

The nonnuclear submarine was readily outclassed in speed by destroyers and other surface warships as well as by some merchant ships. In contrast, the nuclear submarine may well be able to outrun its most speedy surface opponents whether it is attempting to take defensive and evasive action or is attacking surface warships. Historically, the traditional submarine

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[36] *Jane's Fighting Ships 1965–66* 460.
[37] *Ibid.*
[38] *Ibid.* The respective figures for France are zero and nineteen. *Ibid.*
[39] Kuenne 178.
[40] *Ibid.*
[41] Kuenne 188–91 and *passim.*
[42] Martell, "Defending the Sea," *Industrial Research* 95, 98 (March 1966).
[43] *Ibid.*

has not usually been a militarily effective combatant unit employed against modern surface warships. The offensive capabilities of the new attack submarine may well have changed this situation so that surface warships become principal objects of attack.[44]

There can be no doubt but that the combat capabilities of antisubmarine warfare have also been greatly increased since the end of the Second World War.[45] It would be hazardous, nevertheless, to assume that antisubmarine warfare has kept pace with submarine warfare. It must be recalled that in two World Wars the dual-powered German submarines were almost successful in defeating all antisubmarine efforts.[46] One professional observer has recently concluded that "the submarine has opened a yawning gap between its own capabilities and those of the ASW forces."[47] In addition, the convoy system which was one of the chief means of defeating the traditional submarines was based upon a concentration of shipping. One may wonder to what extent concentration, rather than dispersal, involves unacceptable risks in an era of tactical and strategic nuclear weapons.

3. Future Submarine Warfare

There is, of course, no reason to believe that contemporary attack and fleet ballistic missile submarines represent the final development of submarine warfare or warfare submerged.[48] Without indicating all of the possibilities, it has been suggested that the future "ocean-based missile force could conceivably take some totally new direction of development in the future which would hopefully combine many of the better characteristics of the land-based force." [49]

The same report continues:

> Such developments may, for example, take the form of missiles of Polaris' size or even considerably larger placed on relatively shallow

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[44] Kuenne 189.

[45] Weakley, "Antisubmarine Warfare—Where Do We Stand?" *Naval Review 1965* 2 (1964).

[46] The antisubmarine war against Germany in World War II is described in 1 Morison, *History of United States Naval Operations in World War II: The Battle of the Atlantic* (1947) and United Kingdom Gov't, *The Battle of the Atlantic* (1946).

Popular accounts appear in Farago, *The Tenth Fleet* (1962) and Lewis, *The Fight for the Sea* (1961). Each of these two contains inaccuracies and the latter at 204 even confuses the civilian and naval heads of the British Navy.

[47] R. H. Smith, Jr., "The Submarine's Long Shadow," 92 *Nav. Inst. Proc.* No. 3, p. 30, 34 (1966).

[48] See generally Grenfell, "The Growing Role of the Submarine," 89 *Nav. Inst. Proc.* No. 1, p. 49 (1963).

[49] Report of the Panel on Oceanography of the President's Science Advisory Committee, *Effective Use of the Sea* 33 (1966).

underwater barge systems on the Continental Shelf in a way which conceals their location and requires the system to move infrequently so that the potential of its being tracked by motion-generated noise is minimized. In addition one might consider a slightly mobile ocean-bottom system which creeps along.[50]

It should not be necessary to emphasize the common interest of all states and all people in abolishing the weapons of mass destruction through effective international control. Until this is done, it is the comparatively modest function of the laws of war to limit their use, whenever possible, in order to protect humanitarian values.

B. PRINCIPAL CLAIMS CATEGORIES IN SUBMARINE WARFARE

The factual process of coercion gives rise to claims and counterclaims concerning the lawfulness or unlawfulness of various methods and techniques of naval warfare. These claims and counterclaims are advanced by the neutral states as well as by the belligerent ones. They constitute the particular juridical controversies which are resolved by the decision-makers through the application of the legal doctrines.

It is helpful for purposes of systematic organization and appraisal to identify and group together each of the major claims categories. Each such category comprises a closely related group of claims and counterclaims which raise significant juridical issues. In submarine warfare there are four major categories of claims.

1. Claims Concerning Combatants

Only individuals who have lawful combatant status are entitled to exercise violence during war or hostilities. Such individuals, upon capture by the enemy, are to be accorded the standard of treatment prescribed by international law for prisoners of war. Unlawful combatants who are captured enjoy considerably less protection under law.

In naval warfare the basic combatant unit is typically a vessel or aircraft which is manned by a group of individuals. A warship or a naval aircraft is a lawful combatant unit since it satisfies the dual legal requirements of public authorization and control. The lawful combatant status of the crew members is associated with that of their warship or aircraft. The submarine, unlike other warships, has been the subject of controversy concerning its combatant status. The principal claim has been that it

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[50] *Ibid.* See *id.* at 30–40 concerning oceanography, national security and submarine or submerged weapons. See also Craven, "Sea Power and the Sea Bed," 92 *Nav. Inst. Proc.* No. 4, p. 36 (1966); Alexander, "Oceanography and Future Naval Warfare," 89 *Nav. Inst. Proc.* No. 6, p. 66 (1963).

should be denied lawful combatant status. The countering claim is that the submarine has the same combatant status as any other warship.[51]

2. Claims Concerning Areas of Belligerent Operation

The high seas are employed in time of war for the conduct of submarine warfare. These are the same areas which are employed by neutral states for interneutral trade as well as for trade with one or more of the belligerents. These conflicting uses give rise to claims and counterclaims between belligerents and neutral states. The typical belligerent claim is to establish a submarine operational area from which neutral merchant shipping may be legally excluded with the sanction of sinking without further warning if such shipping persists in entering the area. This claim is used by the belligerent to reach the enemy belligerent through the neutral states which supply the enemy belligerent and so support its war economy. The typical neutral counterclaim is that neutral merchant ships have the legal right to use the high seas without being subjected to this type of belligerent action.

There are also interbelligerent claims concerning submarine operational areas. The typical claim is to employ the operational area against the enemy belligerent as a distinctive method of submarine warfare.[52]

3. Claims Concerning Objects and Methods of Belligerent Attack

Claims and counterclaims concerning the lawfulness of particular objects as targets of attack and claims and counterclaims concerning methods of attack are so closely related that they may be grouped conveniently in one category. A typical belligerent claim is that submarines may lawfully sink enemy merchant ships without warning. The countering claim is that enemy merchant ships may not be sunk lawfully unless the crew and passengers are assured a place of safety.

Claims concerning objects and methods of attack in naval warfare also include the issue of the applicability to submarines of the generally recognized legal duty to search for and rescue the survivors after each naval engagement. The claim is that submarines have the same legal obligations as other warships in this respect. The countering claim is that submarines simply do not have adequate space to carry survivors and, consequently, the obligation to rescue survivors is inapplicable.[53]

4. Claims Concerning Weapons of Belligerent Attack

The crucial importance of claims and counterclaims concerning the

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[51] Claims concerning combatants are appraised in Chapter II.

[52] Claims concerning areas of operation are appraised in Chapter III.

[53] Claims concerning objects and methods are appraised in Chapter IV.

lawfulness of weapons is demonstrated by the greatly increased efficiency of the traditional weapons combined with the development of contemporary weapons of mass destruction. The awesome characteristics of these latter weapons are far beyond that of the traditional weapons and traditional experience. It has been pointed out above that contemporary submarines possess both a tactical and strategic nuclear capability.

The most general claim in this category is that all militarily efficient weapons are lawful. The countering claim is that particular weapons are unlawful because they create suffering and injury disproportionate to their military utility.[54]

C. THE LAWS OF WAR: SOURCES, PRINCIPLES, AND SANCTIONS

It is well known that war is accompanied by the destruction of human and material values. A central objective of the laws of war is to reduce the destructiveness involved in military operations by providing at least a minimum standard of protection to individuals. The individuals who are so protected comprise noncombatants and combatants including the wounded, the shipwrecked, and prisoners of war.[55]

1. Sources of Decision

The decision-makers of international law, during both peace and war, in the present decentralized organization of the world community, include the officials of various international public organizations. The most important contemporary international law decision-makers, however, are the officials of national states. These same national officials also act upon occasion as claimants concerning the exercise of coercion on behalf of their nation-states. This duality of function permits, and indeed requires, reciprocity to operate as a sanction which promotes the common self-interest of the community of states in all rational claims and decisions.[56] Among the national decision-makers of the international laws of war is the military officer. In certain circumstances the military or naval commander must determine the legality of his own proposed military measures and of the measures employed by the enemy.[57]

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[54] Claims concerning weapons are appraised in Chapter V.

[55] Relevant conventional and customary law authorities are cited *infra* in the present section.

[56] See McDougal & Feliciano 40.

[57] The *Law of Naval Warfare* section 310(b) states that:

> [A] subordinate commander may, on his own initiative, order appropriate reprisals, but only after as careful an inquiry into the alleged offense as circumstances permit. Hasty or ill-considered action may be found subsequently to have been unjustified and may subject the officer himself to punishment for violation of the laws of war.

There is a similar provision in *The Law of Land Warfare* paragraph 497(d).

The decision-makers are authorized to resort to the legal doctrines of both conventional and customary law in making particular decisions. The function of these doctrines is not, of course, to automatically direct the decision-makers to a predetermined decision.[58] It is rather to direct their attention to the significant common values of the community of states which are protected by the laws of war. Since the doctrines are to be considered in varying contexts there must be careful factual analysis as a preliminary to equally careful ascertainment of doctrinal relevance and applicability. In addition, appropriate weight must be given to the changing conditions of war including its changing technology. So conceived, the legal doctrines may be utilized to enhance rational and just decisions.

Illustration of some of the significant factors which should be considered in decision is provided by the judgment of a United States Military Tribunal in *The Flick Trial*.[59]

> They [the provisions of Hague Convention IV of 1907] were written in a day when armies travelled on foot, in horse-drawn vehicles and on railroad trains; the automobile was in its Ford Model T stage. Use of the airplane as an instrument of war was merely a dream. The atomic bomb was beyond the realms of imagination. Concentration of industry into huge organisations transcending national boundaries had barely begun. Blockades were the principal means of 'economic warfare.' 'Total warfare' only became a reality in the recent conflict. These developments make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically or abstractly. Reasonable and practical standards must be considered.

a. CONVENTIONAL LAW

The conventional or treaty laws of war, based upon the express agreement of states,[60] are properly associated with international conferences, such as those at the Hague and in Geneva. The latest significant example of lawmaking concerning war by international convention are the four Geneva Conventions of 1949 for the Protection of War Victims.[61]

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[58] Contrast Stone, *Aggression and World Order* 10–11 and *passim* (1958) which is criticized in McDougal & Feliciano 151–55.

[59] 9 *Reps. U.N. Comm.* 1, 23 (1947).

[60] The Soviet Union emphasizes express agreement over other sources. Ramundo, *The (Soviet) Socialist Theory of International Law* 1–2, 27–28, 57–58 (George Washington Univ. Inst. for Sino-Soviet Studies No. 1, 1964).

[61] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 *U.S.T. & O.I.A.* 3114 (1956), *T.I.A.S.* 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 *U.S.T. & O.I.A.* 3217 (1956),

The detailed rules of these Conventions provide for some substantive improvements over preexisting conventional and customary law concerning the same subjects. It is unfortunate, however, that the prescription of law by explicit agreement has rarely achieved more than a restatement or codification of the existing customary consensus on the particular subject. The national negotiators meeting at international conferences in time of peace must be concerned about the future security of their respective states and are understandably hesitant to recommend rules which are unlikely to meet the test of a future war.

The principal international conventions or agreements which provide rules and principles conerning the conduct of war at sea are:

Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines (1907) [62]

Hague Convention IX Respecting Bombardment by Naval Forces in Time of War (1907) [63]

Hague Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (1907) [64]

Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War (1907) [65]

The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (1949) [66]

Article 22 of the Treaty for the Limitation and Reduction of Naval Armament (London, 1930) [67]

Article 22 of the London Naval Treaty is the only express agreement directed to the regulation of submarine warfare. It is set forth and interpreted in Chapters III and IV of the present study. Article 23 of the same treaty provides that "Part IV [art. 22] shall remain in force without limit of time." Prior to the expiration of the other provisions of the Treaty the parties to it invited all other states to agree to the article 22 rules through the Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London (of 1930) (November 6, 1936). [68] The rules, consequently, are now in effect between forty-eight

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T.I.A.S. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, 6 *U.S.T. & O.I.A.* 3316 (1956), *T.I.A.S.* 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 *U.S.T. & O.I.A.* 3516 (1956), *T.I.A.S.* 3365.

[62] 36 Stat. 2332 (1910), T.S. 541.

[63] 36 Stat. 2351 (1910), T.S. 542.

[64] 36 Stat. 2396 (1910), T.S. 544.

[65] 36 Stat. 2415 (1910), T.S. 545.

[66] 6 *U.S.T. & O.I.A.* 3217 (1956), *T.I.A.S.* 3363.

[67] 46 Stat. 2858 (1930), T.S. 830.

[68] 31 *A.J.I.L. Supp.* 137 (1937).

states, including the principal naval powers, and the Holy See. [69]

b. *CUSTOMARY LAW*

The pragmatic case-by-case development of the customary laws of war is, of course, a continuous process only in time of war or hostilities. This implicit agreement of states is, nevertheless, more comprehensive in doctrinal content and more effective than express conventional agreement in the development of the laws of war. In a fundamental sense it may be regarded as the accumulated juridical learning concerning the subject. Customary international law authorizes decision-makers to achieve contemporaneously effective and socially responsive decision by the rational evaluation of past authoritative experience. Thus, the inherited doctrines may be adapted to the needs of legal control in an era of rapidly changing technology or, in the alternative, be allowed to lapse and expire through disuse. In these respects the customary laws of war are similar to the Anglo-American customary common law. The laws of war tend to emphasize experience over logic [70] and, again like the common law, develop upon the basis of legislative or policy factors: "considerations of what is expedient for the community concerned." [71] A view of the relevant sources of law and of change in the customary laws of war is reflected in the Judgment of the International Military Tribunal at Nuremberg:

> The law of war is to be found not only in treaties but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but continual adaptation follows the needs of a changing world. [72]

The judgment of the United States Supreme Court in *The Paquete Habana* [73] provides illustration of the ascertainment and application of customary law to naval war. Coastal fishing boats operating from Havana, which were not participating in the war, had been captured by U.S. Navy vessels on blockade duty during the Spanish-American War. The issue was whether or not such craft could be captured and condemned. The Court responded negatively and stated:

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[69] The parties listed in Dept. of State, *Treaties in Force* 292 (1966) include the major naval powers of World War II: Canada, France, Germany, Italy, Japan, Soviet Union, United Kingdom, and United States. Other parties include Nepal, Saudi Arabia and Switzerland.

[70] Holmes, *The Common Law* 1 (1881, reprint 1938).

[71] *Id.* at 35. See Cardozo, *The Nature of the Judicial Process* 112–41 (1921). The same considerations are developed in constitutional law in Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law* 3–44 and *passim* (1962).

[72] 1 *I.M.T.* 221.

[73] 175 U.S. 677 (1900).

> By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.[74]

The doctrinal holding of the immunity of coastal fishing boats which do not participate in the war or hostilities was based entirely upon the customary international law since it was not set out in any applicable international agreement or municipal regulation of the United States. The case also illustrates a function of the laws of war: humanitarianism will be advanced by the protection of noncombatants and their property when it is consistent with the maintenance of military efficiency.

2. Basic Principles

The basic principles of the laws of war usually refer to military necessity and humanity. The principle of chivalry is sometimes added even though it appears to be only a relic of medieval times when combat between mounted warriors of high social status was regulated by formalistic rules.[75] The principle of military necessity has frequently been formulated in broad and open-ended terms. For example, Oppenheim-Lauterpacht describe it as:

> [T]he principle that a belligerent is justified in applying any amount and any kind of force which is necessary for the realisation of the purpose of war—namely, the overpowering of the opponent.[76]

The quoted formulation and similar ones are so comprehensive as to permit great and unreasonable amounts and types of force to be legally justified. If such a statement of the principle were actually applied the result would be to sweep away the substantive restrictions of the laws of war. A more restrictive formulation of the principle is clearly desirable. One is set forth in the *Law of Naval Warfare.*

> The principle of military necessity permits a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of

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[74] *Id.* at 686.

[75] Spaight 110–12 recounts incidents of chivalry between airmen in World War I. He also recounts the "change of spirit" in World War II. *Id.* at 118–19.

Even in medieval times chivalry was inapplicable to civilians, peasant foot soldiers, and to enemy personnel of different religious identification. See, e.g., Keen, *The Laws of War in the Late Middle Ages* 243 (1965): "Gentlemen prisoners were usually treated well, and allowed to go free on parole. . . . But the story was different in the case of the noncombatant. The civilians, and above all the humble, suffered untold hardships in war."

[76] Oppenheim-Lauterpacht 227.

> the enemy with the least possible expenditure of time, life, and physical resources.[77]

This formulation makes it clear that the principle is subject to the express prohibitions of the laws of war. Military necessity should be regarded as legalizing only that destruction which is necessary to the prompt achievement of lawful military objectives. More specifically, military necessity only justifies destruction which is both relevant and proportionate. Such destruction must be relevant to the attainment of lawful military objectives. It must also be proportionate in the sense of a reasonable relation between the amount of the destruction carried out and the military importance of the object of attack. Based upon past experience, the requirements as applied in actual war or hostilities are only that the irrelevance and disproportionality of the destruction effected must not be great.[78]

With this interpretation placed upon military necessity there remains a pervasive ambiguity in the conception of "lawful miltary objectives." The determination of the lawfulness of particular objects of attack in submarine warfare is a central task of Chapter IV of the present study.

The principle of humanity is formulated as follows in the *Law of Naval Warfare:*

> The principle of humanity prohibits the employment of any kind or degree of force not necessary for the purpose of the war, i.e., for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources.[79]

On first impression the formulation of the humanity principle appears to be an obvious tautology since it only prohibits the use of force which is not permitted under the principle of military necessity. In addition, the phrase, "the purpose of the war," is as open-ended and ambiguous as is the conception of "lawful military objectives." The principle of humanity, consequently, appears no more precise than that of military necessity.

Both basic principles, nevertheless, protect important value interests of the world community. Until war and hostilities are abolished, the basic principles reflect the interest of states in conducting war or hostilities (at least for defensive purposes), but in conducting them with the least possible destruction of human and material values.[80] It is wanton and unreasonable destruction which is made illegal by the principles of military necessity and humanity.

The application of the two basic principles presents little difficulty in clear-cut factual situations. For example, it should be readily apparent that

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[77] *Law of Naval Warfare* section 220(a) (footnotes omitted).

[78] Compare the textual formulations with those appearing in McDougal & Feliciano 524–28 and in O'Brien, "Legitimate Military Necessity in Nuclear War," 2 *World Polity* 35 at 48–57 (1960).

[79] *Law of Naval Warfare* section 220(b) (footnotes omitted).

[80] See McDougal & Feliciano 522–23.

it is legally permissible under the principles for submarines to sink without warning those enemy merchant ships which are armed and convoyed by the naval forces of the enemy belligerent. It should be equally apparent that it is illegal under the principles to kill the helpless survivors of the same merchant ships.[81]

In the many difficult and complex factual situations which arise the decision-maker may be aided by other and more specific legal principles. Whether there are other relevant principles or not, there is no substitute for careful factual analysis in each case combined with insight concerning the values to be protected by each of the basic principles. Illustration of the considerations which are involved in a careful juridical appraisal is provided by a United States Military Tribunal in *United States* v. *List:*

> Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to faciliate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the neccessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communications or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.[82]

Although stated in terms of military necessity, it may be noted that the quoted analysis is entirely consistent with the principle of humanity. In a superficial analysis the two principles may appear to be opposites. Nevertheless, the application of either principle as if the other did not exist

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[81] The textual statement may be buttressed in other terms than military necessity and humanity. The killing of such survivors could be termed simply "murder on the high seas."

[82] 11 *Trials of War Crims.* 757 at 1253–54.

would result in unbalanced decision. It is essential to apply each principle in the light of the other if the common interests of states are to be honored. From this perspective, each principle may be usefully conceived as merely an element of a larger composite principle which comprises both military necessity and humanity. [83] At the very least, the complementary character of the two traditional principles should be recognized and stressed in order to promote just decisions.

3. Sanctions

Laws of war of ideal doctrinal content would emphasize the principle of humanity over other principles. Such laws of war without enforcement would be less effective in protecting human values than laws in which the doctrinal content is frankly recognized as a compromise between humanitarianism and military necessity and which have at least a measure of enforcement. To achieve effectiveness it is necessary to adapt precise nineteenth century formulations of legal rules to the realities of modern naval warfare while maintaining the basic principles and values in the rules rather than to abandon the attempt to regulate naval warfare.[84] It is also necessary to recognize that a usable conception of law, whether international or municipal, should include at least some element of sanction or enforcement. The term "sanction" is here used broadly to refer to anything which promotes adherence to the law.[85] If there is no possibility of enforcement it is illusory to invoke the label of "law."

Since it is sometimes alleged that the laws of war are not law at all in the sense of being susceptible to enforcement, it should be mentioned that the sanction of the laws of war is the common conviction of the participants in the war or hostilities that self-interest is advanced by adhering to the law rather than by violating it. This is, of course, the same as the basic sanction for any other body of law whether international or municipal.[86] The conception is that the interests of the participants are not only mutual but reciprocal as well. It is recognized that the laws of war cannot be long sanctioned as to one participant alone. The sanction applies to all on the condition of reciprocity in observance. When reciprocity in observance breaks down, acts of reprisal may be employed to induce observance.

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[83] Compare McDougal & Feliciano 530 who state an "overriding conception of minimum unnecessary destruction [of values]."

[84] Colombos 786 issues a call to face the "realities of naval warfare" and quotes with approval Sir Samuel Evans' view that "precedents handed down from earlier days [should be used] as guides to lead and not as shackles to bind." *Id.* at 787.

[85] Compare the narrow conception in St. Korowicz, *Introduction to International Law: Present Conceptions of International Law in Theory and Practise* 5 (1959): "Retorsion (retaliation), reprisals, and war individually or collectively applied are the means by which sanctions are carried out."

[86] See McDougal & Feliciano 53.

The participants also share an interest in economy in the use of force.[87] The destruction of values which is unnecessary to obtain military objectives is obviously uneconomical use of force since it involves the expenditure of force without a return in net military advantage. In addition, the unregulated use of coercion contrary to the laws of war will very likely increase the enemy's will to resist and thus will compel the use of a greater quantum of coercion than should have been necessary to secure the same military objective. It is conceded that the effectiveness of this sanction is dependent upon the rationality of the participants in the war or hostilities as well as their dedication to humanitarian values.[88] When a pathological desire for destruction as an end in itself supplants rational calculations of self-interest, there may be a corresponding breakdown in the enforcement of the laws of war.

Reprisals are widely regarded as sanctions to obtain adherence to the laws of war.[89] A reprisal measure is an act, otherwise unlawful, which one belligerent directs against the enemy belligerent in retaliation for illegal acts of warfare by the latter. The object of a reprisal is to obtain adherence to the laws of war and consequently when the opposing belligerent terminates his illegal practice the reprisal should be stopped. Even the possibility of future reprisals is regarded as a sanction which deters a belligerent from violating the laws of war.

The Geneva Conventions of 1949 reduce significantly the individuals against whom reprisals may be legally directed.[90] The Geneva Sea Convention provides:

> Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.[91]

In anticipation of claims appraised in Chapter III, particular techniques of submarine warfare have frequently been claimed to be legitimate reprisals in both World Wars. For example, the German claim to establish submarine operational areas has been advanced as a legitimate reprisal in response to alleged illegalities in the British conduct of naval war. The British naval warfare methods were, in turn, based upon alleged German illegalities. Both the German submarine operational area and the British long-distance blockade were each claimed to be justified as a legitimate

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[87] See the text accompanying note 116 *infra*.

[88] As an example of the enforcement of a part of the international laws of war see Wright, "The Value of International Law in Occupied Territory," 39 *A.J.I.L.* 775 (1945).

[89] See generally Oppenheim-Lauterpacht 561–65. Concerning reprisals in naval warfare see 7 Hackworth 134–56.

[90] See Albrecht, "War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949," 47 *A.J.I.L.* 590, 607–10 (1953).

[91] Art. 47. The protection includes warships' sickbays and their equipment. Art. 28.

reprisal. If appraisal is limited to their validity as measures of reprisal only, it is possible to conclude that the substantive law of naval warfare remains unchanged. The persistent and continuing character of these naval methods throughout both World Wars, however, may suggest that their use reflects a basic change in the customary international law of war.

Reprisals have been invoked with such frequency in naval warfare that they may be regarded as having a legislative function. This function is to bring the traditional doctrines up to date so that they apply to the contemporary methods of war.[92]

War crimes trials may be regarded as a deterrent sanction for the laws of war.[93] The conception is that the mere possibility of trials after the conclusion of the war may be an effective deterrent. It should not be assumed that only military personnel of the vanquished state will be subjected to trial. Although the personnel of victorious states are not usually subject to war crimes trials under international law, they may be subject to trial under municipal law including the military code governing the armed forces. The important point is that municipal military codes such as the United States Uniform Code of Military Justice [94] prohibit in substance the same type of conduct which is prohibited by the international laws of war.

The submarine war conducted by Germany during the Second World War is the largest such military operation in history from the standpoint of the numbers of submarines and of submarine personnel involved.[95] At the conclusion of that war there was one war crimes trial in which German submarine personnel were charged with violation of the laws of war in killing the survivors of a sunken ship. This single instance was *The Peleus Trial* [96] in which the defendants were accused of killing survivors of a sunken merchant vessel by the use of gunfire and hand grenades. There is no record of any other case involving such charges directed at German submarine personnel. The fact that this case stands alone may be regarded as indicating its aberrational character.

In the ensuing chapters appraisal will be made of the war crimes trials

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[92] See McDougal & Feliciano 675.

[93] See *id.* at 703–31 and Oppenheim-Lauterpacht 566–88.

[94] 64 Stat. 108 (1950), 10 U.S.C. sections 801–940 (1964).

[95] Roskill 447 under the subheading "German U-Boat Losses" states that 1,162 German submarines were built and commissioned during the war of which 785 were destroyed, 156 surrendered, and the remainder were scuttled. *Jane's Fighting Ships 1944–45* 635 under the heading "War Loss Section" states that 781 German submarines were destroyed.

[96] Trial of Eck, 1 *Reps. U.N. Comm.* 1. A more complete report of the same case including apparently the full trial proceedings appears in the entire first volume of Maxwell-Fyfe (ed.), *War Crimes Trials.* See the description of the facts of the case in Langdon, "Live Men Do Tell Tales," 78 *Nav. Inst. Proc.* 17 (1952).

involving charges of violations of the laws of naval and submarine warfare. In particular the trial of Admiral Donitz of the German Navy before the International Military Tribunal at Nuremberg for violation of the law of submarine warfare during the Second War will be appraised.

In evaluating the war crimes trials conducted by the victorious allies at the conclusion of the Second World War, Professor Lauterpacht has stated:

> The stature of those tribunals is bound to grow with the passage of time and their judgments will be increasingly regarded as a weighty contribution to International Law and justice. These judgments—perhaps more than anything else—give a complexion of reality to any attempt at a scientific exposition of the law of war, which never before in history was so widely and so ruthlessly disregarded as in the Second World War. In that perspective the occasional criticisms of these courts as having been tribunals set up by the victor acting as judge in his own cause must be deemed to be of limited importance.[97]

Such an analysis does not, of course, preclude appraisal of the substantive accuracy of determinations of law and of findings of fact made by particular war crimes tribunals including the International Military Tribunal at Nuremberg.

D. SITUATIONS WHERE THE LAWS OF WAR ARE APPLICABLE

A duly declared war with states as the participants in which all of the participants recognize its character as "war" and in which there is no issue concerning illegal resort to coercion is the obvious situation where the laws of war apply. There are also other less obvious situations where these laws apply.

There can be but little doubt that Germany's role in the Second World War was that of a state illegally resorting to coercion by a war of conquest and aggression contrary to its obligations under the Pact of Paris of 1928 [98] renouncing the use of war as an instrument of national policy. If it follows from this that every single military act of Germany, including its submarine war, is illegal, careful analysis concerning the legality of particular aspects of submarine warfare is unnecessary. It would simply be assumed that the officers and crew of each German submarine were war criminals without regard to whether they complied with the specific legal doctrines applicable to naval war or not. Employing the same reasoning, if the United States and the United Kingdom are regarded as states legally employing coercion, then it would follow that all of the particular features of their conduct of submarine warfare would be deemed lawful even

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[97] Oppenheim-Lauterpacht, "Preface" v.

[98] "The Kellogg-Briand Pact," 46 Stat. 2343 (1929), T.S. 796.

though they were substantially the same methods which were used by Germany.

This issue concerning the relation between illegal resort to coercion and the applicability of the laws of war was raised in the *Trial of List* [99] before a United States Military Tribunal at the end of World War II. The prosecution argued that since Germany's wars against Greece and Yugoslavia were illegal wars that Germany obtained no legal rights as a belligerent occupant and that the presence of German troops in those countries was unlawful. The Tribunal rejected the argument, stating:

> For the purposes of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defense.[100]

Other courts took the same position. It is particularly important that a claim by the prosecution which was similar to that made in the *Trial of List* was rejected by the International Military Tribunal at Nuremberg. [101] The result is that the illegal character of a particular participant's resort to coerction does not relieve it from the applicability of the detailed rules of the laws of war. The soundness of this position seems clear in view of the central role of reciprocity as a sanction for the laws of war. Unless a distinction is made between the illegal character of resort to coercion and the applicability of the detailed requirements of the law concerning the conduct of the coercion, an aggressor state might evade the detailed doctrines by the simple expedient of being the aggressor. If the aggressor state were not subject to the law, it might shortly be claimed that the defending state was also freed from adherence to the specific doctrines. The result could be widespread destruction of human and material values of the kind protected by the laws of war. In consequence, if the humanitarian objectives of the laws of war are to be effectuated, it is necessary that they be applied without regard to the question of illegality in the initial resort to coercion. [102] Therefore, in spite of the character of the German resort to coercion in World War II as well as the documented Nazi murders of

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[99] 8 *Reps. U.N. Comm.* 34.

[100] *Id.* at 59.

[101] The argument of the French Chief Prosecutor, M. de Menthon, appears in 5 *I.M.T.* 387. The International Military Tribunal rejected the argument by necessary implication from its entire Judgment. 1 *I.M.T.* 171–341.

[102] The same conclusion is reached, after some equivocation, by Lauterpacht, "Rules of Warfare in an Unlawful War" in *Law and Politics in the World Community* 89, 91–99 (Lipsky ed. 1953).

civilians on land, [103] the German submarine war must be appraised according to the same juridical criteria applied to the United States and the United Kingdom submarine operations. By the same reasoning, the Japanese submarine war must also be appraised by the same criteria.

Another situation presenting an issue concerning the applicability of the laws of war is that involving a war which includes participants other than states. For example, it has been stated with respect to collective action by the United Nations that this international organization "has a superior legal and moral position as compared with the other party [presumably a national state] to the conflict." [104] From this it has been suggested that the United Nations might "forbid use of atomic bombs by a state while reserving the right to use them itself." [105] It has also been concluded that:

> [T]he United Nations should not feel bound by all the laws of war, but should select such of the laws of war as may seem to fit its purposes (e.g., prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible with its purposes. [106]

To the extent that the United Nations rejected particular portions of the laws of wars, the probable result would be lack of reciprocity and ensuing breakdown of the law. If the United Nations picked and chose among the laws of war this would seem to be an invitation for the opposing belligerents to do the same. During the Korean War, as a matter of fact, the United Nations carefully observed the laws of war. [107] This seems a more practical way of manifesting "a superior legal and moral position" than the quoted alternative.

If one or more of the participants in war or hostilities is a rebel or insurgent group, there remain, nevertheless, the humanitarian reasons for the application of the laws of war. Describing widespread violence as "internal" does not mitigate its objective characteristics. In the United

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[103] 1 *I.M.T.* 171 at 232–38, 243–53. Attorney-General of the Government of Israel v. Adolf, the son of Karl Adolf Eichmann, Criminal Case No. 40/61, Dist. Ct. of Jerusalem, Israel, Dec. 11–12, 1961, affirmed Criminal Appeal No. 336/61 Sup. Ct. of Israel, May 29, 1962.

The Eichmann case is cited only concerning the Nazi murders and not concerning jurisdictional authority under international law to conduct the trial because of doubts concerning the latter. For amplification see Mallison, "The Zionist-Israel Juridical Claims to Constitute 'the Jewish people' Nationality Entity and to Confer Membership in It: Appraisal in Public International Law," 32 *Geo. Wash. L. Rev.* 983, 1043–46 (1964).

[104] Report of Committee on Study of Legal Problems of the United Nations, "Should the Laws of War Apply to the United Nations Enforcement Action?" 46 *Proc. A.S.I.L.* 216, 217 (1952).

[105] *Id.* at 218.

[106] *Id.* at 220.

[107] Letter from U.S. Ambassador Warren R. Austin to the Secretary-General of the United Nations, July 5, 1951, 25 *Dept. of State Bull.* 189 (1951).

States Civil War, a situation of widespread rebellion, the laws of war were applied.[108] If they had not been applied and if every single Confederate soldier or sailor had been treated as a traitor, the result would probably have been much greater destruction of values than actually occurred.

The Geneva Conventions of 1949 undertake the regulation of violence in internal conflicts. The detailed rules of the Conventions are not applicable as such in civil wars but the Conventions provide that each of the participants in an armed conflict "not of an international character" occurring in the territory of a contracting party must be bound at least by the prescribed humanitarian standards.[109]

Finally, the laws of war are applicable in war or hostilities without regard to invocation of the label "war" or to the recognition of a state of war by the participants. In relevant part the four Geneva Conventions provide:

> In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[110]

As a matter of drafting, it might have been better to change the last clause to read "even if the state of war is not recognized by one or more of them." It is clear, nevertheless, that one of the fundamental purposes of the Geneva Conventions is to obtain application of their detailed rules in all situations involving the use of international coercion and violence. The humanitarian objectives of the laws of war require an equally broad application of the customary laws of wars.

E. LIMITED WAR AND THE EFFECTIVE CONTROL OF INTERNATIONAL COERCION

Professor Quincy Wright has described the historical functions performed by war:

> War has been the method actually used for achieving the major political changes of the modern world, the building of nation-states, the expansion of modern civilization throughout the world, and the changing of the dominant interests of that civilization.[111]

The same writer, even in 1942 before the advent of atomic weapons, detected a certain modern disenchantment with war:

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[108] Professor Francis Lieber was the principal author of U.S. War Dept., *Instructions for the Government of Armies of the United States in the Field,* Gen. Orders No. 100 (April 24, 1863).

[109] Art. 3 of each Convention.

[110] Art. 2, paragraph 1 of each Convention.

[111] 1 Wright, *A Study of War* 250 (1942) (footnote omitted).

> There is, however, a more widespread opinion than in any other period in history that war has not functioned well in the twentieth century. From being a generally accepted instrument of statesmanship, deplored by only a few, war has, during the modern period, come to be generally recognized as a problem. [112]

The "problem" of preatomic times now involves the issue of survival of the human race unless war can be effectively controlled. [113]

In an era of weapons of mass destruction and of rapid missile delivery techniques there are sound reasons to consider limited war as the rational alternative to unlimited war until it is possible to abolish war altogether. Policy makers who are concerned with national self-interest have persuasive inducements to avoid a war of mutual catastropic devastation. This is not to say that an unlimited war is impossible since such a war could take place by accident or miscalculation. It is only to say that an unlimited war involving mass destruction without regard to rational political objectives does not serve the interests of any of the participants in such a war.

Limited war has been authoritatively described in these terms:

> A limited war is one in which the belligerents restrict the purposes for which they fight to concrete, well-defined objectives that do not demand the utmost military effort of which the belligerents are capable and that can be accommodated in a negotiated settlement. Generally speaking, a limited war actively involves only two (or very few) major belligerents in the fighting. The battle is confined to a local geographical area and directed against selected targets—primarily those of direct military importance. [114]

In 1957 the United States Chief of Naval Operations stated his estimate of future probabilities:

> The Korean War was a limited war. A limited war is the type of war most likely to occur in the thermonuclear age. [115]

If a limited war with major powers among the participants is the most probable type of war, there are compelling strategic reasons to be prepared for it. There is also the opportunity to determine whether or not limited war provides the effective means for the juridical limitation of international coercion. Since limited war involves limited political objectives, it should be clear that the coercion which is employed to achieve the objectives of limited war must itself be limited both in scope and intensity. Assuming that the belligerents comprise major powers with nuclear and thermonuclear capabilities, each must limit the coercion it employs. If this is not done it will provoke expanded countercoercion with a resulting escalation

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[112] *Ibid.*

[113] See generally Kissinger, *Nuclear Weapons and Foreign Policy* (1957).

[114] Osgood 142.

[115] Admiral Burke's words appear in his foreword to Cagle & Mason.

of the war. In short, the military principle of economy of force must be employed if a war is to be limited. This principle has been described as follows:

> It prescribes that in the use of armed force as an instrument of national policy no greater force should be employed than is necessary to achieve the objectives toward which it is directed; or, stated another way, the dimensions of military force should be proportionate to the value of the objective at stake. [116]

Another type of war is limited in the sense that the belligerents are not capable of greater military efforts than those involved in a limited war. From the standpoint of such belligerents the war may be deemed to be general in terms of the resources involved and the military effort exerted. For the neutrals, such a war will nevertheless be regarded as limited. [117] Neutral interests in maintaining their peacetime activities should be a powerful influence upon the belligerents in limiting the coercion employed. It is not realistic to think that minor belligerents would be permitted to disrupt the peaceful activities of the world community by the employment of extensive military techniques.

The result of either kind of limited war should be to reduce belligerent claims concerning legally permissible combatants, areas of operation, objects and methods of attack, and weapons of attack. If this is accurate, it appears to be probable that a limited war would enhance the role of law by reducing the types and amounts of the coercion employed. A governmental decision to fight a limited war rather than a general one would normally involve a high-level policy decision not to use some methods and degrees of coercion which are lawful under the laws of war. In view of the great disparity between the factual context of limited war and unlimited war, it is even possible that some of the traditional legal doctrines which were not honored during the World Wars, such as visit and search at sea, could be maintained in limited war situations. It is clear that a war of all-out thermonuclear devastation would leave little or no role for law. Consequently, the term "general war" is used to refer to a situation of comprehensive international coercion such as both the World Wars in which only the traditional weapons are employed or to the same type of war in which nuclear weapons are also employed but

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[116] Osgood 18.

[117] It is recognized that the United Nations Charter has changed the law of neutrality. See Oppenheim-Lauterpacht 647:

> While the Charter has affected in a decisive way the right of Members of the United Nations to remain neutral, it has not substantially abolished their right to neutrality either in wars between Members of the United Nations or in wars between non-Members or between Members and non-Members.

in a carefully restricted manner.[118] General war in this sense and limited war, in contrast to an all-out war of mutual destruction, provide the opportunity to place meaningful juridical limitations upon the exercise of international coercion. In each of the ensuing chapters the central legal issues will be examined in the context of limited as well as general war.[119]

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[118] This, in substance, is the recommendation concerning the use of nuclear weapons in Cagle, "A Philosophy for Naval Atomic Warfare," 83 *Nav. Inst. Proc.* 249 (1957). A similar recommendation appears in Brodie, *Escalation and the Nuclear Option* (1966).

[119] The limited war context is not usually employed in studies of the law of naval warfare. It is apparently assumed that only general war is likely in the future. See e.g. the Colombos, Smith, and Tucker books.

CHAPTER II

CLAIMS CONCERNING LAWFUL COMBATANTS

The most general claim concerning combatants in naval warfare is that it is lawful to use all efficient vessels, aircraft, and personnel against the enemy. As stated in Chapter I, submarines have been the subject of claims and counterclaims concerning their combatant status. If the claim to deny submarines lawful combatant status or to "abolish" them were successful, it would deprive the submarine officers and crew of status as lawful combatants. A related claim is that the submarine must be "limited" by law in some way.

A. WARSHIPS AS LAWFUL COMBATANTS

It is well known that not everyone may lawfully participate in combat during war or hostilities. Both public authorization and public control have been traditionally required in order to confer the status of lawful combatants.[1] Thus, soldiers, sailors, and airmen who are members of the public armed forces are typical lawful combatants.[2] They are authorized by their government to commit acts of regulated and controlled coercion and violence. "Lawful combatants" is used to refer to those indviduals who, if captured by the enemy, must be accorded all the rights provided by international law for prisoners of war. "Unlawful combatants," in contrast, is used to refer to those individuals who, upon capture, are subject to punishment if they lack public authorization and control.

In land hostilities the individual is regarded as the basic unit of military force and, consequently, it is important that he be identified indvidually as having combatant status.[3] In sea and air hostilities the individual combatant is usually associated with a combatant unit such as a warship or

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[1] The customary law requirements stated in the text are reflected in Hague Convention VII (1907). Art. 1 requires both governmental "authority" and "control" over a warship which is converted from a merchant ship. These are the same requirements which apply to warships generally.

[2] Oppenheim-Lauterpacht 255. Army personnel, such as the crews of the Japanese Army submarines mentioned in the text of Ch. I accompanying note 30 are, of course, lawful combatants in naval war.

[3] The uniform is regarded as more important in land than in naval or air war. See Spaight 100–04.

military aircraft.[4] A warship or military aircraft is a lawful combatant unit since its personnel comply with the dual juridical requirements of public authorization and public control.

Where they are separated from their vessel or aircraft, as in a shipwreck or forced landing situation, naval officers and crewmen retain their status as lawful combatants. In the same way, such officers and sailors who conduct hostilities apart from warships and naval aircraft, such as the U.S. Navy's underwater demolition teams composed of swimmers,[5] are lawful combatants. There can be no doubt concerning the lawful combatant status in such a situation but, as a practical matter it may be particularly desirable for such combatants to carry military identification tags or to wear uniforms in order to facilitate their identification. If questions are raised concerning lawful combatant status, reasonable doubts in establishing identification should be resolved in favor of those claiming such status.

The necessity for according prisoner of war status to all lawful combatants is illustrated by the *Trial of Schoengrath* [6] before a British Military Court in Germany in 1946. In this case the defendants, seven members of the Nazi SS, were charged with committing a war crime "in the killing of an unknown Allied airman, a prisoner of war." [7] The facts concerned an airman who had descended by parachute from his bomber aircraft which had been flying westward over occupied Holland. The defendants, apparently acting on the assumption that he was an Allied airman, shot him shortly after his capture rather than accord him status as a prisoner of war. The defense contended that there was no case to answer because the prosecution had produced no evidence to show that the victim was in fact an Allied airman.[8] The prosecution replied that it was too far-fetched to assume that the bomber aircraft involved, in view of the facts, was a neutral aircraft.[9] The court convicted the defendants as charged even though the nationality of the airman was not proved. The decision is sound because the airman was entitled to prisoner of war status in the light of the facts which were shown. Even if he had been a neutral national serving in the air force of an Allied state, he would have been a lawful combatant.

Where an individual is entitled to status as a prisoner of war, he must not be subjected to discriminatory treatment. This doctrine is prescribed

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[4] Such combatant units typically display the national flag or emblem as an identifying mark.

[5] Factual description appears in Fane & Moore, "The Naked Warriors," 82 *Nav. Inst. Proc.* 913 (1956).

[6] 11 *Reps. U.N. Comm.* 83.

[7] *Ibid.*

[8] *Id.* at 84.

[9] *Ibid.*

in appropriately broad terms in the Geneva Convention Relative to the Treatment of Prisoners of War (1949):

> Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.[10]

Since the submarine warship is subject to the same public authorization and control as any other warship, it appears to qualify as a lawful combatant unit. If a submarine is a lawful combatant, its personnel are entitled to prisoner of war status if they are captured. Claims to abolish or limit submarines are based upon the implicit premise of their existing lawful combatant status.

B. CLAIMS TO "ABOLISH" OR LIMIT SUBMARINES AS COMBATANTS

1. The Hague Peace Conferences

The primary work of the Hague Conferences was the legal regulation of warfare rather than the establishment of peace.

a. THE 1899 CONFERENCE

The Russian Emperor issued the first invitation for the 1899 Conference with stated objectives which included ending "these incessant armaments." [11] Apparently the negative reaction of the powers required the second invitation which relegated disarmament, except that concerning submarines, to a secondary role.[12] The motivation for the Conference has been ascribed to the humanitarian personal characteristics of the Czar.[13] It probably was at least partly due to the superiority of other states over Russia in military and naval technology and armament. It was cautiously proposed in the first article of the second invitation that consideration be given to not increasing existing military forces and to making "a preliminary examination of the means by which a reduction might even be effected in the forces and Budgets [*sic*] above mentioned." [14] Other subjects proposed as the second and third articles respectively were the limitation of guns and explosives to prohibit any more powerful than those

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[10] Art. 16. Spaight 105–07 sets forth incidents demonstrating the lack of a "colour line" in air warfare.

[11] Rescript of the Russian Emperor (Aug. 24, 1898). 2 Scott 1 at 2.

[12] Russian Circular (Jan. 11, 1899). 2 Scott 3.

[13] By Prof. James Brown Scott. 1 Scott 39.

[14] 2 Scott 4.

then in use.[15] "The subjects to be submitted for international disucussion at the Conference" included, as the fourth article, the proposal

> To prohibit the use, in naval warfare, of submarine torpedo boats or plungers, or other similar engines of destruction. . . .[16]

The proposal was at a time when no new major war appeared to threaten the peace of the world and when the submarine or "plunger" was a relatively new and untried vessel.

Secretary of State Hay instructed the United States delegation on these points in no uncertain terms:

> The second, third, and fourth articles, relating to the non-employment of firearms, explosives, and other destructive agents, the restricted use of existing instruments of destruction, and the prohibition of certain contrivances employed in naval warfare, seem lacking in practicability, and the discussion of these propositions would probably prove provocative of divergence rather than unanimity of views. It is doubtful if wars are to be diminished by rendering them less destructive, for it is the plain lesson of history that the periods of peace have been longer protracted as the cost and destructiveness of war have increased. The expediency of restraining the inventive genius of our people in the direction of devising means of defense is by no means clear, and, considering the temptations to which men and nations may be exposed in a time of conflict, it is doubtful if an international agreement to this end would prove effective. The dissent of a single powerful nation might render it altogther nugatory. The delegates are, therefore, enjoined not to give the weight of their influence to the promotion of projects the realization of which is so uncertain.[17]

The combined instructions and rationale just quoted fixed the position of the United States delegation. The views of the various delegations on the Russian proposal to ban submarines were expressed on May 31, 1899.[18] The German delegate, representing a state engaged in the construction of a great surface navy, favored interdiction conditioned upon unanimity. The Japanese and Italian delegates stated their opinions as being similar to the German. The British delegate, representing the preeminent naval power, favored prohibition providing only that the Great Powers agreed.

The lesser naval powers could be expected to take a different view. The delegate of Austria-Hungary represented a state which possessed no submarines but in the personal view of the delegate they "may be used for

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[15] *Ibid.*

[16] *Ibid.*

[17] 2 Scott 6 at 7–8.

[18] The views of the delegations summarized in the two textual paragraphs appear in Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1899* 367–68 (1920).

the defense of ports and roadsteads and render very important services." The delegate of France, representing a country with a navy and a building program inferior to that of Great Britain or Germany, stated his country's position "that the submarine torpedo [boat] has an eminently defensive purpose, and that the right to use it should therefore not be taken from a country." The Netherlands delegate characterized the submarine as "the weapon of the weak" [19] and so not subject to prohibition. The delegate of Sweden-Norway concurred with the Netherlands views. The Turkish delegate wished to reserve the defensive use of submarines. The delegate of Siam wished to refer the matter to his Government since he had general instructions to favor humanitarian interests but believed that "the necessities of defense of the small nations must be taken into serious consideration." The Danish delegate, perhaps surprisingly, thought that his Government, to which he referred the question, would favor prohibition conditioned upon unanimity. The attitude of Russia was not in doubt but its desire for prohibition was also conditioned on unanimity. The dominant view of the smaller naval powers was that submarines constituted a cheap means of defense and so could not be prohibited.

Three weeks later the question of prohibiting submarines was put to a vote in plenary meeting. The voting was recorded as follows: [20]

For prohibition with reservation (of unspecified character): Belgium, Greece, Persia, Siam, and Bulgaria (five states).

For prohibition with reservation of unanimity: Germany, Italy, Great Britain, Japan, and Roumania (five states).

Against prohibition: United States, Austria-Hungary, Denmark, Spain, France, Portugal, Sweden-Norway, Netherlands, and Turkey (nine states).

Abstaining: Russia, Serbia, and Switzerland (three states).

Thus the first attempt to make the submarine an unlawful combatant ended in failure.

b. THE 1907 CONFERENCE

During the Russo-Japanese War, President Theodore Roosevelt took the initiative in calling the Conference of 1907 [21] and, after the Peace Treaty of Portsmouth ending that war, the President allowed the Czar to become the nominal initiator as a matter of diplomatic courtesy.[22] By 1907 most of the major navies contained submarines and neither the

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[19] That the submarine is the weapon of the weak is argued in Castex, "The Weapon of the Weak—A French View," 77 *J. Royal United Serv. Inst.* 737 (1932). The contrary appears in Richmond, "The Weapon of the Weak," 77 *J. Royal United Serv. Inst.* 497 (1932).

[20] The voting is recorded in Scott, *op. cit. supra* note 18 at 299.

[21] 1 Scott 91–93.

[22] *Id.* at 93.

diplomatic correspondence issued by the President nor that issued by the Czar suggested their abolition.

The Russo-Japanese War demonstrated the serious apprehensions of the Russian Navy concerning submarines. On April 13, 1904 two first-class Russian battleships struck Japanese mines off Port Arthur and one sank while the other was severely damaged. This event has been described as follows:

> [The] disaster seems to have caused something approaching a panic in the Russian fleet. Ships began to fire wildly at the water round them, apparently under the impression that they were being attacked by submarine boats. . . .[23]

The 1907 Conference recognized by necessary implication the lawful combatant status of surface torpedo boats, surface torpedo boat destroyers, and also submarines. It did this by regulating their principal weapon, the self-propelled torpedo. Hague Convention VIII provided that torpedoes must be so constructed that those which miss their mark then become harmless.[24] Of course, where the target was missed the primary military value of the self-propelled torpedo was eliminated and the regulation only prevented its use as a floating mine. And so the stage was laid for the submarine to be used in World War I.

2. The First World War

a. THE PUNITIVE TREATMENT OF CAPTURED PERSONNEL

In the early part of World War I, during the incumbency of Winston Churchill as First Lord of the Admiralty, the British Government adopted a system of punitive treatment for certain German prisoners of war in its hands. The prisoners of war involved consisted of thirty-nine officers and men who comprised the surviving crew members of two German submarines.[25] All of these submarine prisoners were segregated in naval detention barracks and some of them were held there in solitary confinement. The German Government promptly retaliated by placing an equal number of British Army officers in solitary confinement. Thereafter, the British Government changed its policy and treated captured German submarine personnel in the same way as other prisoners of war. The British claim to accord punitive treatment to German submarine personnel was in substance a claim that German submarines were unlawful combatants

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[23] 1 British Committee of Imperial Defense, *Official History (Naval and Military) of Russo-Japanese War* 94 (1910). In the same war Russia attempted to create a submarine flotilla in the Far East by transporting submarines in sections overland. 2 *id.* 639.

[24] Art. 1, paragraph 3.

[25] The textual statements are based upon 2 Garner 50–51.

and that their personnel, upon capture, were not entitled to nondiscriminatory treatment as prisoners of war.[26]

The case of Captain Fryatt, which also arose in the early part of the First World War, concerns the related issue of the status of merchant ship personnel.[27] Captain Fryatt of the British unarmed merchant ship *Brussels* refused to surrender to a German submarine and attempted, without success, to ram the submarine as it approached his ship. Subsequently he was captured and the German Government declined to accord him prisoner of war status. Following a court-martial he was executed on the charge of having committed "a *franc-tireur* crime against the sea forces of Germany." [28] The official German statement announcing the execution stated that Fryatt was "not a member of a combatant force" and that he had been condemned to death because of his attempted attack upon a German submarine.[29] Thus the German claim rested upon the simple premise that Captain Fryatt was an unlawful combatant who violated the laws of war by his attempted attack. Professor Garner describes the execution as a "plain act of judicial murder." [30]

b. THE PARTIAL "ABOLITION" OF SUBMARINES

During the First World War any doubts as to the efficiency of submarine naval vessels were removed. It is well known that Germany used submarines to bring Great Britain to the brink of defeat. The United States claimed that the German methods of submarine warfare were illegal but did not claim that the submarine was an unlawful combatant unit.[31]

Following the war, the Central Powers' submarines existing or in process of construction were transferred to the Allies or broken up.[32] Submarines were abolished for Germany, Austria, Hungary, Bulgaria, and Turkey by prohibiting each of them to acquire submarines through an article employing the following uniform language which appeared in each peace treaty with the five states just named:

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[26] Prof. Garner's account also states that the two German submarines involved had been "sinking British and neutral merchant vessels." 2 Garner 50. Therefore, issues concerning objects and methods of attack may also be involved. The text, however, only considers the central issue concerning combatant status.

[27] The textual statements are based upon 1 Garner 407–13.

[28] Quoted in 1 Garner 408.

[29] 1 Garner 408, note 1.

[30] *Id.* at 413. See Scott, "The Execution of Captain Fryatt," 9 *A.J.I.L.* 865 (1916).

[31] Hyde 2007.

[32] The Treaty of Versailles with Germany, arts. 181, 188; the Treaty of St. Germain with Austria, arts. 136, 138; the Treaty of Trianon with Hungary, arts. 120, 122; the Treaty of Neuilly with Bulgaria, arts. 83, 84; the (unratified) Treaty of Sevres with Turkey, arts. 184, 185. The cited treaties appear in 1 & 2 Carnegie Endowment for International Peace, *The Treaties of Peace 1919–1923* (1924).

The construction or acquisition of any submarine, even for commercial purposes, shall be forbidden in ————————.[33]

Thus partial abolition was obtained as one of the fruits of victory.

3. Naval Disarmament and Limitation Between the World Wars

a. THE WASHINGTON CONFERENCE (1921–1922)

An observer has stated that the United States was the only state in a position to call a conference on the limitation of armament following World War I.[34] The United States was building the largest navy in the world and was not a member of the League of Nations, which organization was therefore precluded from effective action.[35] The United States position appeared to be that it could achieve agreement on the limitation of naval armament by giving up its great building program.[36]

In addition to the United States, the United Kingdom, and Japan, the two principal European naval powers, France and Italy, were participants.

(1) *The Washington Naval Treaty (1922)*

The United States naval disarmament proposals presented by Secretary of State Hughes were comprehensive and specific.[37] They were based on four stated "general principles": [38] (1) the elimination of actual and projected capital shipbuilding programs; (2) additional reduction by scrapping of certain older capital ships; (3) regard for "existing naval strength"; (4) the existing capital ship tonnage as the basis for proportionate allowance of tonnage for other combatant vessels. It was specifically proposed that the United States and Great Britain would each be allowed 90,000 tons of submarines to 54,000 tons for Japan.[39] But before the question of limitation of submarines was considered, Great Britain, through Lord Lee, the First Lord of the Admiralty, proposed their abolition to the Committee on Limitation of Armament.

(a) Abolition

On December 22, 1921 Lord Lee presented an indictment of

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[33] The Treaty of Versailles art. 191; the Treaty of St. Germain art. 140; the Treaty of Trianon art. 124; the Treaty of Neuilly art. 86; the Treaty of Sevres art. 186.

The British approved dropping the ban on submarines of the Versailles Treaty in the Anglo-German Naval Agreement (June 18, 1935). See Watt, "Anglo-German Naval Negotiations on the Eve of the Second World War, Part I," 103 *J. Royal United Serv. Inst.* 201 (1958).

[34] Buell, *The Washington Conference* 147 (1922).

[35] *Ibid.*

[36] See *id.* at 152.

[37] *Wash. Conf.* 56–63.

[38] *Id.* at 56.

[39] *Id.* at 61.

the submarine.[40] The French view of the need for a large new French submarine fleet had already alarmed the British. In demanding the "total and final abolition" of the submarine, Lord Lee attempted to make it perfectly clear that the British had "no unworthy or selfish motives." [41] On the contrary, they were fighting the battle not only of the allied and associated powers but of the entire civilized world.[42] He explained that the history of the recent war had demonstrated in convincing fashion that submarines constituted neither effective nor economical defense for the smaller powers.[43] During the World War, Germany had employed 375 submarines and 203 of these had been sunk. He pointed out that millions of British and American troops had been transported across the water without the loss of a single man excepting those on hospital ships. The submarine, in the British view, was effective only against merchant shipping. During the war over 12 million tons of such shipping had been sunk along with the killing of 20,000 noncombatant men, women, and children.

Before the end of his speech, Lord Lee admitted that antisubmarine warfare was a very expensive matter indeed. During the war the United Kingdom had maintained "an average of no less than 3,000 anti-submarine surface craft" in order to deal with no more than nine or ten German submarines operating at one time on the Atlantic approaches to France and Great Britain.[44]

A sense of realism concerning Lord Lee's recommendation can best be conveyed by direct quotations from it:

> It was a weapon of murder and piracy, involving the drowning of noncombatants. It had been used to sink passenger ships, cargo ships, and even hospital ships. Technically the submarine was so constructed that it could not be utilized to rescue even women and children from sinking ships. That was why he hoped that the conference would not give it a new lease of life.[45]
>
> * * * * * * *
>
> The submarine was the only class of vessel for which the conference was asked to give—he would not say a license, but permission to thrive and multiply. It would be a great disappointment if the British Empire delegation failed to persuade the conference to get rid of this weapon, which involved so much evil to peoples who live on or by the sea.
>
> To show the earnestness of the British Government in this matter, Lord Lee pointed out that Great Britain possessed the largest and

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[40] *Id.* at 264–69.

[41] *Id.* at 265.

[42] *Id.* at 268.

[43] The balance of the summary in the textual paragraph is taken from *id.* at 265–67.

[44] *Wash. Conf.* 268. See also the text of Ch. I accompanying note 19.

[45] *Wash. Conf.* 269.

probably the most efficient submarine navy in the world, composed of 100 vessels of 80,000 tons. She was prepared to scrap the whole of this great fleet, to disband the personnel, provided the other powers would do the same. That was the British offer to the world, and he believed it was a greater contribution to the cause of humanity than even the limitation of capital ships.[46]

The French, Italian, and Japanese delegations then joined with the British in deploring the illegal and inhumane use of submarines by Germany during the World War.[47] But each of them indicated that submarines were regarded as useful for defense and expresssed the conviction that submarines could be used consistent with the law.[48]

Secretary Hughes then placed the United States on record as opposed to abolition by reading the report on submarines which had been prepared by the Advisory Committee of the American delegation. The report joined in condemning illegal uses of the submarine and considered uses regarded as legal in some detail.[49] It also stated:

The United States would never desire its Navy to undertake unlimited submarine warfare. In fact, the spirit of fair play of the people would bring about the downfall of the administration which attempted to sanction its use.[50]

On December 23, 1921 Admiral de Bon made formal reply to Lord Lee for the French Government.[51] He first emphasized the military efficiency and uses of submarines and referred to a number of examples drawn from the World War. His second and main point concerned the efficiency of the submarine against merchant vessels. It started with the usual denunciation of German methods and went on to claim the efficiency of the submarine even without the use of such methods.

Certainly the fruits of submarine warfare would have been smaller if they had been obliged to confiine themselves to the limits of honorable warfare, but it is impossible to claim that there would have been none.[52]

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Our opinion is that it is especially the weapon of nations not having a large navy. It is, in fact, a comparatively cheap element in naval warfare which can be procured in large numbers at a cost far below that of capital ships.[53]

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[46] *Ibid.*
[47] *Id.* at 270–72.
[48] *Ibid.*
[49] *Id.* at 273–77.
[50] *Id.* at 276.
[51] *Id.* at 278–85.
[52] *Id.* at 281.
[53] *Id.* at 282.

In conclusion, Admiral de Bon stated the French position unequivocally: "I believe that 90,000 tons is the absolute minimum for all the navies who may want to have a submarine force." [54] This was supported by saying that it would only mean ninety vessels of modern type of which, because of maintenance and repair requirements, only fifteen or twenty would be capable of simultaneous action.[55]

Mr. Balfour then made two replies to the French arguments.[56] In his second statement he pointed out that France had prevented any consideration of reduction of land armaments because of its need to maintain a great army against possible German military resurgence.[57] Now it was stated that France must also maintain a tremendous submarine fleet. He asked as to the value of a French submarine fleet if the German submarine fleet were rebuilt. In the British view, such a French submarine fleet would be of no value and, futher, France would have to look to British Navy antisubmarine forces for protection as it had done before.[58]

Secretary Hughes, as chairman, then formally recognized that it was not possible to reach agreement on abolition.[59] After complimentary references to the substance and spirit of the British proposal, he expressed the hope that the discussions on the subject would lead to a denunciation of illegal methods of submarine warfare and an undertaking by the five powers to assure the application of the principles of international law to such warfare.[60] In the chairman's view, limitation should be considered unless further discussion of abolition was desired.[61] Mr. Balfour took the opportunity to place a brief summary of the British position in the record.

> The British Empire delegation desired formally to place on record its opinion that the use of submarines, whilst of small value for defensive purposes, leads inevitably to acts which are inconsistent with the laws of war and the dictates of humanity, and the delegation desires that united action should be taken by all nations to forbid their maintenance, construction, or employment.[62]

Dr. Royse has summarized the outcome of the "submarine debates":

> Utilitarianism appeared at the Washington Conference of 1921–22 as a dominating motive in the submarine debates. The same attitude was taken toward the submarine, by most of the Powers present, as

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[54] *Id.* at 285.
[55] *Id.* at 284–85.
[56] *Id.* at 285–89, 295–98.
[57] *Id.* at 295.
[58] *Id.* at 295–96.
[59] *Id.* at 300.
[60] *Id.* at 300–02.
[61] *Id.* at 302.
[62] *Ibid.*

that taken by the United States Government during the late [First World] war, that the submarine was not an illegitimate weapon in itself.[63]

(b) Limitation

Chairman Hughes then turned to the limitation of submarines by making a concrete revised proposal on this subject. In lieu of the 90,000 tons of submarines first proposed for the United States and Great Britain, he now proposed 60,000 tons maximum for each. The remaining three powers would maintain the status quo and he understood this to be 31,452 tons for Japan, 31,391 tons for France, and about 21,000 tons for Italy.[64] When the meeting reconvened on December 24 the British delegation accepted the chairman's proposal.[65] Admiral de Bon referred to the French conception of ninety vessels as a minimum submarine fleet and said that the proposal was so far below this that it "was equivalent to abolishing the whole French program." [66] Consequently, the French delegation could not accept the proposals and must ask instructions of its Government.[67] Italy and Japan also rejected the United States proposals. Italy was willing, however, to accept a maximum of 31,500 tons on condition of parity with France.[68] Japan insisted on the original United States proposal of 54,000 tons in spite of the substantial reductions already accepted by the United States and Great Britain.[69]

Four days later Mr. Sarraut presented the considered views of the French Government. After referring to the French acceptance of inferior strength in capital ships, he stated that 90,000 tons for submarines constituted the minimum consistent with his country's vital interests.[70] Thus ended the attempt to restrict the total tonnages of submarine fleets. Chairman Hughes admitted his disappointment concerning the French position on submarines.[71] Mr. Balfour went further and said that the 90,000 tons of submarines were intended to destroy commerce.[72] In addition, the great submarine fleet to be built on the shores closest to Great Britain would necessarily be a menace to her.[73] Mr. Sarraut indignantly rejected the criticisms.[74] Mr. Balfour then attempted further explanation of the reasons

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[63] Royse 19 (footnote omitted).
[64] *Wash. Conf.* 303.
[65] *Id.* at 304.
[66] *Ibid.*
[67] *Ibid.*
[68] *Id.* at 305.
[69] *Id.* at 306.
[70] *Id.* at 309–10.
[71] *Id.* at 310–11.
[72] *Id.* at 312.
[73] *Id.* at 313.
[74] *Id.* at 314–16.

why submarines were a threat to Britain.[75] The records of the Conference do not reveal French sympathy for what was regarded as a British problem.

In addition to the failure to limit the size of submarine forces, the ratified Treaty on Limitation of Naval Armament[76] between the five naval powers states no limitation on the size or armament of individual submarines. This lack of restriction together with the provision in the Treaty permitting the stiffening of merchant ships' decks in time of peace to facilitate arming them in wartime[77] indicated the probability that both submarines and armed merchant ships would be used in the next general war. It was probable that aircraft would be used also. The discussions showed no interest in the "abolition" of military aircraft. Mr. Balfour, for example, stated:

> Unlike the case of submarines, in the case of aircraft military and civilian uses were not sharply divided. There was practically no commercial civil use for a submarine, but there were many who thought that the development of aerial invention was going to exert an immense influence upon the economic development of mankind and upon intercommunication of different peoples. In the present stage of their knowledge of air matters it seemed quite impossible to limit aircraft designed for commercial uses . . . .[78]

(2) *The Submarine Treaty (1922): Submarine Personnel as Pirates*

After it became clear that there would be neither abolition nor limitation, as such, of submarines, Mr. Root, a distinguished former Secretary of State of the United States, proposed certain resolutions concerning the rules of submarine warfare. In his view, the resolutions should be clear and simple.[79] They were characterized by their terms as "the prohibition of the use of submarines in warfare" [80] but actually only prohibited their use against merchant ships.

In the ensuing discussion, Senator Schanzer, the head of the Italian delegation, thought it would be desirable to provide a definition of "merchant craft." [81] Mr. Root replied that, "Throughout all the long history of international law no term had been better understood than the term

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[75] *Id.* at 316–17. "There was no doubt that submarines were powerful for the destruction of lines of communication; but they were powerless to protect them." *Id.* at 317.

[76] The official text of this Treaty of Feb. 6, 1922 is in 43 Stat. 1655 (1923).

[77] Art. 14.

[78] *Wash. Conf.* 414.

[79] So that they could be understood by "the man in the street and the man on the farm . . . " *Id.* at 321.

[80] *Wash. Conf.* 322.

[81] *Id.* at 326–27.

'a merchant ship'." [82] Further, the term "could not be made clearer by the addition of definitions which would only serve to weaken and confuse it." [83] Senator Schanzer later concluded for his delegation that the term "merchant vessel" as employed in the resolution was understood to refer to "unarmed merchant vessels." [84]

The resolutions were subject to some change before they were written into A Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare. Article I of the proposed treaty laid down certain rules of law, stated to be "an established part of international law," [85] concerning visit, search, and seizure of merchant vessels as well as attacks upon them. Article I further provided:

> Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.[86]

Article III provided:

> The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.[87]

As indicated by the excerpt quoted from article I, as well as by the negotiating history and the title of the treaty, the submarine was the principal subject. Article III had been broadened beyond submarine personnel but, in the light of the experience in the First World War, submarine personnel were the principal concern.

In substance the Root resolutions were an attempt to do indirectly what the Conference had declined to do directly, that is, make submarines and their personnel unlawful combatants. The attempt, however, was only successful in placing conditions upon the combatant status of submarines. When the specified rules concerning action against merchant ships are violated, the status of the submarine's personnel is assimilated to that of

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[82] *Id.* at 328.

[83] *Ibid.*

[84] *Id.* at 365.

[85] *Id.* at 887. Prof. G. G. Wilson has demonstrated the inaccuracy of the statement: *U.S. Naval War College, International Law Situations 1930* 34, 35 (1931)

[86] *Wash. Conf.* 887.

[87] *Ibid.*

unlawful combatants or pirates. The Root resolutions, including this provision, received unanimous assent in the Conference.[88] Thereafter, the French Government declined to ratify the Submarine Treaty and, consequently, submarines and their personnel remained lawful combatants unconditionally. In summary, the submarine came out of the Washington Conference with undiminished status as a lawful combatant.[89]

b. THE GENEVA NAVAL CONFERENCE (1927)

For present purposes this Conference is important because the United States changed its position concerning the necessity for submarines which it had advanced at the Washington Conference and now favored their abolition. In instructing the United States delegation to the Conference, President Coolidge stated orally the difficulty of a three-power conference abolishing submarines but indicated that we should express our willingness to abolish.[90] The British were consistent in favoring abolition and the Japanese were consistent in favoring retention.[91]

The 1927 Conference may be described briefly as a failure. France and Italy refused to attend and Japan, the United Kingdom, and the United States accomplished little or nothing by attending. The United Kingdom and the United States became involved in fruitless controversy concerning the numbers and types of cruisers.[92]

c. THE LONDON NAVAL TREATY (1930)

The failure of the 1927 Conference was doubtless one of the causes of the London Conference of 1930.

(1) Abolition

The British invitation to Japan, France, and Italy was shown

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[88] *Id.* at 367–84. Before voting on the provision including the phrase "act of piracy" Mr. Hanihara, speaking for the Japanese delegation, asked enlightenment as to its meaning. *Id.* at 385. He received but little clarification from Chairman Hughes and Mr. Root. *Id.* at 383–84.

[89] General description of the Washington Conference appears in Wright, "The Washington Conference," 6 *Minn. L. Rev.* 279 (1922).

The submarine provisions are regarded as based upon "humane sentiments for the protection of lives . . . " in Anderson, "As If for an Act of Piracy," 16 *A.J.I.L.* 260 (1922). They are criticized in Anderson, "Submarines and Disarmament Conferences," 53 *Nav. Inst. Proc.* 50 (1927); Knapp, "Treaty Number Two at the Washington Conference," 39 *Poli. Sci. Q.* 201 (1924); and Roxburgh, "Submarines at the Washington Conference," 3 *Brit. Y.B.I.L.* 150 (1922–23).

[90] Memorandum by the Chief of the Division of Western European Affairs, June 1, 1927, [1927] *Foreign Rel. U.S.* 42 at 43 (1942).

[91] The view of each of the three parties is set forth in Dept. of State, *Records of the Conference for the Limitation of Naval Armaments Held at Geneva from June 20 to August 4th 1927 passim* (1927).

[92] *Ibid.* See Toynbee, *1927 Survey of International Affairs* 43–82 (1929).

to the United States in advance and apparently approved by it.[93] It contained the following significant paragraph:

> Since both the Government of the United States and His Majesty's Government in the United Kingdom adhere to the attitude that they have publicly adopted in regard to the desirability of securing the total abolition of the submarine, this matter hardly gave rise to discussion during the recent conversations. They recognize, however, that no final settlement on this subject can be reached except in conference with the other naval Powers.[94]

The proposal for abolition was made by Mr. Alexander, the First Lord of the British Admiralty.[95] His summary of the proposal contained five major points:

(1) In the general interests of humanity.
(2) In consideration of our view that these vessels are primarily offensive instruments.
(3) In order to secure a most substantial contribution to disarmament and peace.
(4) In view of the very important financial relief to be obtained.
(5) In consideration of the conditions of service of the personnel and the undue risks which can be abolished.[96]

Mr. Alexander dealt with the humanity point briefly and referred to "the feelings of horror which the peoples had experienced as results of submarine action" [97] in the First World War. He referred to a number of uses of the submarine which were deemed to be offensive including the German war against commerce.[98] In connection with the economy point (4), he emphasized the indirect savings from the abolition of submarines which would be realized in destroyers and antisubmarine forces generally.[99] The last point (5) opened up a new subject. It was explained that working conditions in submarines were cramped and the sailors suffered

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[93] *London Conf.* 3. The proceedings and documents of this Conference also appear in United Kingdom Gov't, *Documents of the London Naval Conference 1930* (1930).

[94] *London Conf.* 3 at 4.

[95] *Id.* at 78–82.

[96] *Id.* at 81.

[97] *Id.* at 78. Compare the quoted views with those expressed in Thuillier, "Can Methods of Warfare be Restricted?" 81 *J. Royal United Serv. Inst.* 264 at 267–68 (1936):

> If it were possible to induce other nations to forego the use of submarines it would be a great advantage to us, since it would rid us of fear of a weapon which very greatly neutralizes the power and scope of action of our battle fleets, and one which in the late war very nearly brought about our total defeat. But we should distinguish between proposals based on the plea of humanity and those based on self-interest.

[98] *London Conf.* at 79.

[99] *Id.* at 80.

from poor air when submerged. This was not in keeping with the improved standards urged generally for industrial workers.[100] In addition, peacetime submarine accidents presented a grim peril. He pointed out that since 1918 there had been twelve major disasters in the submarine forces of the five Powers represented at London with a loss of at least 570 men.[101] Such losses, in the British view, could not be prevented by lifesaving equipment.

Secretary of State Stimson, the chairman of the United States delegation, supported abolition in a short speech with the following central paragraph:

> The essential objection to the submarine is that it is a weapon particularly susceptible to abuse; that it is susceptible of use against merchant ships in a way which violates alike the old and well-established laws of war and the dictates of humanity. The use made of the submarine revolted the conscience of the world, and the threat of its unrestricted use against merchant ships was what finally determined the entry of my own country into the conflict. In the light of our experience it seems clear that in any future war those who employ the submarine will be under strong temptation, perhaps irresistible temptation, to use it in the way which is most effective for immediate purposes, regardless of future consequences. These considerations convince us that technical arguments should be set aside in order that the submarine may henceforth be abolished.[102]

The only elaborate statement of opposition to abolition came from Mr. Leygues, the French Minister of Marine.[103] In the French view, the submarine was to be regarded as any other warship and it was sometimes more efficient than other warships and sometimes less so.[104] The World War had proven the effectiveness of submarines against surface warships.

> Must it disappear because it disturbs the habits and the honored traditions of surface ships? It may happen to-morrow [*sic*] that every type of warship in the various navies will belong to the submarine class.[105]

In the French view, the submarine was deemed the defensive weapon of the smaller navies.[106] It would supplement the comparative weakness of

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[100] *Id.* at 80–81.

[101] *Id.* at 81.

[102] *Id.* at 82.

[103] *Id.* at 84–88.

[104] *Id.* at 85.

[105] *Id.* at 85–86.

[106] *Id.* at 86. Compare the view expressed in Richmond, *Sea Power in the Modern World* 167 (1934):

> It is natural that the attitudes which the several Powers have taken regarding the submarine should have been governed by considerations of the advantages and disadvantages which would accrue to each from its abolition or retention.

the French surface fleet and provide scouts for it. It would maintain lines of communication between France and its overseas territories. In addition, alleged barbarity is to be ascribed to particular users of the submarine and not to the vessel itself.[107] The development of the submarine was regarded as making it more capable of conforming to the rules applicable to surface ships.[108] The French Government believed that unrestricted submarine warfare against commerce should be outlawed,[109] but France could not accept abolition of the submarine.[110]

The Italian Foreign Minister stated that the abolition of submarines would favor the more powerful navies.[111] Italy, however, did not object to abolition, in principle, provided that all the naval powers concurred and that it would bring about a drastic reduction of other armaments.[112]

For the Japanese delegation, Admiral Takarabe argued for the retention of submarines because of Japan's geographical situation:

> Japan, consisting, as she does, of so many islands scattered so widely on the sea extending from the tropical to the frigid zones, sees in such kind of arm a convenient and adequate means to provide for her national defense. With this comparatively inexpensive war craft she can contrive to look after her extensive waterways and vulnerable points. Japan desires to retain submarines solely for this purpose.[113]

(2) *Limitation*

Submarines were treated similarly to the other principal types of warships by the Conference. Article 7 of the Treaty, applicable to all five Powers, provided the general rule that each submarine was to be limited to a maximum displacement of 2,000 tons with no gun above 5.1 inch caliber.[114] Three larger submarines with greater caliber guns were permitted for each Power.[115] Article 16, applicable only to the United States, Great Britain, and Japan, limited the total submarines of each to 52,000 tons.[116] France and Italy did not accept limitations upon total tonnage.

In summary, the limitations recognized the lawful combatant status of submarines by implication. The failure of abolition, even though the United

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Those attempts to arrive at a decision on the basis of its 'offensive' or 'defensive' character resulted in nothing more than special pleading.

[107] *London Conf.* 87.

[108] *Ibid.*

[109] *Ibid.*

[110] *Id.* at 88.

[111] *Id.* at 89–90.

[112] *Id.* at 91.

[113] *Id.* at 92.

[114] *Id.* at 208.

[115] Art. 7, paragraph 2.

[116] *London Conf.* 215.

States supported the consistent British position,[117] recognized their lawful combatant status more directly. Article 22 of the London Naval Treaty of 1930[118] set forth rules regulating submarines and other warships in their actions against merchant ships. Its subject, therefore, concerns the lawfulness of the objects and methods of belligerent attack and assumes lawful combatant status.

d. THE LONDON NAVAL TREATY (1936)

In the opening speech of the Conference, British Prime Minister Baldwin mentioned that the British "still press for the abolition of the submarine." [119] This consistent objective was supported by the United States [120] and opposed by France.[121] In the technical subcommittee Vice Admiral Robert of the French delegation stated that the question of the abolition of the submarine "should be buried forever." [122] The result was no further consideration of abolition during the Conference.

A measure of qualitative limitation of submarines was achieved in the Treaty. It was provided that future submarines were not to exceed 2,000 tons standard displacement or carry a gun in excess of 5.1 inches in caliber.[123] Other warships were limited analogously.

4. The Spanish Civil War and the Second World War

a. *THE NYON AGREEMENT (1937)*

During the Spanish Civil War in 1937 attacks without warning were made by unknown submarines against non-Spanish warships and merchant ships.[124] The United Kingdom and France took the lead in calling a special conference at Nyon in order to condemn submarine attacks upon such ships and to provide sanctions to deter the attacks.[125] The ensuing nine-Power agreement provided:

> Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against

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[117] The interest of the British legal profession is illustrated by "Discussion on the Abolition of Submarines," 11 *Grotius Trans.* 65 (1925).

[118] Article 22 is set forth in the text of Ch. III accompanying note 114.

[119] Dept. of State, *The London Naval Conference 1935: Report of the Delegates of the United States of America, Text of the London Naval Treaty of 1936 and Other Documents* 49 (Conference Series No. 24, 1936).

[120] *Id.* at 95.

[121] *Id.* at 59.

[122] *Id.* at 330.

[123] Art. 7. *Id.* at 32. The official text of this Treaty of March 25, 1936 is in 50 Stat. 1363 (1937).

[124] Padelford, "Foreign Shipping During the Spanish Civil War," 32 *A.J.I.L.* 264 at 270 (1938).

[125] *Id.* at 271.

merchant ships not belonging to either of the conflicting Spanish parties; and

Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22, 1930 with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy . . .[126]

The remainder of the Agreement specified "certain special collective measures against piratical attacks by submarines" including:

Any submarine which attacks such a [merchant] ship in a manner contrary to the rules of international law referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on April 22, 1930, and confirmed in the Protocol signed in London on November 6, 1936 shall be counter-attacked and, if possible, destroyed.[127]

Article 22 of the London Naval Treaty of 1930, the juridical basis for the Nyon Agreement, provides certain rules for warships, both surface and submarine, to observe with regard to merchant ships. As a general rule, it is prescribed that such warships "may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew, and ship's papers in a place of safety." [128] Unlike the abortive Treaty Concerning Submarines and Noxious Gases,[129] the London Naval Treaty makes no provision for assimilating naval personnel to pirates. The Nyon Agreement, therefore, goes beyond the London Treaty in this respect.[130] The juridical result of the Nyon Agreement is to deprive the personnel of the submarines concerned of status as lawful combatants when they carry out the attacks proscribed in the Nyon Agreement and deemed to be "piratical acts." The scholars have differed as to whether or not the Nyon Agreement is a proper extension of the law of piracy.[131] The present significance of the Agreement, although it was an *ad hoc* arrangement for the Spanish Civil War, is that it was a high point in the international

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[126] International Agreement for Collective Measures Against Piratical Attacks in the Mediterranean by Submarines, Nyon, Sept. 14, 1937, *United Kingdom Treaty Series* No. 38, p. 2 (1937); 31 *A.J.I.L. Supp.* 179 (1937).

[127] *Ibid.;* 31 *A.J.I.L. Supp.* 179 at 180 (1937). The Nyon Supplementary Agreement of Sept. 17, 1937 extended the piracy concept to surface war vessels and aircraft. 31 *A.J.I.L. Supp.* 182 (1937).

[128] The full text of art. 22 appears in the text of Ch. III accompanying note 114.

[129] See the text accompanying notes 86, 87 *supra.*

[130] On the Nyon Agreement see generally 2 Hackworth 692–95.

[131] 1 Oppenheim-Lauterpacht, *International Law: Peace* 613 (8th ed. 1955) and Padelford, *op. cit. supra* note 124 view it as a proper extension of piracy. The contrary view appears in Anonymous, "The Nyon Arrangements: Piracy by Treaty?" 19 *Brit. Y.B.I.L.* 198 at 207–08 (1938) and Genet, "The Charge of Piracy in the Spanish Civil War," 32 *A.J.I.L.* 253 at 263 (1938).

acceptance of the British juridical claim to make submarines and their personnel unlawful combatants.[132]

b. THE UNDECLARED ATLANTIC NAVAL WAR (1941)

On September 4, 1941 the United States destroyer *Greer,* en route to Iceland, was the object of an unsuccessful torpedo attack by a submerged German submarine.[133] President Roosevelt stated that, "This was piracy, legally and morally" [134] and "when you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him." [135] The President described the German attack as an aggression against "the freedom of the seas" [136] and stated that the United States would continue to defend this freedom by ordering the U.S. Navy to attack German or Italian vessels which entered "waters the protection of which is necessary for American defense . . . ." [137]

The United States claim enunciated by President Roosevelt has been described as a defense measure against piratical attacks which were contrary to international law.[138] The use of the piracy terminology could be construed as a claim to deprive the particular submarine personnel of status as lawful combatants. In view of the context, including the lack of a declared war, it is probably more plausible to interpret the President's piracy wording as a part of a claim for the U.S. Navy to initiate attack in appropriate circumstances. Professor Lauterpacht, however, has approved the United States claim as a claim concerning piracy and stated:

There is substance in the view that, by continuous usage, the notion

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[132] In view of the prior French role in preserving the lawful combatant status of submarines, French agreement alone would have been significant. In addition to France and the United Kingdom the parties to the Agreement were: Bulgaria, Egypt, Greece, Roumania, Soviet Union, Turkey, and Yugoslavia. The Nyon Agreement cited *supra* note 126 at 8–9, 31 *A.J.I.L. Supp.* 179 at 181 (1937).

[133] Factual description appears in Karig, *Battle Report: The Atlantic War* 67–70 (1946).

It should be noted that the *Greer* was a 1,200 ton flush deck four pipe World War I destroyer of the same type as the fifty U.S. destroyers transferred to the United Kingdom in 1940 pursuant to the Churchill-Roosevelt Agreement. From a tactical standpoint it is thus possible that the attacking German submarine could have mistaken the *Greer* for a British destroyer. The Churchill-Roosevelt Agreement is set forth in 34 *A.J.I.L. Supp.* 183 (1940). Commentary appears in Borchard, "The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases," 34 *A.J.I.L.* 690 (1940) and Briggs, "Neglected Aspects of the Destroyer Deal," 34 *A.J.I.L.* 569 (1940).

[134] Address by the President (Sept. 11, 1941), *U.S. Naval War College, International Law Documents 1941* 15 (1943).

[135] *Id.* at 22.

[136] *Id.* at 19.

[137] *Id.* at 24.

[138] Oppenheim-Lauterpacht, *op. cit. supra* note 131 at 613.

of piracy has been extended from its original meaning of predatory acts committed on the high seas by private persons and that it now covers generally ruthless acts of lawlessness on the high seas by whomsoever committed.[139]

c. THE PARTIAL "ABOLITION" OF SUBMARINES (1945)

During the Second World War submarines with increased efficiency were employed by, *inter alia,* Germany, the United States, and the United Kingdom. The principal claims and counterclaims relating to submarines concerned other legal issues than combatant status.

At the close of World War II the remaining German and Japanese submarines were destroyed or divided among the principal victorious Allies.[140] In 1966 the German Federal Republic [141] had submarines but apparently East Germany did not. In 1966 both Japan [142] and Italy [143] had submarines.

d. THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG (1946)

Admiral Donitz, who was one of the defendants in the trial before the International Military Tribunal at Nuremberg, had served first as head of the German submarine arm and then as commander in chief of the Navy.[144] The argument of his counsel to the Tribunal referred briefly to the retention of an "effective weapon":

> The prosecution will perhaps take the standpoint that, in lieu of this [use of submarines inconsistent with article 22 of the London Naval Treaty of 1930], submarine warfare against armed merchant vessels should have been discontinued. In the last war the most terrible weapons of warfare were ruthlessly employed by both sides on land and in the air. In view of this experience the thesis can hardly be upheld today that in naval warfare one of the parties waging war should be expected to give up using an effective weapon after the adversary has taken measures making the use of it impossible in its previous form.[145]

The Tribunal's Judgment applicable to Admiral Donitz did not respond expressly to the quoted claim. It is clear, however, that the Tribunal regarded submarines as lawful combatants. Its analysis was limited to other

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[139] *Id.* at 613–14 (footnotes omitted).

[140] *A Decade of American Foreign Policy, Basic Documents, 1941–49,* S. Doc. No. 123, 81st Cong., 1st Sess. 41 (1950).

[141] *Jane's Fighting Ships 1965–66* 103; *Les Flottes de Combat 1966* 45–46.

[142] *Jane's Fighting Ships 1965–66* 160; *Les Flottes de Combat 1966* 275.

[143] *Jane's Fighting Ships 1965–66* 147; *Les Flottes de Combat 1966* 264–65.

[144] 1 *I.M.T.* 310.

[145] 18 *I.M.T.* 315.

legal issues than combatant status but these other issues could not have been considered as they were except upon the implicit holding of the lawful combatant status of submarines.[146] Apparently no question was raised concerning the lawful combatant status of military aircraft and their personnel.[147]

C. SUBMARINES AS LAWFUL COMBATANTS

The rejection of the claims to abolish the submarine have confirmed its lawful combatant status. In the same way the limitation of the submarine by international agreement where other types of warships were subject to analogous restriction has also recognized the lawful combatant status of submarines and their personnel. Even the attempt to make submarines conditional unlawful combatants, as where they fail to comply with particular rules concerning action against merchant ships, has been dropped.

Combat interactions between submarines and merchant ships characterized both World Wars. It is important, therefore, to examine briefly the combatant status of merchant ships and their personnel. The Geneva Conventions of 1949 accord prisoner of war status and thus status as lawful combatants to the personnel of belligerent merchant ships.[148] The Geneva Sea Convention includes among those entitled to prisoner of war status:

> Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.[149]

It is particularly significant that merchant seamen are accorded prisoner of war status without regard to whether their ships are armed or not. In the same way no qualification is made concerning the action of merchant ships and, consequently, even Captain Fryatt, [150] who attempted to ram a German submarine, would now be entitled to prisoner of war status. Thus, the personnel of belligerent merchant ships are now entitled to prisoner of war status like the personnel of belligerent submarines.

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[146] 1 *I.M.T.* 310–15.

[147] See the judgment concerning Marshal Goring, the commander in chief of the German Air Force. 1 *I.M.T.* 279–82.

[148] To state that merchant ships and their personnel are lawful combatants is not to state that they are entitled to initiate attack against the enemy as if they were warships. As a tactical matter such initiation of attack is unlikely anyway. See Colombos 479–82 and Bellot, "The Right of a Belligerent Merchantman to Attack," 7 *Grotius Trans.* 43 (1922).

[149] Art. 13(5). The same provision appears in the Geneva Prisoners of War Convention art. 4(5).

[150] See the text accompanying notes 27–30 *supra.*

1. General War

The submarine's status as lawful combatant has been retained because of the national interests or supposed national interests of some of the major naval powers and particularly of France.[151] These national interests have included the use of the submarine as a militarily efficient warship and, particularly, its use in general war. The United States and the United Kingdom have upon occasion agreed to abolition of the submarine conditioned upon the agreement of other powers. The same two states, however, later manifested their national interests by employing submarines in general war.

In the contemporary era of nuclear armed and propelled submarines there are no governmental proposals to abolish the submarine.[152] The principal thrust of contemporary disarmament proposals is directed at nuclear and thermonuclear weapons.[153] These are the weapons which comprise the principal military capability of fleet ballistic missile submarines. Effective nuclear disarmament would not, however, deprive submarines of lawful combatant status. Thus, for the foreseeable future, submarine warships and their personnel will continue to have status as lawful combatants.

2. Limited War

It is clear that submarine warships and their personnel have the same *de jure* status as lawful combatants in limited war which they have in general war. Nevertheless, the strategic and tactical uses of submarines as a component of naval power may be expected to be considerably less in limited wars than in general wars. Professor Halperin has stated: "Submarines have not been used extensively, if at all, in local wars . . . ." [154] Apparently submarines were not used in the Korean War. The Soviet Union, which was in effect fighting the war by proxy,[155] did not directly employ its submarines even though they could have constituted a major threat to the seaborne logistic support of the United Nations command. The United States, which also sought to limit the war in other ways, did

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[151] See Royse 19–20.

[152] Gaddis Smith, *Britain's Clandestine Submarines, 1914–1915* (1964) describes the secret shipping of submarine sections from the neutral United States to belligerent Canada where they were assembled and completed. This suggests that if international abolition of submarines were to be successful it would require effective international inspection.

[153] See generally U.S. Arms Control and Disarmament Agency, *Agenda Item—Peace* (1964); *Arms Control: Issues for the Public* (Henkin ed. 1961).

[154] See Garthoff 114.

[155] Halperin, *Limited War in the Nuclear Age* 35 (1963).

not employ its submarines.[156] There is no indication that submarines have been used in the war in Vietnam.

The result is that, although submarines are *de jure* entitled to combatant status, they are not extensively employed in limited war. The nonuse, or at the most the very restricted use, of submarines is one way of keeping a war limited.[157] Where the submarine is used for the same general purposes for which surface warships are used, as for gun bombardment of the shore, there is no reason that such action should increase the intensiveness or extensiveness of a limited war.

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[156] Cagle & Manson do not record the use of United States submarines.

[157] Osgood 241–43 stresses the importance of limiting "military means."

CHAPTER III

CLAIMS CONCERNING LAWFUL AREAS OF OPERATION: SUBMARINE OPERATIONAL AREAS

In times of relatively low coercion the high seas are an international resource open to the peaceful uses of all states. The community policies reflected in the legal doctrines of the law of the sea in time of peace are designed to encourage the most comprehensive shared used and exploitation of the high seas.[1] One of the principal uses of the sea has been described by Admiral Mahan:

> The first and most obvious light in which the sea presents itself from the political and social point of view is that of a great highway; or better, perhaps, of a wide common, over which men may pass in all directions, but on which some well-worn paths show that controlling reasons have led them to choose certain lines of travel rather others.[2]

In times of relatively high coercion and violence the legal doctrines permit belligerents to conduct hostilities upon the high seas which are the same areas permitted to neutral states for trade and other uses. It is apparent that these conflicting uses in times usually called war will bring about claims by belligerents against neutrals and by neutrals against belligerents. It is a principal purpose of the international law concerning high seas operational areas to resolve these claims. Another principal purpose of this branch of law is to resolve interbelligerent claims concerning the use of high seas operational areas as a distinct method of conducting hostilities.

It is well established doctrine that lawful naval combatant forces are legally permitted to operate on the high seas as well as in the territorial

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[1] The textual statement is implicit in the literature: 4 Whiteman 499–739; Colombos 1–431; 1 Oppenheim-Lauterpacht, *International Law: Peace* 582–635 (8th ed. 1955); 2 Hackworth 651–759. The statement is documented in McDougal & Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (1962).

For a future projection see Burke, *Ocean Sciences, Technology, and the Future International Law of the Sea* (1966).

[2] Mahan, *The Influence of Sea Power upon History 1660–1783* 25 (25th ed. 1916).

waters and the internal waters of belligerents.[3] Such operations are forbidden in neutral territorial waters.[4] This prohibition is conditioned upon the mutual observance of such neutral immunity by both naval belligerents.[5] The principal claims and controversies concerning areas of operation in modern naval warfare, both between belligerents and neutrals and inter-belligerent, have been connected with the lawfulness of operational areas enforced, *inter alia,* by submarines, aircraft, and mines.

As employed by both sides during the World Wars, operational areas were directed at the enemy belligerent and also at neutrals who traded with the enemy. As to the enemy, the claim was to the employment of a particularly severe method of naval warfare, frequently involving sinking of all enemy vessels upon sight, within the specified area. As to neutrals, the claim was to prevent neutral commerce with the enemy by excluding neutral ships from the use of the operational area except use which is controlled by the claimant-belligerent. Operational areas enforced by submarines have been one of several methods of conducting economic warfare against the enemy through control of the neutrals.[6]

A. THE ECONOMIC WARFARE CONTEXT OF CLAIMS TO ESTABLISH OPERATIONAL AREAS IN GENERAL WAR SITUATIONS

Economic warfare is, of course, designed to have an adverse impact upon the enemy belligerent. Neutral states constitute the vital external source of supply for the enemy belligerent. Consequently, economic warfare measures directed against neutral states have an impact upon the enemy belligerent.[7]

The belligerent claim to control or prohibit economic intercourse with the enemy involves the carrying out of three separate functions. The first is the characterization of the goods to be prohibited or controlled and it includes examining the relation of the goods to the military power of the

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[3] Stone 571; *Law of Naval Warfare* section 430.

[4] *Ibid.* Article V of Hague Convention XIII provides: "Belligerents are forbidden to use neutral ports and waters as a base of naval operations. . . ."

[5] The principal example of World War II is the *Altmark* case: Colombos 600–01; McDougal & Feliciano 454–56; Oppenheim-Lauterpacht 693–95; 7 Hackworth 568–75. See Waldock, "The Release of the Altmark's Prisoners," 24 *Brit. Y.B.I.L.* 216 (1947). The principal example of World War I is the *Dresden* case: Colombos 600; Oppenheim-Lauterpacht 755; 7 Hackworth 370–72.

See the astonishing suggestion by the Chairman of the United States Delegation to the Geneva Conference on the Law of the Sea (1958) that belligerent submarines could operate in neutral territorial waters "practically inviolable" from surface warships in Dean, "The Geneva Conference on the Law of the Sea: What Was Accomplished," 52 *A.J.I.L.* 607, 610–11 (1958).

[6] The various methods of economic warfare are described in 1 and 2 Medlicott.

[7] See e.g. 1 Medlicott 468–508.

enemy.[8] The traditional doctrines distinguishing between "free goods," "conditional contraband," and "absolute contraband" were designed to facilitate this characterization.[9] "Free goods" were those deemed to be incapable of military use. "Conditional contraband" covered goods which could be used for military or civilian purposes and it was usually necessary also to show their military destination before they could be controlled or prohibited. "Absolute contraband" was limited to goods which were specialized for military uses. In a war situation in which major powers remain neutral, it may be expected that belligerent characterization of goods will take account of neutral interests in maintaining trade with the enemy belligerent. In situations of general war, such as the two World Wars, the contraband lists became more comprehensive as neutral interests and influence declined.[10] It is impossible to avoid the conclusion that belligerent decisions in this field are determined in substantial part by neutral power and purpose.[11]

The second function is the actual stopping of the flow of neutral goods imported by the enemy.[12] In addition, based upon the practice of the two World Wars, it now involves stopping the flow of enemy exports to neutrals as well.[13] The principal objective in stopping enemy exports has been to prevent the enemy from earning foreign exchange credits. The range of methods employed by belligerents to stop economic intercourse with the enemy has been very great. Traditionally it involved visit and search [14] and capture of suspected individual vessels and the use of "close-in" naval blockades.[15] In the World Wars it included the occasional use of the methods just mentioned and also extended to "long-distance" naval blockades and high seas operational areas or "war zones" as well as to comprehensive administrative techniques of economic warfare [16] which changed the locus of enforcement from the high seas to the docks.

The third function is the disposition of the goods and of the vessel or

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[8] Colombos 633–57; McDougal & Feliciano 481–88; Oppenheim-Lauterpacht 799–813; 7 Hackworth 14–99.

[9] The distinctions are articulated in Grotius, *De Jure Belli ac Pacis Libris Tres,* Bk. III, Ch. I, section 5, 2 *Classics of International Law* 602 (Kelsey transl. 1925).

[10] Seymour, *American Diplomacy During the World War* 32–34 (1934).

[11] See Buehrig 85–105 (Ch. 5 entitled "The Defense of Trade") (1955). See generally Percy, *Maritime Trade in War* (1930).

[12] Colombos 672–752; McDougal & Feliciano 488–509; Oppenheim-Lauterpacht 768–90, 848–68.

[13] McDougal & Feliciano 501–07; 1 Medlicott 112–24.

[14] The procedures of visit and search are described in Harvard Research, *Naval War* 535–47. The black letter summary of visit and search in the Harvard Research is quoted in the text of Ch. IV, section A.

[15] Traditional blockades are described in Tucker 283–95.

[16] Such techniques are described in 1 Medlicott 415–29. See also Y. Wu, *Economic Warfare passim* (1952).

aircraft carrying them.[17] The extreme alternative courses of action are release of the goods and craft on the one hand and destruction without warning on the other. It is obviously in the interests of a belligerent capable of rational calculations of self-interest to condemn the goods and the carrier and requisition them for his own purposes wherever possible.[18]

The present chapter focuses upon the second of the above described functions of economic warfare, stopping the flow of commerce between neutrals and the enemy belligerent, and particularly upon submarine operational areas as a method of accomplishing this. It should be recognized that all of the economic control methods, ranging from occasional visit and search to submarine operational areas and comprehensive administrative techniques applied at the source, are but different methods of achieving the central objective of stopping neutral commerce with the enemy belligerent which may benefit the latter.[19] In selecting particular methods of economic control, a belligerent must take into account its economic and military resources including the kind of naval power which it has. A belligerent with predominantly surface naval power usually selects a method of stopping commerce with the opposing belligerent which can be made effective by surface naval power. In the same way, a belligerent which does not command the surface of the sea but which has effective submarine naval power, Germany being the obvious example, is compelled to select a method of commerce interdiction which can be enforced by submarine naval forces.[20]

In selecting particular economic control methods there are certain traditional modes of stopping commerce with the enemy which must be avoided by surface and submarine naval powers alike because of the technical conditions of modern warfare. Specifically, the traditional procedures of visiting and searching a suspected merchant vessel on the high seas are inconsistent with the elementary requirements of self-preservation for both surface and submarine warships.[21] The surface warship which attempts to follow these procedures becomes particularly vulnerable to submarine and air attack. The submarine, during the World Wars, was even more vulnerable to these types of attack. In addition, the submarine which attempted to lower a boat for visit and search was vulnerable to attack by ramming and gunfire from merchant ships.

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[17] Colombos 758–83; Oppenheim-Lauterpacht 869–79; Rowson, "Prize Law During the Second World War," 24 *Brit. Y.B.I.L.* 160 (1947); Fitzmaurice, "Some Aspects of Modern Contraband Control and the Law of Prize," 22 *Brit. Y.B.I.L.* 73 (1945).

[18] Phillips, "Capture at Sea in Perspective," 91 *Nav. Inst. Proc.* No. 4, p. 60 (1965) sets forth the interest in capture as opposed to sinking.

[19] See McDougal & Feliciano 479.

[20] The German reasons for resorting to the use of submarines against commerce are set forth in Scheer, *Germany's High Sea Fleet in the World War* 215–58 (1920).

[21] See 7 Hackworth 6.

It is impossible to conduct anything but the most superficial search of a large merchant vessel at sea whether the warship attempting to make the search is a surface or submarine one. The surface naval powers, in consequence, adopted the technique of diversion during the World Wars.[22] Under this technique a suspected merchant vessel was diverted to a designated control port where a comprehensive examination of the cargo could be made. This technique was not available to a submarine naval power since its exercise was dependent upon control of the surface of the sea.

The time-honored "close-in" naval blockade involved the use of stationary or slowly cruising warships immediately off the coast of the blockaded state.[23] This type of blockade was not employed by any naval belligerent against any major enemy naval power during the World Wars.[24] It is obvious that the blockading vessels would have been subjected to the same type of dangers involved in attempting to visit and search.[25] In response to the dangers of employment of submarines, mines, and aircraft, and to the requirements of effective economic warfare, the surface naval powers employed the so-called "long-distance" blockade against Germany.[26] The actual naval enforcement of the blockade against Germany consisted of patrolling strategic high seas passages on the routes to Germany at some distance from Germany itself.[27] In performing this task the surface naval powers were in a position to rely primarily upon surface rather than upon submarine warships. The surface warships were usually supplemented by other means including mines and aircraft.

The long-distance blockade enforced in the manner described was

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[22] See *id.* at 182–201.

The legality of diversion is maintained in Garner, "Violations of Maritime Law by the Allied Powers during the World War," 25 *A.J.I.L.* 26 (1931). It is denied in Warren, "Lawless Maritime Warfare," 18 *Foreign Affairs* 424 (1940).

[23] The requirements for lawfulness of such blockades were: (1) the juridical competence to establish the blockade possessed by the belligerent government; (2) the formal declaration of establishment and its communication to neutrals; (3) "effectiveness" in the sense of reasonably efficient enforcement as opposed to a "paper" blockade. Tucker 287–89; 7 Hackworth 114–34.

[24] In World War I close-in blockades were employed against German East Africa, the Cameroons, portions of Asia Minor, Kiauchau in China, and some other coasts without modern defenses. 2 Garner 318–19. In the Russo-Finnish War of 1939 the Soviet Union employed a close-in blockade. McDougal & Feliciano 491. The modern impracticability of such blockades is stressed in Colombos 693.

[25] Blockade in the strict legal use of the term—that is, the close investment of the enemy's coasts or ports—was regarded as scarcely practicable under modern conditions of warfare. . . .

1 Medlicott 23.

[26] A classic study of the World War I blockade is Guichard, *The Naval Blockade 1914–1918* (Turner transl. 1930). See also Parmelee, *Blockade and Sea Power* (1924); Malkin, "Blockade in Modern Conditions," 3 *Brit. Y.B.I.L.* 87 (1923).

[27] E.g. the passage between the Shetland Islands and Iceland. Roskill 37.

a method of commerce interdiction which was not available to Germany because of its lack of surface naval power. In response to the same realities of modern naval warfare which brought about the employment of the long-distance blockade, Germany developed the operational area enforced by submarines as its preeminent method of interdicting commerce with the United Kingdom.[28] For a time during the First World War, Germany attempted to apply differential treatment to enemy and neutral merchant ships in the prescribed area. Only the enemy merchant ships were sunk without warning and, in theory at least, the neutrals were spared this fate.[29] Because of the tactical difficulty, and indeed impossibility in many situations, of a submarine attempting to distinguish between neutral and enemy merchant vessels, the attempt was doomed to failure. Germany was presented with the dilemma whereby it either had to abandon submarine enforcement of its areas for all ships or apply that enforcement to all ships including neutrals. The German dilemma is reflected in the considerable diplomatic correspondence between Germany and the United States while the latter was a neutral.[30]

The long-distance blockade was employed in both World Wars as a part of the comprehensive system of Allied economic warfare. The following conception of such economic warfare, with specific reference to the Second World War, is provided by Professor Medlicott:

> Economic warfare is a military operation, comparable to the operations of the three Services in that its object is the defeat of the enemy, and complementary to them in that its function is to deprive the enemy of the material means of resistance. But, unlike the operations of the Armed Forces, its results are secured not only by direct attack upon the enemy but also by bringing pressure to bear upon those neutral countries from which the enemy draws his supplies. It must be distinguished from coercive measures appropriate for adoption in peace to settle international differences without recourse to war, e.g., sanctions, pacific blockade, economic reprisals, etc., since, unlike such measures, it has as its ultimate sanction the use of belligerent rights.[31]

It should not be supposed that either the long-distance blockade or comprehensive economic warfare was only a British concern. A study with

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[28] Factual description appears in Gibson & Prendergast, *The German Submarine War 1914–1918* (1931).

[29] See the text accompanying notes 46–48 *infra*.

[30] The diplomatic correspondence appears in: [1917] *Foreign Rel. U.S. Supp. No. 1* (1931); [1916] *Foreign Rel U.S. Supp.* (1929); [1915] *Foreign Rel. U.S. Supp.* (1928). Critical analysis appears in Buehrig *passim*.

[31] 1 Medlicott 17. The term "economic warfare" was planned as comprehensive and covering the entire field. *Id.* at 12–17. Narrower terms such as "blockade" were rejected as "out of date and inadequate" in reflecting the activities involved. *Id.* at 16. The "economic blockade" subject of Professor Medlicott's two volumes is but a part of "economic warfare." *Id.* at 17.

specific reference to the First World War has described the role of the United States:

> [O]f all the nations engaged in the World War none was more ready to make full use of its own economic power than the United States. When the United States entered the war one of the first demands which she made on Britain and the other allies was that they should enforce a still more complete embargo on exports from their territories to doubtful destinations in Europe than they had previously thought it necessary to impose, and she herself for many months stopped all exports whatsoever, both to the Scandinavian countries and to Holland. She had made bitter complaints against the blacklisting by the British government of German firms in South and Central America, but as soon as she entered the war she carried the blacklist policy even farther on her own initiative. She has never admitted complicity with the action of the British navy against neutral trade, even after the American navy was patrolling the seas side by side with the British navy, but in the use of the economic resources of the allied and associated Powers as bargaining counters and as means of bringing pressure to bear on neutral countries, she not only eagerly accepted the position of an accomplice, but even took the lead in giving this kind of economic weapon a keener edge and in wielding it more effectively.[32]

Consistent with the comprehensive conception of economic warfare, it is significant that the belligerent objective of completely interdicting commercial intercourse between the enemy belligerent and neutrals is now widely accepted as lawful in general war.[33] This reflects the actual economic warfare techniques of the World Wars and changes the focus of legal analysis from the objective itself to the various methods of achieving it. In particular, the legality of the operational area enforced by submarines has been questioned. The appraisal of such areas under law is made in the balance of this chapter.

B. CLAIMS TO ESTABLISH SUBMARINE OPERATIONAL AREAS IN GENERAL WAR SITUATIONS

The German claims are considered at the outset since they were first in time and are of central importance for legal appraisal.

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[32] Percy, *Maritime Trade in War* 58, 59 (1930).

In 1946 the United States Government abandoned a plan to write the history of the American role in economic warfare. 2 Medlicott x. The Medlicott study, however, is also valuable in describing the American role. See e.g. *id.* at 19–25; 26–62.

[33] Colombos 509–10; McDougal & Feliciano 478–79; Stone 508–10; Oppenheim-Lauterpacht 796–97. Professor Lauterpacht refers to the diminished "cogency of the claim of neutrals to unimpeded commercial intercourse with the belligerents." Oppenheim-Lauterpacht 796, n. 1.

1. German Claims

a. THE FIRST WORLD WAR

On February 4, 1915 Germany proclaimed an "area of war" in the waters surrounding Great Britain and Ireland.[34] The Chancellor's Proclamation transmitted by the German Ambassador in Washington to the U.S. Secretary of State invoked retaliation against Great Britain.[35] In relevant part it provided:

> Just as England has designated the area between Scotland and Norway as an area of war, so Germany now declares all the waters surrounding Great Britain and Ireland including the entire English Channel as an area of war, and thus will proceed against the shipping of the enemy.
>
> For this purpose beginning February 18, 1915 it will endeavor to destroy every enemy merchant ship that is found in this area of war without its always being possible to avert the peril, that thus threatens persons and cargoes. Neutrals are therefore warned against further entrusting crews, passengers and wares to such ships. Their attention [is] also called to the fact, that it is advisable for their ships to avoid entering this area, for even though the German naval forces have instructions to avoid violence to neutral ships in so far as they are recognizable, in view of the misuse of neutral flags ordered by the British Government and the contingencies of naval warfare their becoming victims of torpedoes directed against enemy ships cannot always be avoided; at the same time it is specifically noted that shipping north of Shetland Islands in the eastern area of the North Sea and in a strip of at least thirty sea miles in width along the Netherlands coast is not imperiled.[36]

It should be noted that submarine enforcement was not mentioned. Since the German Navy lacked the power to provide enforcement by surface warships (except on an occasional basis), submarine enforcement

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[34] [1915] *Foreign Rel. U.S. Supp.* 95 (1928).

[35] The retaliation was in response to the British "area of war" of Nov. 3, 1914 which was, in turn, in retaliation for alleged illegal German minelaying. The British area appears in [1914] *Foreign Rel. U.S. Supp.* 463 (1928). Its central paragraph provides:

> They therefore give notice that the whole of the North Sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft, and all other vessels will be exposed to the gravest dangers from mines which it has been necessary to lay and from warships searching vigilantly by night and day for suspicious craft.

Id. at 464. Safe routes were prescribed for neutral vessels. *Ibid.*

In the note of Nov. 10, 1914 from the Secretary of State to the U.S. minister in Norway the United States refused to join other neutrals in protesting the British zone. [1914] *Foreign Rel. U.S. Supp.* 466 (1928).

[36] [1915] *Foreign Rel. U.S. Supp.* 95, 96 (1928).

was implicit. Further, the Proclamation was directed at "enemy" but not at neutral merchant shipping and safe areas were designated for the latter.[37] Because of the difficulties encountered by submarines in attempting to distinguish neutrals from belligerents, neutral merchant ships were sunk in the "area of war." Neutrals, particularly the United States, claimed the illegality of the submarine operational area. This resulted in German Government vacillation in the actual application of submarine enforcement in the area.[38]

The British merchant vessel *Lusitania* (unarmed but carrying munitions from the United States to the United Kingdom) was torpedoed in the operational area on May 7, 1915 with considerable loss of American as well as British lives.[39] There followed a year of claim and counterclaim between the United States and Germany in which the United States maintained the position that nothing in the accepted principles of international law or in any proper extension of them justified the sinking of belligerent merchantmen transporting neutral passengers in the German operational area.[40] The German Government's note of May 4, 1916 to the United States stated:

> In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance.[41]
>
> * * * * * * *
>
> The German submarine forces have had, in fact, orders to conduct submarine warfare in accordance with the general principles of visit and search and destruction of merchant vessels as recognized by international law, the sole exception being the conduct of warfare against the enemy trade carried on enemy freight ships that are encountered in the war zone surrounding Great Britain . . . .[42]

This was nothing less than German agreement with the major contentions of the United States. Specifically, Germany conceded that even in the "war zone" unarmed belligerent merchantmen with the sole exception of cargo ships (as opposed to passenger ships) were to be accorded treatment by submarines in accordance with the traditional rules of international law regulating attack by surface warships. This amounted to a

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[37] Compare with the text Colombos 488.

[38] Potter & Nimitz 456–58 (1960).

[39] [1915] *Foreign Rel. U.S. Supp.* 384 (1928).

[40] The United States made demand to Germany for disavowal, reparation, and assurances in its note of May 13, 1915. *Id.* at 393–96.

[41] [1916] *Foreign Rel. U.S. Supp.* 257, 259 (1929).

[42] *Id.* at 257.

withdrawal of the German operational area claim of February 4, 1915 as to belligerent unarmed passenger vessels.

The termination of the German submarine operational area does not necessarily lead to the conclusion that the German position was untenable in law. Its significance was that Germany was not prepared to maintain its legal position at the risk of war with the determined and powerful neutral United States.[43] Even though Germany admitted its willingness "to use the submarine weapon in strict conformity with the rules of international law as recognized before the outbreak of the war," the note specifically referred to the objective of the United States obtaining British adherence to the traditional rules. The note concluded by stating that if the United States were not successful in this objective, Germany "would then be facing a new situation in which it must preserve [for] itself complete liberty of decision." [44] It is well known that the United States had no more success in modifying the British long-distance naval blockade after May 4, 1916 than it had achieved before then. The real issue confronted by the German decision-makers did not include the possibility of modification of the increasingly successful British methods of economic warfare. The central issue was whether Germany would abandon the use of submarine operational area warfare or risk war with the United States.[45] It might have been militarily advantageous to Germany to make the decision in 1916 but it was nevertheless delayed until 1917.

The German "unrestricted" submarine warfare claim within a prescribed operational "zone" was set forth in enclosures to a message of January 31, 1917 from the German Ambassador in Washington to the U.S. Secretary of State:

> Germany has, so far, not made unrestricted use of the weapon which she possesses in her submarines. Since the Entente powers, however, have made it impossible to come to an understanding based upon equality of rights of all nations, as proposed by the Central powers, and have instead declared only such a peace to be possible which shall be dictated by the Entente allies and shall result in the destruction

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[43] In Prof. Buehrig's view the United States demands on Germany following the *Lusitania* sinking "left no recourse except war, should Germany fail to keep the submarine within bounds acceptable to the United States." Buehrig 126.

[44] [1916] *Foreign Rel. U.S. Supp.* 257, 260 (1929).

In acknowledging that the German operational area policy announced on Feb. 4, 1915 was "now happily abandoned" the United States rejected the suggestion in the German note that the changed German policy was contingent upon the successful outcome of negotiations between the United States and the United Kingdom designed to maintain the traditional United States rights as a neutral against the British. The United States note of May 8, 1916 added: "Responsibility in such matters is single, not joint; absolute, not relative." *Id.* at 263.

[45] On the military and political factors in the decision see Buehrig 71–75; Millis, *The Road to War: America 1914–1917* 354–82 (1935).

and humiliation of the Central powers, Germany is unable further to forego the full use of her submarines . . . .

Under these circumstances Germany will meet the illegal measures of her enemies by forcibly preventing after February 1, 1917, in a zone around Great Britain, France, Italy, and in the eastern Mediterranean all navigation, that of neutrals included, from and to England and from and to France, etc., etc. [*sic*] All ships met within that zone will be sunk.[46]

This claim was expressly directed against neutrals as well as belligerents. It specifically invoked submarine enforcement. American passenger ships were permitted to sail once a week in each direction between the United States and the United Kingdom provided that the United States Government guaranteed that no contraband according to the German list was carried.[47] Its juridical basis was not a claim of legal right but was rather stated to be a legitimate reprisal measure based upon alleged British violations of international law. It is well known that the present German claim provided the ostensible basis for the participation of the United States as a belligerent.[48]

(1) *Appraisal as Reprisal*

Initial appraisal should be made in terms of reprisal since it was invoked. In addition, some writers regard reprisal as central to the legal analysis of this subject. For example, Professor Tucker states:

[I]t does not appear possible to assert that—apart from reprisal—belligerents have at present the right to restrict the movement of neutral vessels within vast tracts of the open seas merely by proclaiming that these areas have been rendered dangerous—in one form or another—to neutral shipping. Hence, despite bellgerent [*sic*] practices in two wars the establishment of war zones forms a lawful measure only when taken in response to the persistent misconduct of an enemy.[49]

In typical formulation reprisals are acts of retaliation undertaken through a course of conduct, otherwise unlawful, employed by one belligerent against the enemy belligerent for acts committed by the latter contrary to the law of war.[50] The object of reprisals is deemed to be inducing the enemy to abandon its illegal methods of warfare. Appraisal

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[46] [1917] *Foreign Rel. U.S. Supp. No. 1* 97, 100 (1931).

[47] *Id.* at 102.

[48] Beuhrig *passim* sets forth various bases including United States concern over a possible German victory.

[49] Tucker 305 (footnotes omitted).

[50] Stone 353–56; Oppenheim-Lauterpacht 561–63. See the text of Ch. I accompanying note 89.

of reprisals in the present context must, therefore, consider the major features of British naval warfare.

The United Kingdom armed its merchant ships and issued instructions that they were to open fire upon German submarines.[51] These actions could be regarded as violations of the traditional law which only permits duly commissioned naval vessels to initiate attack.[52] It seems quite impossible to maintain that such British merchant ship departures from or violations of the traditional law are valid while holding that German submarine departures from or violations of the same law are invalid. Consequently, sinking without further warning than that involved in notification of the operational area to British merchant ships may be justified as a legitimate reprisal. It should be noted that the specific modality of the reprisal, the submarine operational area, was directed particularly to these British merchant ship violations of the traditional law.[53]

It may be recalled that from a German perspective the British long-distance blockade was a "hunger blockade" since foodstuffs were not allowed through it to Germany.[54] In the British view, the traditional law required visit and search of merchant ships by submarines in order to protect "noncombatant" values. If this is accepted, it is difficult to avoid the conclusion that the same law also required maintenance of the distinction between absolute and conditional contraband concerning the British blockade, thus permitting food shipments to German "noncombatants." [55] It is concluded, therefore, that the actual British blockade methods also

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[51] The most explicit evidence appears in the enclosures to the note of Feb. 14, 1916 from the U.S. Ambassador in Berlin to the Secretary of State. The enclosures included British Government instructions to masters and gun crews of "defensively" armed merchant ships which were captured by Germany on the English steamer *Woodfield*. The instructions appear in [1916] *Foreign Rel. U.S. Supp.* 187, 191–98 (1929). See particularly *id.* at 196. The instructions are quoted in relevant part in the text of Ch IV, section B.

[52] The ambivalence of the doctrinal formulations is adequately illustrated by Oppenheim-Lauterpacht 467–68: "Any merchantman of a belligerent attacking a public or private vessel of the enemy would be considered a pirate and treated as such . . ." but, "it was perfectly legitimate for merchantmen of the Allies to attempt to ram German submarines even if signaled to stop and submit to visitation."

[53] If reprisals are designed to induce the opposing belligerent to give up its unlawful measures, it is desirable to direct the reprisals against the specific unlawful measures. See generally Oppenheim-Lauterpacht 563.

[54] Admiral Scheer provides illustration:

> When the starvation of Germany was recognised as the goal the British Government were striving to reach, we had to realise what means we had at our disposal to defend ourselves against this danger. England was in a position to exert enormous pressure. We could not count on any help from the neutrals.

Germany's High Sea Fleet in the World War 219 (1920).

[55] It was indeed upon the civilian population that the [blockade] action of the Allies bore with the greatest weight; since Germany was able, thanks to her

provided adequate justification for the submarine operational area as a legitimate reprisal.

In addition, it should be remembered that the British employed "Q-ships" as a ruse of naval warfare designed to entrap and destroy submarines.[56] These ships appeared to be innocent merchantmen but actually were warships with substantial armament. The extent of the "warning" they afforded to a submarine attempting to comply with the traditional law is that the British naval ensign was hoisted simultaneously with opening fire.[57] The signifiance of the Q-ships is that they made it impossible for submarines to attempt compliance with visit and search of merchant ships without regard to whether a particular merchant ship appeared to be armed or to have wireless equipment. If the Q-ships were a lawful ruse of war, it also can be maintained persuasively that the German use of a submarine operational area was a lawful measure. If, on the other hand, the employment of Q-ships was illegal, the submarine operational area may be deemed a legitimate reprisal to it.

It should be mentioned that the British established the first modern operational area, designating the entire North Sea as "a military area," on November 3, 1914.[58] The German operational area may be justified as a legitimate reprisal to the British one. If the submarine operational area as a legitimate reprisal measure could be properly invoked against each of the particular British methods of naval war alone, it seems abundantly clear that it was justified by the combination of them.

Consideration should also be given to the validity of the German operational area as a reprisal affecting neutrals. The position of the United States, while a neutral, was that interbelligerent reprisals could not affect the rights of neutrals.[59] It is difficult to see how the United States could

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energy and ingenuity, to keep her armies supplied with food and material up to the armistice.

Guichard, *The Naval Blockade 1914–1918* 304 (Turner transl. 1930).

[56] Scheer, *op. cit. supra* note 54 at 262; Campbell, *My Mystery Ships* (1928); R. W. Smith, "The Q-Ship—Cause and Effect," 79 *Nav. Inst. Proc.* 533 (1953).

[57] "[Q-ships] were fitted with a very carefully concealed armament, which was kept hidden until the submarine was within point-blank range. . . ." Jellicoe, *The Grand Fleet 1914–1916* 262 (1919).

[58] *Supra* note 35. Oppenheim-Lauterpacht 681–82, in attempting to distinguish between the British and German areas, state:

> In both cases neutral shipping suffered grievous hardship, but the British Government did at least indicate lanes through the mine-fields through which ships might pass with safety. . . .

[59] The United States note to Germany of July 21, 1915, for example, states:

> If a belligerent cannot retaliate against an enemy without injuring [*sic*] the lives of neutrals, as well as their property, humanity, as well as justice and a due regard for the dignity of neutral powers, should dictate that the practice be discontinued.

[1915] *Foreign Rel. U.S. Supp.* 480, 481 (1928). The German note to the United

establish and expand a wartime trade with the United Kingdom which supplied the latter with the sinews of war and expect at the same time to be immune from German belligerent reprisals.[60] From the beginning of the war the United States had protested but acquiesced in the British long-distance blockade measures which effectively stopped its trade with Germany.[61] In addition, the belligerent United States by laying the great mine barrage between the Orkney Islands and the Norwegian coast during the First World War, with its impact upon neutrals, may have changed its earlier position.[62] It is concluded, consequently, that the actual impact

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States of Feb. 16, 1916 indicates apparent agreement. In referring to the *Lusitania* sinking, it states, "[T]he German retaliation affected neutrals which was not the intention, as retaliation should be confined to enemy subjects." [1916] *Foreign Rel. U.S. Supp.* 171 (1929).

[60] See notes 86, 87, *infra.*

[61] The United States note to Great Britain of Dec. 26, 1914, for example, protested against seizures and detentions of American cargoes destined to neutral European ports. [1914] *Foreign Rel. U.S. Supp.* 372 (1928).

[62] Because of its impact upon neutrals, the United States, with minimum consistency, could not and did not justify the barrage as a reprisal measure. The United States note to Norway of Aug. 27, 1918 described the mine barrage as follows:

> The Government of the United States is also advised that the Norwegian Government has been informed that the Governments of the United States and Great Britain are engaged in laying a barrage across that portion of the North Sea lying between Scotland and Norway, which when completed will effectively prevent the passage of enemy submarines to and from the Atlantic Ocean by the northern route through the North Sea provided that they are not permitted illegal passage through the territorial waters of Norway.

[1918] *Foreign Rel. U.S. Supp. No. 1* vol. 2, 1782, 1783 (1933).

Prof. Hyde has written:

> Excuse for the belligerent achievement was seen in the fact that it proved to be a vital and necessary means of safeguarding the shipping of the Allied and Associated Powers from the dire consequences of illegal conduct of the enemy persistently exemplied in the methods employed in submarine attacks. The laying of the barrage constituted a direct mode of combating a particular activity of the enemy, and called for no invocation of the theory of retaliation as a prop to support it in the face of neutral opposition.

Hyde 1945. This analysis supports the wisdom of the United States in not invoking retaliation although Prof. Hyde concedes that the mine barrage arose from the "illegal conduct of the enemy." Apparently, if a belligerent does not invoke retaliation, legal justification may be made without it.

Kenworthy & Young, *Freedom of the Seas* 97 (undated, circa 1928) after stating that the U.S. Navy laid 57,000 moored mines while the British laid 13,000, continue:

> And by rigidly restricting neutral merchant shipping to certain well-defined and narrow channels they made the control of the sea-routes to Germany absolute.
>
> From that time forward, no neutral merchant ship, even if she escaped bunker control, black lists, export restrictions and search in harbours could, without an Allied permit, hope to reach a port in a rationed neutral country. Which final denial of all neutral rights at sea was another contribution of America.

Factual description appears in the U.S. Office of Naval Records and Library, *The Northern Mine Barrage and Other Mining Activities* (1920).

of the German measures upon the United States and other neutrals cannot deprive these measures of their status as legitimate reprisals.

(2) *Appraisal as Claim of Right*

Although upheld as a legitimate reprisal, it is necessary to appraise the lawfulness of the submarine operations area apart from reprisal. Some commentators have concluded that such areas are unlawful. For example, Professor Garner has stated flatly:

> As for the German war zone decree of January 1917, it was so flagrantly contrary to the laws of maritime warfare that nothing can be said in defense of it.[63]

Professor Tucker has stated similar views:

> Even if completely effective in preventing all neutral traffic with an enemy, and this possibility can no longer be excluded, the methods that have characterized war zone operations would not warrant serious consideration in this respect, for the degree of effective danger that is to attend the attempt to break blockade must be a lawful danger. There is no basis for the belief that the requirement of effectiveness, demanded of lawful blockades, can be met simply by using any means in order to render dangerous the passage of neutral vessels through areas of the high seas declared to be blockaded.[64]

In making such an appraisal, it is sometimes pointed out that new weapons and methods of warfare (apparently meaning the submarine and its use) do not bring about new rules of international law.[65] It is clear

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[63] 1 Garner 354.

[64] Tucker 298 (footnotes omitted).

Prof. Stone concludes that war zones on the high seas are lawful as between belligerents. Stone 572. He does not reach a conclusion as to their lawfulness against neutrals. *Id.* at 574.

Prof. Lauterpacht concludes that war zones are lawful as between belligerents providing that the submarines used "comply with the laws of maritime warfare." Oppenheim-Lauterpacht 682. In his view, the use of war zones as to neutrals "can only be justified as a reprisal." *Id.* at 683–84.

Prof. Hyde states:

> If, however, the belligerent can prove that its interference [through operational areas] with the neutral is inconsequential in comparison with the advantage to itself necessarily connected with the defense of its territory, the safety of which is otherwise jeopardized, the excuse is entitled to respectful consideration.

3 Hyde 1949.

Prof. Keith reached a tentative wartime conclusion in 1944:

> What is clear is that the change in the nature of naval weapons and methods of warfare may compel revision of the issue of freedom of neutral navigation by sea; as custom has recognized the right of blockade and of visit, search and capture for carriage of contraband or the performance of unneutral service, so it may authorize use of the conception of war zones.

2 Keith (ed.), *Wheaton's International Law* 346 (7th Eng. ed. 1944).

[65] Colombos 467–68; Higgins, *Studies in International Law and Relations* 294 (1928).

that this is not an acceptable method of analysis unless novelty is to be treated as illegality. It is also difficult to accept such an analysis in view of the consistent historical record of acceptance of new methods and instruments of war which are militarily efficient.[66]

Professor Lauterpacht, after conceding that the long-distance surface enforced blockade "could not be squared with the technical requirements of the law of blockade as generally accepted," [67] has stated its juridical basis:

> [M]easures regularly and uniformly repeated in successive wars in the form of reprisals and aiming at the economic isolation of the opposing belligerent must be regarded as a development of the latent principle of the law of blockade, namely, that the belligerent who possesses the effective command of the sea is entitled to deprive his opponent of the use thereof for the purpose either of navigation by his own vessels or of conveying on neutral vessels such goods as are destined to or originate from him.[68]

It appears to be no more rational to determine the validity of measures enforced by submarines according to the criteria applicable to surface warships than to apply the exact criteria applicable to nineteenth-century blockades to the modern "long-distance" ones with literally no variations or considerations of "latent principle" permitted to accommodate technological changes.

Following the successful conclusion of the First World War by the Allied powers, it was argued on the stated grounds of humanity that practically all of the principal methods of the victors, including the long-distance blockade, were illegal.[69] The argument emphasized the differences between these methods and those employed during the previous century. It was not emphasized, of course, that the nineteenth-century methods themselves were an outgrowth and development of earlier methods. No attempt was made to explain how or why the development and adaptation of the law of naval warfare were irrevocably frozen in their nineteenth-century formulations. This type of argument, even assuming its acceptance after the

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[66] This historical record is examined in Royse 1–21 and *passim*.

[67] Oppenheim-Lauterpacht 796.

[68] *Id.* at 796–97.

[69] Trimble, "Violations of Maritime Law by the Allied Powers during the World War," 24 *A.J.I.L.* 79 (1930).

> It [the long-distance blockade] violated the three fundamentals of a blockade, as was pointed out by the American Secretary of State, because it was not maintained at close range; it stopped vessels going to neutral ports; and it left the German ports of the Baltic open to the Scandinavian countries, while they were closed to other Powers.

Id. at 93 (footnote omitted.) These conclusions are supported by Baty, "Prize Law and Modern Conditions," 25 *A.J.I.L.* 625 (1931).

war, had no impact on the decision-making process during the war. If the argument had been accepted at that time, it seems most improbable that it would have affected decision-makers by compelling a reversion to the naval methods of the previous century since those earlier methods were no longer feasible from a technological standpoint.[70] The net effect of reversion to the nineteenth-century methods would have been foregoing the effective use of surface naval power, not to mention losing the war. Because of this the almost certain outcome would have been that the newer methods would have been continued under the onus of illegality. The consequences would have been the enhancement of the attitude that international law is inadequate to regulate modern war and an abandonment of all restraints upon naval warfare. Such a decision, or any functionally equivalent one to conduct war outside of law, would hardly promote humanitarian objectives. Considering these factors, Professor Lauterpacht's appraisal of the long-distance blockade is preferable. In addition, a method of legal appraisal which proclaims illegality after the war but which has no impact on decision-makers during the war leaves something to be desired.[71] This difficulty persists, of course, whether such an inadequate appraisal is made concerning surface or submarine methods of warfare.

If Germany had claimed to establish the submarine area as a matter of legal right it could have advanced a number of specific arguments. British economic warfare against Germany, enforced by surface naval power, was an adaptation of the traditional principles of the law of war to the changed circumstances of the First World War. In particular, the long-distance blockade was a development of the traditional principles and could not be regarded as lawful unless technological change were accepted as fact and unless consequent doctrinal adaptation and extension were accepted as an integral part of the law.[72]

Employing precisely the same criteria, Germany could claim that its submarine warfare was also an adaptation and extension of the traditional principles. This claim, in substance, is analogous to Professor Lauterpacht's appraisal of the long-distance surface blockade quoted above. The summary way to reject it is to argue that the reasoning is inapplicable to submarines. Mr. Colombos has stated:

[T]he attempt to change existing principles to the advantage of the

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[70] See the text accompanying notes 23–27 *supra*.

[71] It is obvious that the humanitarian objectives of the laws of war must be implemented during the actual war or hostilities.

[72] The lawfulness of the long-range blockade is upheld by Colombos 693–94; Oppenheim-Lauterpacht 796–97; Garner, "Violations of Maritime Law by the Allied Powers During the World War," 25 *A.J.I.L.* 26, 42–48 (1931) (emphasizing geographical factors).

> party which lacks command of the surface of the sea is an attempt to avoid the consequences of naval weakness.[73]

In view of the military efficiency manifested by submarines in two World Wars, one may doubt the accuracy of the label of "naval weakness." The quoted writer has been equally explicit in summarizing modern economic warfare enforced by surface vessels: "The economic weapon was thus effectively used to throttle the enemy's commerce." [74] In the same context of surface naval enforcement he states that, "The annihilation of the enemy's commerce is one of the great aims of naval warfare." [75] The contrast in such an appraisal of surface and submarine naval warfare could lead an observer to suspect a bias against the latter without regard to the relative destruction of values actually involved in its use.

It may be that operational areas, at least for individual submarines, could be juridically upheld even by the same standards applicable to surface warships. Dr. Royse, after examining the failure of the Hague Conventions to restrict the efficient use of surface naval gunfire, states:

> The warship, in a legal sense, thus became a floating battlefield carrying with it the same immunity from restrictions as attended land operations in the actual combat zone. The exclusive military sphere characterizing land operations, in which the principle of utility or effectiveness dominated, became similarly operative in any zone occupied by a belligerent naval vessel. This sphere may be said to have followed the warship through all waters in all its war operations. Whatever restrictions obtained were concerned, as in land operations, with wanton destruction and terrorization. Effective artillery operations were left unrestricted.[76]

It is not necessary, of course, to rely on this interesting analysis alone because of the other considerations which indicate the juridical validity of submarine operational areas.

It is sometimes stated that the vulnerability and other characteristics of submarines do not reduce the obligation to comply with the traditional doctrinal requirements.[77] It must be recalled that even the British, with predominant surface naval power, were not able to comply with the traditional procedures of visit and search at sea.[78] It could be persuasively maintained, in consequence, that these technologically obsolete procedures were no more applicable to submarine warships. Before resorting to "unrestricted" submarine warfare in 1917, the argument would stress, Germany

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[73] Colombos 470.

[74] *Id.* at 707.

[75] *Id.* at 509–10.

[76] Royse 164 (footnote omitted).

[77] Colombos 469–70; 1 Garner 377–80.

[78] The technique of diversion of merchant ships was adopted because of the impracticability of visit and search at sea. See the text accompanying note 22 *supra.*

actually attempted visit and search by submarines and this was proven unworkable in the light of the new technology in general and the methods of warfare employed by British merchant ships in particular.[79]

The relative destructiveness of particular methods of stopping commerce with the enemy belligerent should be more important criteria to determine lawfulness than compliance with obsolete procedures.[80] The intermediate sanctioning devices employed for the long-distance blockade consisted of the navicert system, diversion of ships to ports for adequate searches, compliance with bunker controls, and similar methods.[81] The ultimate sanction applied to merchant vessels which failed to acquiesce in the intermediate sanctions and persisted in attempting to run the blockade was gunfire from surface naval vessels.[82] It is well established even under the traditional law that a merchant vessel which refuses to stop when ordered to do so may be attacked by a belligerent warship.[83] The refusal by a merchant ship to comply with the warning involved in a proclaimed submarine operational area, in view of the changes in naval technology, may be said to be tantamount to persistent refusal to stop when ordered to do so by a surface warship. In this context, there is no reason why torpedo attack without further warning than that involved in a specified and notified operational area should be regarded as more destructive of neutral human and material values than gunfire from surface warships.

The German submarine operational area is also reasonable in other respects. The notice concerning the area issued to neutral states enchanced the military effectiveness of the area in interdicting commerical intercourse between the United Kingdom and the neutrals.[84] At the same time the notice was designated to minimize destruction of neutral values by encouraging or coercing the neutrals to keep their merchant ships out of the operational area. The central importance of the economic objective in

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[79] See the text accompanying notes 51, 56, and 57 *supra*.

[80] See McDougal & Feliciano 494.

[81] These sanctions were highly effective. 1 & 2 Medlicott *passim*.

[82] This was the ultimate sanction even though the traditional texts only list capture as a sanction for breach of blockade. See, e.g., Oppenheim-Lauterpacht 788–89. The same text reveals no hesitancy in allowing an attack on a merchant ship if the attack is in response to a refusal to submit to visit. See *infra* note 83.

[83] "Enemy merchantmen may be attacked only if they refuse to submit to visit after having been duly signalled to do so." Oppenheim-Lauterpacht 466–67 (footnotes omitted).

[84] Compare the comprehensive character of commerce interdiction sanctioned by surface naval power:

> It is now not only a case of blockade, it is a case of shutting down German commerce the world over, so far as we are able to do it.

De Montmorency, "The Black List," 3 *Grotius Trans.* 23, 34 (1917).

general war to both surface and submarine naval powers also supports the conclusion of the reasonableness of the submarine area.[85]

Appraisal of the German submarine operations area as a claim of right should also be made in terms of its impact upon neutrals. Although termed "neutrals," it must be recalled that some neutrals, and particularly the United States, were engaged in the large and profitable trade of supplying war material to Germany's principal enemies but not to Germany.[86] In view of the general character of the war situation and of the crucial importance of economic warfare, the belligerent interest in maintenance of the operational area must be deemed to outweigh by far the neutral interest in trade with one group of belligerents. The neutral interest thus overcome, it should be emphasized, is not the mere maintenance of the former peacetime trade but rather the development of a greatly expanded wartime trade.[87]

For these further reasons, the German submarine operational area of the First World War must be upheld as a lawful claim of right. In summary, the outcome of the decision-making process in the First World War was the development of expectations of uniformity and rightness of the kind usually described as customary law. This customary law upholds as reasonable and lawful both the long-distance surface blockade and the submarine operational area. It should be added that the interwar period produced no international agreement specifically designed to outlaw submarine operational areas.

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[85] "It would appear that recourse to this practice [submarine operational areas], because of fundamental belligerent rights, cannot be opposed." Mori, *The Submarine in War: A Study of Relevant Rules and Problems* 172 (1931).

[86] From June 30, 1914, to June 30, 1917, the United States shipped $506,674,000 worth of gunpowder and $665,237,000 in other explosives.

Buehrig 89 (footnotes omitted). The quoted figures do not include firearms, cartridges, and various metals. Prof. Buehrig states that as to all of these (except copper—277% increase):

> [T]he increase over the three-year period 1911–13 was so extreme as to indicate that before the war the countries in question imported these commodities from the United States in only negligible quantities.

Ibid.

[87] If the neutrals had in reality been content to continue their normal peacetime trade, many of the conflicts with the belligerents would not have taken place and the law of neutrality might have been shaped quite differently.

Jessup, 4 *Neutrality: Its History, Economics and Law* (vol. 4 is additionally entitled *Today and Tomorrow*) 23 (1936).

> They have sought to grasp the momentary inflated profits of the war boom, unwilling to hold themselves down to a normal economic life even in so far as normality is possible under such circumstances. Their compaints, their quarrels with the belligerents and their frequently resulting involvement in the war, have resulted from their insistence upon entering the economic conflict.

Id. at 34.

b. THE SECOND WORLD WAR

On November 24, 1939 the German Government made its first submarine area claim of the new war in a note to several of the maritime neutral states.[88] The note was not sent to the United States which barred its citizens, ships, and aircraft from a combat zone which included a large area off the European west coast.[89] The note pointed out the existence of the United States combat zone as well as the alleged use of enemy merchant ships for aggressive purposes and stated that these matters caused the German Government:

> to warn anew and more strongly that in view of the fact that the actions are carried on with all the technical means of modern warfare, and in view of the fact that these actions are increasing in the waters around the British Isles and near the French coast, these waters can no longer be considered safe for neutral shipping.[90]

Admiral Donitz's counsel, Flottenrichter Kranzbuhler, described the operational area and its effect to the International Military Tribunal as follows:

> The note then recommends as shipping lanes between neutral powers certain sea routes which are not endangered by German naval warfare and, furthermore, recommends legislative measures according to the example set by the United States. In concluding, the Reich Government rejects responsibility for any consequences which might follow if warning and recommendation should not be complied with. This note constituted the announcement of an operational area equivalent in size to the U.S.A. combat zone, with the specified limitation that only in those sea zones which were actually endangered by actions against the enemy consideration could no longer be given to neutral shipping.[91]

On August 17, 1940, following its victory over France and the low countries, Germany made another operational area claim in a note to neutrals not including the United States.[92] It was described by Kranzbuhler as "a declaration in which the entire area of the U.S.A. combat zone around England without any limitation was designated as an operational area." [93] It provided in part:

> The German Government assumes no responsibility for damage

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[88] 18 *I.M.T.* 327.

[89] Authority for the combat zone was provided in the Neutrality Act of 1939, 54 Stat. 4, 7 (1939). A chart depicting the United States zone is in 1 Medlicott 334. The combat zone was a municipal measure applicable only to United States citizens, vessels and aircraft.

[90] 18 *I.M.T.* 328.

[91] *Ibid.*

[92] *Id.* at 328–29.

[93] *Ibid.*

to ships or injury to persons which may befall them in this area.[94]

As the result of the developments which the war has taken during the last weeks England has been brought into the center of the war activities at sea and in the air. In the sea area surrounding the British Isles constant war action is consequently from now on to be expected which makes it impossible for merchant ships to pass through this sea area without running serious risks. The entire sea area around the British Isles has therefore become a combat zone. Every vessel which passes through this area is exposed to destruction not only by mines but also by other weapons. The German Government therefore most urgently renews its warning to neutral shipping against passing through the danger zone . . . .

Apparently this later German claim did not provide for safe shipping routes between neutral states as the earlier one did.

Appraisal

It should be noted that the earlier claim of November 24, 1939 does not, in substance, go beyond that in the German "unrestricted" submarine zone of February 1, 1917.[95] The factual conditions of the naval war situation during the Second World War were basically similar to those of the First World War and included another Allied long-distance blockade. The importance of the economic objective in general war was not reduced.[96] The same legal analysis employed in appraisal of the German claim of February 1, 1917 also justifies the conclusion of the lawfulness of the present claim. The International Military Tribunal at Nuremberg, however, reached a decision which is in significant part inconsistent with this conclusion.[97]

Assuming that the claim of August 17, 1940 did not provide for safe routes between neutrals for genuine interneutral trade and that it was practicable to do this, it is concluded that the claim is not justified in law in this respect. The issue as to whether or not it is consistent with law to prevent neutral trade with the opposing belligerent by the use of a submarine operational area has been considered in connection with the

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[94] 6 Hackworth 485–86; it is also quoted less fully and with slight variations in wording in 18 *I.M.T.* 329.

"War zone" declarations enforced by either surface or submarine naval power are collected in *U.S. Naval War College, International Law Documents 1943* 51–67 (1945) and *U.S. Naval War College, International Law Documents 1940* 44–52 (1942). What is apparently a German propaganda version of the claim quoted in the text appears in *id.* at 46–50.

[95] See the text at note 46 *supra.*

[96] See generally 1 & 2 Medlicott.

[97] *I.M.T.* 311–13.

claim of February 1, 1917.[98] It will be considered further with the other issues raised before the International Military Tribunal.[99]

Admiral Donitz was indicted before the International Military Tribunal for, *inter alia,* "waging unrestricted submarine warfare contrary to the Naval Protocol of 1936." [100] In support of this claim, the prosecution contended:

> Nor need we take time to examine the astonishing proposition that the sinking of neutral shipping was legalized by the process of making a paper order excluding such neutral ships not from some definite war zone over which Germany exercised control but from vast areas of the seas. For there is one matter at least about which nobody questions or puts questions to the law.[101]

This statement reflects adequately the prosecution's view of operational areas. In its opinion such areas could only be lawfully claimed by a belligerent exercising effective "control." Since Germany did not meet this requirement, in spite of highly effective and almost decisive submarine enforcement of the area, one is led to conclude that only a surface naval power could exercise "control" in this restricted sense. In substance the prosecution submitted that the German claim, because based upon submarine control and enforcement, was only a "paper order" [102] and the claim of its legality as to neutrals an "astonishing proposition."

It was argued in behalf of Admiral Donitz that consideration was extended to neutrals in the conduct of submarine warfare as long as it was possible.[103] Article 74 of the German Prize Law of 1939 incorporated the substance of the Protocol of 1936.[104] Flottenrichter Kranzbuhler emphasized that this Ordinance was carried out by German submarines for the first few weeks of the war until the enemy made it impossible. In his words:

Why was this practice not kept up? Because the conduct of the enemy

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[98] See the text accompanying notes 86, 87 *supra.*

[99] See the text accompanying notes 121–27 *infra.*

[100] 1 *I.M.T.* 311.

The "Naval [or Submarine] Protocol of 1936" is the same as the Proces-Verbal of 1936 and both, in substance, are the same as art. 22 of the London Naval Treaty of 1930. See note 114 *infra* for full citation.

[101] Stated by Sir Hartley Shawcross. 19 *I.M.T.* 469.

[102] The "paper order" or "paper blockade" terminology was used historically to refer to a traditional blockade supported by insufficient naval power to meet the requirement of effectiveness. See Hall, *The Law of Naval Warfare* 198–99 (2nd rev. ed. 1921).

[103] 18 *I.M.T.* 314, 326–27.

[104] The German Prize Law Code of Aug. 28, 1939 art. 74 is quoted in 7 Hackworth 248.

made such a procedure militarily impossible, and at the same time created the legal prerequisites for its modification.[105]

The claim of reprisal could, of course, be invoked again as it was in the earlier general war. Because of British and American departures from the strict interpretation of the traditional law [106] the German submarine operational area may again be justified as a legitimate reprisal. It could be argued in favor of such an approach that reprisals have actually been used as a legislative device to bring the law up to date with modern technological realities.[107] Because of the facility of successfully invoking reprisals, however, a more fundamental appraisal should be made. In addition, it is simply not credible that the militarily efficient use of modern naval power, whether surface, submarine, or air, is entirely dependent upon the commission of illegalities by the opposing belligerent.[108]

At the time of the proclamation of the German submarine operational area of August 17, 1940 the following facts confronted the German naval command according to Kranzbuhler:

> (1) A legal trade between the neutrals and the British Isles no longer existed. On the grounds of the German answers to the British stipulations concerning contraband goods and the British export blockade, any trade to and from England was contraband trade and therefore illegal from the point of view of international law.
>
> (2) The neutrals in practice submitted to all British measures, even when these measures were contrary to their own interests and their own conception of legality.
>
> (3) Thus, the neutrals directly supported British warfare, for by submitting to the British control system in their own country they permitted the British Navy to economize considerably on fighting forces which, according to the hitherto existing international law, should have exercised trade control at sea and which were now available for other war tasks.[109]

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[105] 18 *I.M.T.* 314.

[106] The British Admiralty assumed effective control over British merchant shipping on Aug. 26, 1939 just before the start of World War II. Roskill 35. By March 1941, the Admiralty had overcome the initial shortage and fitted 3,434 merchant ships with antisubmarine guns. *Id.* at 47.

[107] See McDougal & Feliciano 675.

[108] See the remarkable account of the background of the British Reprisals Order in Council of Nov. 27, 1939 in 1 Medlicott 112–14. One may receive the impression that the British urgent need for effective economic warfare was so great that if reprisal were not available another ground would have been invoked. In addition, the careful long-range planning of economic warfare between the World Wars indicated unequivocally that it was to be considerably more than an occasional reprisal response to enemy illegality. 1 Medlicott 12–24.

[109] 18 *I.M.T.* 335.

Because of these facts, in Kranzbuhler's view, there was no reason for the German Government to give preference to the neutrals over German military needs "in determining its operational area with a view to preventing illegal traffic from reaching England." [110] He also pointed out that the neutral ships traveling to England, in spite of German warnings, underwent a great risk for the purpose of earning a high profit.[111]

The judgment of the Tribunal, after stating that it "is not prepared to hold Donitz guilty for his conduct of submarine warfare against British armed merchant ships," [112] continued:

> However, the proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the war of 1914–1918 by Germany and adopted in retaliation by Great Britain. The Washington Conference of 1922, the London Naval Agreement of 1930, and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the First World War. Yet the Protocol made no exception for operational zones. The order of Donitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.[113]

The "Protocol of 1936" is, in substance, the same as article 22 of the London Naval Treaty of 1930 and provides:

> (1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.
>
> (2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.[114]

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[110] *Ibid.*

[111] *Ibid.*

[112] 1 *I.M.T.* 312.

[113] *Id.* at 312–13.

[114] The "Protocol of 1936" or the "Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930" contains the identical rules set forth in the London Naval Treaty Part IV (art. 22) and quoted in the text. Art. 23 of the London Naval Treaty provided, "Part IV shall remain in force without limit of time" (the rest of the Treaty expired on Dec. 31, 1936). In the Proces-Verbal the parties to the London Naval Treaty invited

The second paragraph of the Protocol states two exceptions to the rules: "persistent refusal to stop on being duly summoned" and "active resistance to visit or search." The Tribunal's conclusion that "the Protocol made no exception for operational zones" necessarily involves the interpretation that the stated exceptions precluded the existence of others, and that the stated ones did not cover the situation of a submarine operational area being the functional equivalent of the stated exceptions. The Tribunal's conclusion appears to be an example of mechanical interpretation or literalism.[115] There is no indication that the Tribunal gave careful consideration to the alternative interpretation that the Protocol was inapplicable in operational areas since there was no international agreement on this subject. Such an interpretation was advanced by Kranzbuhler [116] and it is at the very least as plausible as the interpretation selected by the Tribunal. It is more plausible if the operational area is evaluated as too important to be dealt with by implication.

The ambiguities of the Protocol suggest that its rational interpretation, that is ascertaining the probable intended meaning of the parties based on all relevant evidence,[117] is more difficult than the Tribunal seemed to appreciate. Among the ambiguities are the term "merchant ships" in the first paragraph and the term "a merchant vessel" in the second paragraph.[118] The Tribunal interpreted these terms as excluding "British armed merchant ships." [119] It recognized that the British Admiralty convoyed merchant ships and directed them to send position reports upon sighting submarines, "thus integrating merchant vessels into the warning

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other states to agree to Part IV (art. 22). Forty-nine states adhere to it including France, Germany, Italy, Japan, Soviet Union, United Kingdom, and United States. Dept of State, *Treaties in Force* 292 (1966).

The London Naval Treaty Part IV (art. 22) is in 46 Stat. 2858, 2881–82 (1931); 2 Hackworth 691; 6 Hackworth 466.

The Proces-Verbal or Protocol of 1936 is in 31 *A.J.I.L. Supp. Official Docs.* 137–39 (1937); 7 Hackworth 248.

[115] The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some preexisting specific intention of the parties with respect to every situation arising under a treaty.
Harvard Research, *Treaties* 946.

[116] 18 *I.M.T.* 330.

[117] The Harvard Research, *Treaties* 937 (art. 19(a)) employs interpretation in the light of the general purpose to be served by the treaty. The Harvard Research is quoted in relevant part in the text of Ch. IV, section B. The same approach to interpretation appears in American Law Institute, *Restatement of the Foreign Relations Law of the United States* section 147 (1965).

[118] Compare Prof. Morison who describes the Treaty as "perfectly explicit" in 1 *History of the United States Naval Operations in World War II: The Battle of the Atlantic* 8 (1947).

[119] 1 *I.M.T.* 312.

network of naval intelligence." [120] The references to merchant ships in the Protocol could, with consistency, have been interpreted as not applicable to any vessel including neutrals so integrated into the British warning network.

The Tribunal, however, found Admiral Donitz guilty of a violation of the Protocol in the sinking of "neutral merchant vessels" which entered the submarine operational areas.[121] The term "neutral merchant vessels" is more precise than the language concerning merchant vessels in the Protocol but it is not self-defining. The broad term "neutral merchant vesssels" comprises at least two distinct categories. The first covers those which are engaged in genuine interneutral trade and do not contribute to the economic war resources of the belligerents. The second consists of those neutral vessels which, through acquiescence or coercion, participate in the navicert system and the other modalities of the surface long-distance blockade.[122] Although the ambiguous term "neutral" covers both categories, it is obvious that the functional economic differences between them are much greater than any similarities. The category of neutral vessels possessing British navicerts,[123] ship navicerts,[124] or ship warrants,[125] actively cooperated in British economic warfare measures. The real issue before the Tribunal, in view of the fundamental importance of naval economic warfare in general war, was whether this second category of "neutrals" were so functionally a part of British and Allied economic warfare that they could lawfully be accorded the same treatment as that accorded to belligerent merchant ships. The Tribunal's invocation of the ambiguity "neutral merchant vessels" enabled it to avoid making the difficult analysis of this fundamental issue.

Professor Medlicott has now provided the kind of factual material which is relevant to resolving the issue:

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[120] *Ibid.*

[121] 1 *I.M.T.* 313.

[122] Under questioning by the chief British prosecutor, Admiral Donitz used a land warfare analogy in connection with such neutral vessels: "For instance, no consideration would be shown on land either to a neutral truck convoy bringing ammunition or supplies to the enemy." 13 *I.M.T.* 365.

[123] A navicert was a "commercial passport" issued by the British Government "in respect of any consignment which did not appear liable to seizure as contraband." 1 Medlicott 94. See generally 7 Hackworth 212–17; Ritchie, *The "Navicert" System During the World War* (1938).

[124] A ship navicert was issued when the entire cargo was covered by navicerts and was "intended to minimize further the formalities of visit and search." 1 Medlicott 96–97.

[125] The ship warrant was a document issued to each neutral ship whose owner had given satisfactory undertakings to do what the British Government required. The shipowner undertook to comply with economic-warfare regulations. . . . 1 Medlicott 442–43.

> It must always be remembered that the ship-warrant system was of importance not only for economic-warfare purposes, but also for the securing of tonnage and for the furthering of other sides of Allied shipping policy.[126]

In view of the functional naval economic warfare equivalence of these "neutral merchant vessels" with British merchant vessels, it is reasonable and lawful to accord them the same treatment in submarine operational areas which the Tribunal approved in the situation of British merchant ships. This resolution of the issue is formulated in somewhat narrower terms than a conclusion of Professor Lauterpacht concerning the same general subject matter:

> [T]he experience of the two World Wars has shown that that substantial aspect of the traditional law of neutrality which centres around the neutral rights of commerce and intercourse generally has become obsolete to a large extent. In modern war in which the military and economic aspects of the national effort are inextricably interwoven, the concessions which the belligerent is in the position to make to neutral commerce are very narrowly circumscribed.[127]

There is at least one other factor which should have led the Tribunal to accept Kranzbuhler's interpretation of the Protocol. Deference to well-known principles of criminal law due process would have required the Tribunal to resolve the ambiguities of the Protocol in Admiral Donitz' favor since it was applied to him as a criminal statute.[128]

Since the Tribunal provided no reasoned basis, other than its improbable interpretation of the Protocol, for its conclusion that the sinking of "neutral" merchant ships in the submarine enforced operational area was illegal, a further inquiry should be made for possible reasons. In looking outside the judgment itself, there is a significant colloquy between Lord Justice Lawrence, the President, and Admiral Donitz' counsel.

THE PRESIDENT: One minute. Dr. Kranzbuhler, does not the right

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[126] 1 Medlicott 443.

> It is not surprising that the view of the German Supreme Prize Tribunal was that:
> [T]he introduction of ships' warrants is a measure of economic warfare, with the express purpose of getting to the greatest extent under British control those ships which were not yet in British hands.

The Ole Wegger, [1943–45] *Annual Digest* 532, 535 (No. 193).

[127] Oppenheim-Lauterpacht 642. The passage quoted continues by stating that it is difficult "to visualize the nature of the principle" involved.

[128] [A criminal] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

to declare a certain zone as an operational zone depend upon the power to enforce it?

FLOTTENRICHTER KRANZBUHLER: I do not quite follow the point of your question.

THE PRESIDENT: Well, your contention is, apparently, that any state at war has a right to declare such an operational zone as it thinks right and in accordance with its interest, and what I was asking you was whether the right to declare an operational zone, if there is such a right, does not depend upon the ability or power of the state declaring the zone to enforce that zone, to prevent any ships coming into it without being either captured or shot.

FLOTTENRICHTER KRANZBUHLER: I do not believe, Mr. President, that there exists agreement of expert opinion regarding that question. In contrast to the blockade zone in a classical sense where full effect is necessary, the operational zone only provides for practical endangering through continuous combat actions. This practical threat was present in the German operational zone in my opinion, and I refer in that connection to the proclamation of President Roosevelt regarding the U.S.A. combat zone, where the entering of that zone was prohibited, because as a result of combat actions shipping must of necessity be continuously endangered.[129]

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THE PRESIDENT: Do you mean, then, that you are basing the power of the state to declare a certain zone as an operational zone not upon the power of the state to enforce its orders in that zone, but upon the possibility of danger in that zone?

FLOTTENRICHTER KRANZBUHLER: Yes

THE PRESIDENT: You say it depends upon the possibility of danger in the zone?

FLOTTENRICHTER KRANZBUHLER: I would not say the possibility of danger, Mr. President, but the probability of danger, and the impossibility for the belligerent to protect neutral shipping against this danger.[130]

The President's view, as strongly suggested in his questions, is that the power to legally establish an operational area is based upon the ability "to enforce that zone." The questions directed to Kranzbuhler indicate that the questioner did not believe that Germany had such power of enforcement, or "control," as the prosecution put it. The questions, therefore, appear to indicate full judicial agreement with the prosecution claim

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[129] 18 *I.M.T.* 332–33.

[130] *Id.* at 333.

that the legal requirements of enforcement or control could not be met by "a paper order" and submarine enforcement.[131] Unfortunately, Kranzbuhler did not respond to the express statements in the questions and demonstrate their juridical inadequacy. Whether the quoted questions actually reveal the reasoning which was persuasive to the Tribunal or not, it is clear that the decision of the Tribunal is at least consistent with this reasoning.

c. CLAIMS TO ESTABLISH RESCUE ZONES OF IMMUNITY

Two of the Geneva Conventions of 1949 provide for the *ad hoc* creation of hospital zones and localities of immunity in land warfare.[132] These humanitarian provisions are designed to protect the wounded and the sick as well as civilian persons from some of the effects of war. There appears to be no sufficient reason why analogous zones for rescue purposes should not be established on the high seas in time of war.

As a matter of fact, a German U-boat captain and Admiral Donitz did attempt to establish such a rescue zone during the Second World War. Captain Roskill, the historian of the British Navy, has described the facts as follows:

> In September, 1942, a group of [four] U-boats and a 'milch cow' (as the Germans called their supply submarines) arrived south of the equator, and there on the 12th U.156 sank the homeward-bound troopship *Laconia,* which had 1,800 Italian prisoners on board. On learning from survivors what he had done Hartenstein, the U-boat's captain, sent a series of messages *en clair* calling for help in the rescue work and promising immunity to ships sent to the scene, provided that he himself was not attacked.[133]

Captain Roskill has also stated that: "Donitz ordered other [U-]boats to go to the rescue, and the Vichy Government was asked to send help from Dakar." [134] The U-boats initiated and took the principal role in the rescue operations including towing lifeboats toward the African coast, and Vichy French warships joined in the rescue work. During the four days involved in the rescue work the submarines were, of course, diverted from their normal wartime operations. The British Navy ordered two ships to proceed to the scene and assist. Roskill's account continues:

> All went well until the next afternoon [Sept. 16] when an American Army aircraft from the newly established base on Ascension Island

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[131] See the text at *supra* note 101.

[132] Convention Concerning Wounded and Sick in the Field, art. 23; Convention Concerning Civilian Persons, art. 14.

[133] Roskill 224.

[134] 2 Roskill, *The War at Sea 1939–1945: The Period of Balance* 210–11 (1956).

arrived, flew around the surfaced U-boats for about an hour, and then attacked U.156 with bombs. It is as impossible to justify that act as it is difficult to explain why it was committed.[135]

The Historical Division of the U.S. Air Force has stated concerning this incident:

A summary of operations from Ascension Island states that on the morning of 16 September 1942 a B-24 of the US Army Air Forces sighted a submarine at 5 degrees South, 11 degrees 40 minutes West. The sub, which was towing two life boats and was in the process of picking up two more, was displaying a white flag with a red cross. The sub did not show a national flag when challenged by the B-24. The plane left the scene and contacted Ascension. Since no friendly subs were known to be in the area, the plane was instructed to attack.[136]

In making an appraisal in 1960, Captain Roskill has written:

To-day two things seem clear. The first is that throughout the days following the torpedoing of the troopship, Hartenstein and the other U-boat captains involved behaved with marked humanity towards the survivors, doing their utmost to rescue friends and foes alike; and the second is that, on the Allied side, whoever sent the order to the aircraft to bomb the U-boat committed a serious blunder.[137]

It should be stated that the order to bomb the submarine was worse than "a serious blunder." In addition, the aircraft commander who carried out the order must have known the actual facts after flying "around the surfaced U-boats for about an hour," and been aware that the order was not based on an accurate understanding of the situation.

Following the bombing incident, Admiral Donitz issued orders to the submarines to stop the rescue attempt.[138] Had it not been for the bombing, the attempt to establish the rescue zone of immunity in an area large enough to effectuate the rescue probably would have been successful. As it was, many of the personnel of the *Laconia,* including Italian prisoners of war and British passengers, were rescued because of the actions of

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[135] Roskill 224–25.

[136] Excerpt of letter from Historical Division, U.S.A.F. to Mr. David D. Lewis (Apr. 12, 1960). The excerpted letter appears as an enclosure to letter from Director, Research Studies Institute, Air University, Maxwell Air Force Base, Ala., to President, Naval War College, Newport R. I. (Apr. 19, 1961). The excerpted letter is quoted more extensively in Lewis, *The Fight for the Sea: The Past, Present, and Future of Submarine Warfare in the Atlantic* (1961) at 179 and at 180, first full sentence (without indication it is a continuation of quotation from prior page).

[137] Roskill 225.

[138] 13 *I.M.T.* 285–87. On Sept. 17, 1942 Donitz issued the "Laconia Order." 18 *I.M.T.* 348. It is appraised substantively in Ch. IV, section B.

Hartenstein and Donitz.[139] There can be no doubt but that the rescue attempt was consistent with the highest humanitarian traditions even though there is no indication that the International Military Tribunal gave credit for it. Since a preeminent objective of the laws of war is to prevent unnecessary loss of life, rescue zones of immunity on the high seas should be honored and implemented by belligerent and neutral states alike in future naval wars.

2. United Kingdom Claims

During the Second World War the United Kingdom usually enjoyed surface naval predominance over Germany. Apparently Germany enjoyed such surface naval predominance in the Skagerrak and Kattegat at the time of the invasion of Norway. Beginning on April 9, 1940 the British Government removed the restrictions on its submarines concerning attacks upon merchant ships east of eight degrees East.[140] On May 8, 1940 the British First Lord of the Admiralty announced in the House of Commons:

> Therefore we limited our operations in the Skagerrak to the submarines. In order to make this work as effective as possible, the usual restrictions which we have imposed on the actions of our submarines were relaxed. As I told the House, all German ships by day and all ships by night were to be sunk as opportunity served.[141]

Appraisal

It was highly unlikely that any neutral ships were sailing in the Skagerrak (Jutland) and Kattegat area at the time the British relaxed their "usual restrictions" on submarine operations. Consequently, the issues concerning neutral merchant vessels in the submarine area do not appear to exist as a practical matter. Nevertheless, the phrase "all German ships by day" indicates that the British undertook to discriminate between German ships and others, presumably neutrals, in the area in the daylight hours. The category "all German ships" presents no legal issues as to German warships, including naval auxiliaries, since they may be sunk lawfully without warning whether in or out of an operational area. It is most probable that the German merchant ships in the category were either armed or otherwise participating in the German naval war effort. The sinking of such ships without warning would be upheld as lawful even according to the decision of the International Military Tribunal in the case of Admiral Donitz.[142]

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[139] In addition to the Roskill books cited *supra* see Peillard, *The Laconia Affair* (Coburn transl. 1963).

[140] Gilbert, "British Submarine Operations in World War II," 89 *Nav. Inst. Proc.* No. 3, p. 73, 74 (1963); MacIntyre, *Narvik* 65 (Amer. ed. 1960).

[141] 13 *I.M.T.* 453–54.

[142] 1 *I.M.T.* 312.

In spite of the high improbability of neutral ships in the British submarine operational area, the phrase "all ships by night" includes the claim to sink neutral ships in the Skagerrak and Kattegat during the hours of darkness. Based on its decision in the case of Admiral Donitz, the Tribunal would deem this claim directed at neutrals to be unlawful.[143] It should be appraised as lawful where the neutral ships were participating in German economic warfare. The reasons for this conclusion have been stated in the criticism of the decision concerning neutral ships participating in the opposing belligerent's economic warfare in the case of Admiral Donitz.[144] In summary, the same legal appraisal which upheld the lawfulness of the German submarine operational areas in both World Wars provides an ample juridical basis for upholding the British claim in the Skagerrak and Kattegat.

3. United States Claims

On December 7, 1941 the United States Chief of Naval Operations sent a secret message to the Commander in Chief, U.S. Pacific Fleet which stated:

> EXECUTE AGAINST JAPAN UNRESTRICTED AIR AND SUBMARINE WARFARE.[145]

The message made no specification of the extent of the operational area in which "unrestricted" warfare was to take place but it is probable, in view of the command held by the addressee and the actual practice, that it was the Pacific Ocean areas. This interpretation is supported by answers given by Admiral Nimitz on May 11, 1946 to interrogatories put to him on behalf of Admiral Donitz at the request of the International Military Tribunal at Nuremberg:

> 2. **Q.** Did the U.S.A. in her sea warfare against Japan announce certain waters to be areas of operation, blockade, danger, restriction, warning or the like?

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[143] *Id.* at 313.

[144] See the text at notes 121–27 *supra*.

To criticize particular parts of the judgment of the International Military Tribunal at Nuremberg is not, of course, the same as making a sweeping attack on war crimes trials in general. There is reason to believe that such trials incorporating basic standards of fairness are better than possible alternative courses of action including executing the accused without trial. For an effective answer to recommendations to execute accused personnel without trial see Jackson, "The United Nations Organization and War Crimes Trials," 46 *A.S.I.L. Proc.* 196, 199–200 (1952).

[145] The text of the message is taken from a photographic copy of the original. The message was declassified on Dec. 2, 1960. It was also sent to other military addresses in the Pacific and further stated: "CINCAF INFORM BRITISH AND DUTCH. INFORM ARMY."

Since the message was secret it could not have notified neutrals of the submarine operational area.

A. Yes. For the purpose of command of operations against Japan the Pacific Ocean areas were declared a theater of operations.

3. **Q.** If yes, was it customary in such areas for submarines to attack merchantmen without warning with the exception of her own and those of her Allies?

A. Yes, with the exception of hospital ships and other vessels under 'safe conduct' voyages for humanitarian purposes.

4. **Q.** Were you under orders to do so?

A. The Chief of Naval Operations on 7 December 1941 ordered unrestricted submarine warfare against Japan.[146]

Appraisal

One of the most obvious aspects of "the Pacific Ocean areas" is their great geographical extent. Considering the factual characteristics of the Pacific war, the area of the Pacific Ocean is not an unreasonable extent for the United States submarine operational area.[147] It is therefore not persuasive to argue that the United States operational area is illegal because of its size.

In its judgment in the case of Admiral Donitz the International Military Tribunal dealt with United Kingdom and United States submarine operational areas in the following paragraph:

> In view of all of the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war, the sentence of Donitz is not assessed on the ground of his breaches of the international law of submarine warfare.[148]

In substance this is a holding that Admiral Donitz, although guilty of violating the Protocol as to "neutral" vessels in operational areas, will not be punished in this respect because of what the Tribunal supposed to be similar submarine operational area warfare conducted by the United Kingdom and the United States.[149]

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[146] 40 *I.M.T.* 108, 109 (Document Donitz—100); the same interrogation is read into the record of the proceedings in 17 *I.M.T.* 378–81.

[147] It is easier, a fortiori, to uphold the reasonableness of the geographic extent of the smaller German operational areas.

[148] 1 *I.M.T.* 313.

[149] The same conclusion is reached in Robertson, "Submarine Warfare," *JAG J.* 3, 8 (Nov. 1956). Compare Smith 212–13:

> The only inference which can be drawn from the passages quoted is that a war crime ceases to be punishable if the defense can prove that similar action was taken on the victorious side.

For a characterization of the Donitz judgment as "confused" see Johnson, Book

As demonstrated above in appraisal of the German Second World War claims, those claims, and the warfare conducted under them, extended to the sinking of neutral merchant ships as well as enemy ones. It has also been pointed out that British submarine warfare in the Skagerrak and Kattegat did not extend to neutrals as a practical matter. In the same way, the Pacific Ocean areas were not frequented by neutral shipping after December 7, 1941. If there was a limited commerce conducted by neutral Soviet Union vessels during the Pacific war, both Japan [150] and the United States, the principal naval belligerents, were interested in avoiding attacks upon such vessels.[151] In any event, it is clear that the United States "unrestricted submarine warfare" in the Pacific was conducted without neutral involvement.[152] Consequently, United States submarine operational area warfare in the Pacific does not raise issues concerning its legality as applied to either genuine interneutral trade or to neutral vessels participating in the enemy economic warfare.

Since no legal issue is presented by the application of the United States submarine operational area to Japanese warships, it will be appraised as applied to Japanese merchant ships. The Japanese merchant ships, like the British, were armed, reported submarine sightings, and attempted to ram or otherwise attack submarines.[153] In short, such merchant ships were functionally incorporated into the Japanese naval forces. Consequently, there can be no doubt but that these merchant ships were the lawful objects of "unrestricted submarine warfare," that is, attack without warn-

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Review, 27 *Brit. Y.B.I.L.* 508 (1950).

For the view that art. 22 of the London Naval Treaty (1930) is obsolete see Kerr, "International Law and the Future of Submarine Warfare," 81 *Nav. Inst. Proc.* 1105 (1955).

[150] Japanese submarine operational areas are not referred to in the judgment of the International Military Tribunal for the Far East. There is a reference to the alleged legality of attacking "unarmed enemy merchant ships" between Hawaii and the U.S. west coast in the proceedings. *F.E.I.M.T. Proc.* 27,296 (twenty seven thousand two hundred ninety-six). Japanese submarine warfare is considered in Ch. IV of the present study.

[151] Possibly the small numbers of such vessels and the limited area traversed by them on voyages in the North Pacific made this tactically feasible.

[152] A secret explanatory message of Dec. 22, 1941 from the U.S. Chief of Naval Operations to the U.S. Special Naval Observer, London made no express claim concerning neutrals. It stated:

> UNRESTRICTED AIR AND SUBMARINE WARFARE AGAINST JAPAN MEANS THAT SUBMARINES AND AIR MAY ATTACK ANY OBJECTIVE WHATSOEVER THAT IS JAPANESE OR IS CONTROLLED BY JAPAN OR IS OPERATING FOR THE DIRECT BENEFIT BENEFIT (*sic*) OF JAPAN.

Text from photographic copy of original which was declassified March 29, 1961.

[153] Admiral Nimitz so stated in response to questions #9 and #11. 40 *I.M.T.* 109–10.

ing within the operational area enforced by submarines.[154] These are the principal reasons for the conclusion of the legality of the United States submarine operational area in the Pacific.

The submarine operational area may also be appraised in terms of reprisal. The message of December 7, 1941 contains no express indication that the unrestricted submarine warfare was to be justified as reprisal action. That Admiral Nimitz thought reprisal was the basis appears in his answers to other questions of the Nuremberg interrogatories:

17. **Q.** Has any order of the U.S. Naval authorities mentioned in the above questionnaire concerning the tactics of U.S. submarines toward Japanese merchantmen been based on the grounds of reprisal? If yes, what orders?

A. The unrestricted submarine and air warfare ordered on 7 December 1941 resulted from the recognition of Japanese tactics revealed on that date. No further orders to U.S. submarines concerning tactics toward Japanese mechantmen throughout the war were based on reprisal, although specific instances of Japanese submarines committing atrocities toward U.S. merchant marine survivors became known and would have justified such a course.

19. **Q.** On the basis of what Japanese tactics was the reprisal considered justified?

A. The unrestricted submarine and air warfare ordered by the Chief of Naval Operations on 7 December 1941 was justified by the Japanese attacks on that date on U.S. bases, and on both armed and unarmed ships and nationals, without warning or declaration of war.[155]

It is well known that the German claim to establish submarine operational areas in the First World War was based upon the argument of legitimate reprisal as response to allegedly unlawful British naval warfare. That claim has been upheld as valid in the present study.[156] By the same reasoning, it is clear that the present claim to a submarine operational area could also be upheld as a legitimate reprisal in response to Japanese violations of the traditional law. Aside from Admiral Nimitz' answers

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[154] See the U.S. Navy Dept. Press Release of Feb. 2, 1946 entitled, "United States Submarine Contributions to Victory in the Pacific," pp. 13A–14, quoted in part in Tucker 66, n. 47. The press release assumed incorrectly that the sinking of Japanese merchant ships in the operational area was a violation of the London Naval Treaty, art. 22.

If particular Japanese merchant ships, for example some deep-sea fishing boats, were not participating in the naval war, such boats could not be sunk lawfully without warning.

[155] 40 *I.M.T.* 111.

[156] See the text accompanying notes 49–62 *supra.*

quoted above, there is no indication that reprisal has been used to justify the United States operational area.

4. Submarine Operational Areas in Future General War

The present analysis postulates a nonnuclear general war or, in the alternative, a general war with only limited use of nuclear weapons for tactical purposes.[157] It is assumed that a central objective of the political elites of states with the capability of conducting an all-out war of thermonuclear devastation is to avoid such a war.[158] In the type of general war postulated, a war similar to the World Wars, it is realistic to expect claims to establish submarine operational areas because some major states do not have the capacity to conduct independent naval operations on the high seas except through the extensive use of submarines.[159]

In projecting the future course of legal decision concerning submarine operational areas in general war it is necessary to accord some significance to the past course of decision. The course of decision in both World Wars, although frequently justified as reprisals, is actually a development of the customary law. This development has resulted in the adaptation of the law to permit the effective use of submarine operational areas as well as to permit the effective use of surface naval power. It would be highly unrealistic to conclude that the entire practice of naval warfare, both submarine and surface, in the two World Wars is comprised of merely temporary variations from the traditional law conditioned upon the existence of illegality in the conduct of war by the opposing belligerent.[160] The importance of the economic objective in general war indicates that this objective has been and will be energetically pursued in the future through submarine as well as surface naval power. The wartime perspective is reflected in Prime Minister Asquith's statement to the House of Commons on March 1, 1915:

> We are not going to allow our efforts . . . to be strangled in a network of juridical niceties. . . . Under existing conditions there is no form of economic pressure to which we do not consider ourselves entitled to resort.[161]

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[157] Such use of nuclear weapons is considered in Brodie, *Escalation and the Nuclear Option* (1966).

[158] See generally Kissinger, *Nuclear Weapons and Foreign Policy* (1957).

[159] "Only [Soviet] submarine operations would be significant in the great oceans." Garthoff 215.

[160] As to the surface enforced long-distance blockade, its indispensability is indicated in Prof. Medlicott's "assessment and perspective." 2 Medlicott 630–61. As to the submarine operational area, it has been indispensable to the United States as well as to other states. At the beginning of the Pacific war it was used before other offensive methods of naval warfare were available to the United States.

[161] Quoted in Seymour, *American Diplomacy During the World War* 28 (1934)

It has been stated that the inadequacy of the International Military Tribunal's opinion in the case of Admiral Donitz is due in part to its apparent assumption that the claim to an operational area could only be upheld through the existence of sufficient surface naval power to exercise effective control. Consistent with this opinion, Mr. Colombos has, in substance, characterized submarine naval power as "naval weakness." [162]

The actual success of submarines in enforcing operational areas in the World Wars does not support the charge of "naval weakness." Submarine naval power is, of course, different from surface naval power in many respects. Nevertheless, the high degree of effective control manifested in submarine operational areas should not be rendered juridically inadequate by simply testing it in terms of the method of control exercised by surface naval power. Even if it should be concluded that submarines during the World Wars did not achieve sufficient control, it is clear that contemporary nuclear-powered and nuclear-armed submarines could achieve a much greater degree of control in the operational area.

The concept of "freedom of the seas" has not outlawed submarine operational areas in past general wars. The best-known formulation of this concept appears in the second of President Wilson's fourteen points:

> Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.[163]

It is not surprising that the British made a reservation to this point.[164] In attempting to reassure them and obtain their agreement, at least in principle, President Wilson explained:

> Blockade is one of the many things which will require immediate redefinition in view of the many new circumstances of warfare developed by this war. There is no danger of its being abolished.[165]

The outcome of President Wilson's attempt to obtain international support for the freedom of the seas[166] was that it was not included in the Treaty of Versailles. The available evidence seems to indicate that con-

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(footnote omitted). President Seymour regarded Asquith's statement as going far "towards an admission of illegality." *Id.* at 40.

[162] Colombos 470. The sentence from which the quoted words are taken appears in full in the text accompanying *supra* note 73.

[163] [1918] *Foreign Rel. U.S. Supp. 1* vol. 1, 15 (1933).

[164] *Id.* at 421–23.

[165] *Id.* at 428.

[166] See the account of the attempt in Seymour, *op. cit. supra* note 161 at 381–89. See also 2 Savage, *Policy of the United States Toward Maritime Commerce in War* 158–60 (Dept. of State, 1936).

ceptions of the freedom of the seas will not outlaw submarine operational areas in future general wars.[167]

To the extent that general war including naval economic warfare is a future possibility,[168] claims to establish operational areas controlled and enforced by nuclear-powered submarines may be expected. The claims may be manifested in the actual conduct of operational area warfare, as was done by the United States in the Second World War, rather than in words.[169] It does not seem a realistic way of promoting human values, particularly in the light of the two World Wars, to contend that this use of an efficient military technique is unlawful. It is clear that such contentions have had little impact on the actual process of decision thus far. In addition, it is of central importance that the destruction of human and material values involved in the use of such operational areas is not disproportionate to their military efficiency. Consequently, it appears that the continued legality of this method of warfare is assured in general war. Another general war based on the pattern of the two World Wars does not, however, appear to be the most probable future type of war.[170]

C. CLAIMS TO ESTABLISH SUBMARINE OPERATIONAL AREAS IN LIMITED WAR SITUATIONS

Limited wars with major powers as the participants and those with minor powers as the participants were referred to in Chapter I. The legality of submarine operational areas in each limited war category should be appraised.

1. Claims by Major Powers in Limited War

It is clear that the coercive methods which are employed to achieve the objectives of limited war must be limited. Assuming that the belligerents comprise major powers wih great military capabilities, each must limit the extensity of the area it uses for coercive purposes. If this

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[167] The doctrinal scope and content of "freedom of the seas" is indicated in 4 Whiteman 501–633; 2 Hackworth 653–710.

The limitations involved in the Grotian conception of the freedom of the seas are considered in Reppy, "The Grotian Doctrine of the Freedom of the Seas Reappraised," 19 *Fordham L. Rev.* 243, 275–78 (1950).

[168] The indications are that the Soviet Union is not projecting a quick nuclear war in which economic warfare would count for little. See Garthoff *passim.*

[169] The United States conduct of submarine operational area warfare constituted the claim since the order to conduct such warfare was secret. See the text accompanying note 145 *supra.*

[170] See the projection of the U.S. Chief of Naval Operations quoted in the text of Ch. I accompanying note 115.

is not done, the result may be an extension of the area of war beyond that consistent with the limited objectives of the war.[171]

The submarine operational area has been employed historically as a method of general war. The absence of claims to establish such areas should be taken as one indication that the war is to be limited in this respect.[172] It will be recalled that in general war situations, neutral interests in maintaining commerce with a belligerent were deemed to be of lesser importance than the belligerent interest in employing the submarine operational area. In limited war, the opposite result can be maintained more plausibly. It would be surprising indeed if the objectives of the belligerents, limited by definition, were accorded precedence over the interests of neutrals in maintaining commerce.

The experience in the Korean War supports this analysis. That war manifested neither submarine operational areas nor other modern methods of general war such as the long-distance surface blockade.[173] The United States, in fact, maintained a traditional close-in naval blockade.[174]

In summary, submarine operational areas will most probably not be employed in limited wars between major powers because of the basic inconsistency between submarine operational areas as employed in the two World Wars and the objectives of limited war, rather than because of an interpretation of the Submarine Protocol of 1936.[175] If such areas should be employed at all they would be employed in a much more restricted manner than in the World Wars. This conclusion is also supported by the primacy of neutral commercial interests over belligerent interests in the context of limited war.

2. Claims by Minor Powers in Limited War

Some wars are limited in the sense that the belligerents are only capable of limited military efforts. In this type of war it may be predicted with some confidence that the interests of neutrals will be protected through their power and influence as opposed to that of the belligerents. The Nyon Agreement provides an illustration of this.[176] Anything except restricted submarine operational areas will probably be denied to the belligerents of they cause substantial inconvenience, much less danger, to the neutral states. It is unlikely that a minor belligerent would be permitted

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[171] Osgood 243–48 stresses the importance of "geographical limitation."

[172] Osgood 240 refers to "the general requirement of the formulation and communication of limited objectives. . . ."

[173] See Cagle & Manson *passim*.

[174] *Id.* at 281–84.

[175] The International Military Tribunal's interpretation is considered and criticized in the text accompanying notes 112–28 *supra*.

[176] See the Nyon Agreement (1937) considered in the text of Ch. II accompanying notes 124–32.

to disrupt world trade by the employment of submarine operational areas of the kind associated with general war. If minor belligerents should make claims to establish such areas, stressing their military efficiency and necessity, the claims may well be outweighed by the claims of neutrals against their use.[177] In addition, a minor belligerent would probably not have sufficient submarine naval power to maintain a submarine operational area effectively.

3. Claims to Establish Restricted "Operational Areas"

A careful legal appraisal should avoid automatically ruling out the drastically restricted use of naval power either in limited war or in coercive situations short of limited war.[178] Whether it is termed "limited naval blockade," "quarantine-interdiction," some kind of "operational area," or given another label, one should be slow to condemn as illegal such limited measures especially when they are used to maintain world public order.[179] This is particularly true where the principal alternatives may be the use of much more coercion including weapons of mass destruction. Whether or not submarines are employed in such uses of naval power including restricted "operational areas" would appear to make but little difference in a legal appraisal.

In describing the use of coercion in the United States quarantine-interdiction of Soviet Union missiles to Cuba in 1962, the present writer has stated:

> [T]he formulation and implementation of the naval quarantine-interdiction amounted to the least possible use of the military instrument. Any lesser use would have amounted to abandonment of the military instrument and exclusive reliance upon non-coercive procedures which most certainly would have been ineffective without supporting military power.[180]

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[177] Seymour, *op. cit. supra* note 161 at 29 stresses the importance of the neutral role even in general war.

[178] See Powers, "Blockade: For Winning Without Killing," 84 *Nav. Inst. Proc.* No. 8, p. 61 (1958).

Naval power or enforcement should not, of course, be used without reason. For an unpersuasive recommendation of the establishment of submarine defense identification zones (by supposed analogy to the U.S. Air Defense Identification Zones) which apparently gives inadequate consideration to possible retaliation, see Sweitzer, "Sovereignty and the SLBM," 92 *Nav. Inst. Proc.* No. 9, p. 32 (1966).

[179] The United Nations Charter art. 2(4) prohibits "the threat or use of force against the territorial integrity or political independence of any state. . . ." Art. 51 recognizes the existence of "the inherent right of individual or collective self-defense." Together they constitute a minimum public order system in the sense of outlawing coercion for aggressive purposes while legalizing it for defensive purposes.

[180] Mallison, "Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law," 31 *Geo. Wash. L. Rev.* 355, 393 (1962) (footnotes omitted).

This is an example of the kind of coercion which should not be condemned without consideration of the alternatives in the factual situation including the effects of other coercive methods as well as the effects of the abandonment of all coercion.[181]

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[181] Some apparently would not agree with the textual statement. See e.g. Wright, "The Cuban Quarantine," 57 *A.J.I.L.* 546 (1963). Prof. Wright's legal analysis appears to be based upon the factual conclusion that the missiles involved only a commercial transaction in time of peace.

> It is difficult to find that the Soviet Union violated any obligation of international law in shipping missiles to, and installing them in, Cuba, at the request of the Castro government. Under general international law, states are free to engage in trade in any articles whatever in time of peace.

Id. at 548–49 (footnote omitted).

CHAPTER IV

CLAIMS CONCERNING LAWFUL OBJECTS AND METHODS OF BELLIGERENT ATTACK

The claims and counterclaims which are appraised in the present chapter include those concerning the highly coercive or violent combat interactions between belligerents. The most general claim is to attack certain objects through the employment of particular methods or techniques of attack. The countering claim is that particular objects are legally immune and that particular methods are unlawful.

The basic legal principles of military necessity and humanity provide broad guidance in distinguishing between lawful and unlawful objects of attack.[1] In general, military necessity permits the selection as targets of those objects which constitute the bases of the enemy belligerent's military power. The humanity principle, in comparable generalization, prohibits the selection of objects which are not effective bases of enemy military power. Combatants who become disabled or helpless, for example, should no longer be made objects of attack. In the same way, these principles are used to determine the particular coercive methods which may be employed lawfully against the enemy. The entire population of the enemy belligerent state constitutes an indispensable base of its power. It is usual, however, to divide the population between combatant members of the armed forces and civilian noncombatants. It is obvious that each of these categories has a different relationship to the enemy military power. Combatants may be made direct objects of attack consistent with the law and highly destructive methods may be employed lawfully against them. Noncombatants may not be attacked directly and it is not lawful to employ highly destructive methods against them. Professor Lauterpacht has stated the central point:

> It is clear that admission of a right to resort to the creation of terror among the civilian population as being a legitimate object *per se* would inevitably mean the actual and formal end of the law of warfare. For that reason, so long as the assumption is allowed to subsist that there is a law of war, the prohibition of the weapon of

[1] The basic principles are considered in the text of Ch. I accompanying notes 75–83.

terror not incidental to lawful operations must be regarded as an absolute rule of law.[2]

The conceptual distinction between combatants and noncombatants is clear enough. A real difficulty, however, is caused by the blurring in fact of the line between combatant and noncombatant which has taken place in the present century.[3] The result is that in some coercive situations combatants and noncombatants are not distinguishable.[4]

In addition to protecting noncombatants, a major objective of this branch of international law is to regulate the processes of coercion and violence in such a way as to permit and assist the transition from coercive to peaceful procedures. The detailed rules prescribing the limits on violence involve two basic assumptions.[5] One is that widespread, wanton, and unnecessary destruction of values tends permanently to embitter relations between enemies so that the return to a constructive peace is either very difficult or impossible. The other is that a peace of extermination, such as that imposed by Rome upon Carthage, is not a legally permisssible objective. If it were lawful, all other limitations would become meaningless.

In both World Wars, difficult legal issues were presented by the combat interactions between merchant ships and submarines. The present chapter emphasizes such combat interactions involving claims concerning objects and methods of attack. Claims concerning bombardment as a method of warfare, including strategic nuclear bombardment, may be considered more conveniently in Chapter V.

A. THE TRADITIONAL LAW CONCERNING OBJECTS AND METHODS OF ATTACK IN NAVAL WARFARE

Chief Justice Marshall commented in 1815: "In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed. . . ." [6] In the era when privateering and piracy were widespread, it was the general practice to arm nonbelligerent merchant ships as well.[7] Although the merchant vessel's armament was designed for self-defense, this armament enabled it to present a danger to any vessel whether privateer, pirate or warship. In this factual context, warships were not under obligation to give unusual

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[2] "The Problem of the Revision of the Law of War," 29 *Brit. Y.B.I.L.* 360, 369 (1952).

[3] See Oppenheim-Lauterpacht 207–08.

[4] The difficulties in identifying and protecting noncombatants in contemporary war are analyzed in Nurick, "The Distinction Between Combatant and Noncombatant in the Law of War," 39 *A.J.I.L.* 680 (1945).

[5] See the similar formulation of basic assumptions in McDougal and Feliciano 43.

[6] The *Nereide,* 9 Cranch 388, 426 (U.S. 1815).

[7] Hyde 1990.

consideration to merchant ships which were themselves capable of initiating attack.

After the abandonment of privateering and the suppression of piracy, it became exceptional for a merchant ship to be armed.[8] During the second half of the nineteenth century warships were greatly improved in both offensive armament and in defensive armor plating.[9] These and other technical advances made the surface warship highly specialized for military purposes and a very different ship from the merchantman. As a result, merchant ships, even if armed, posed only a minor danger to such warships. This military weakness of the merchant ship in relation to the overwhelming military power of the surface warship afforded ample reason to establish the principle that the merchantman and its personnel were entitled to special protection and, in particular, could not be lawfully attacked without warning.

The custom developed in time of war whereby a belligerent warship, rather than attacking a merchant ship without warning, called upon it to surrender or to submit to the procedure of visit and search.[10] The warship was legally justified in attacking only if the merchantman failed to stop, attempted to escape, or otherwise resisted. In view of the military superiority of the warship it was probably not entitled to use more force to compel the submission of the merchant ship than was reasonably required in the circumstances.

1. Methods: Visit, Search, and Capture

In the context just described, the capture of merchant ships rather than their destruction became the regular method employed by warships.[11] In the same way, the precedures of visit and search were employed regularly to enable boarding officers to determine the existence of probable grounds for capture.[12]

The following description of the procedures of visit, search, and capture was prepared by the Harvard Research in International Law. Although published in 1939, it reflects more accurately the principal procedural steps as developed in earlier times:

> (1) In order to exercise the right of visit and search, a warship signals the vessel as by radio or by firing a blank charge. If such notice does not suffice, the warship may fire a projectile across the bows of the vessel. Before this or simultaneously, the warship shall hoist its flag, above which at night a light shall be placed. The

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[8] *Ibid.*

[9] Potter & Nimitz 237–43.

[10] See McDougal & Feliciano 589.

[11] Smith 126–28.

[12] Hyde 1958–59.

vessel shall reply to the signal by hoisting its flag and by stopping at once. Thereupon the warship sends to the vessel a boat manned by an officer and by unarmed men of whom not more than two shall accompany the officer on board the vessel. The boarding party may examine the ship's papers and may interrogate persons on board. It may inspect the cargo but the cargo may not be broken open or removed. Postal correspondence may not be opened or removed.

(2) If the vessel when summoned does not stop, attempts to escape, or resists visit and search, it may be compelled to stop by force and the belligerent shall not be responsible for resulting injury to life or property.

(3) If the visit and search gives rise to a reasonable suspicion that the vessel or its cargo is subject to condemnation or preemption, the vessel may be captured and brought or sent into port for prize proceedings.[13]

Paragraph (1) indicates the somewhat ceremonial character of visit and search. The requirement that the men in the boat be unarmed reflects the historical situation in which the warship possessed great military superiority over the merchant ship being visited. The requirement that each vessel hoist "its" flag was designed to outlaw the use of false flags as a ruse. Although the Harvard Research refers to radio, this means of communication did not exist during most of the time that visit and search was a viable naval procedure. At that time information was obtained by visit and search which could not be obtained or communicated in other ways.

It should be noticed that even under the traditional law, as indicated by paragraph (2) above, the warship is entitled to use force where the merchant vesssel offers resistance. In extreme cases, this included sinking the merchant vessel where the resistance could not be overcome otherwise.

The rights of visit, search, and capture belonged only to the duly commissioned warships of belligerent states.[14] They were directed at merchant ships, whether belligerent or neutral, and could be exercised anywhere on the high seas or in belligerent territorial waters but not in neutral territorial waters.[15] The central purpose was to ascertain the relevant facts concerning the merchant ship including its enemy or neutral status and the origin, destination, and character of the vessel and its cargo.[16] It at least a prima facie case for capture was made out as a result of the visit and search, the warship then had legal authority to make the capture

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[13] Harvard Research, *Naval War* 535–36. See the description of the traditional procedure in Tucker 336–38.

[14] Stone 591; Oppenheim-Lauterpacht 848–49, 861–63.

[15] Oppenheim-Lauterpacht 849.

[16] *Id.* at 848; Tucker 332.

even though the prize court might later release the merchant ship in the light of further evidence subsequently developed in the case.[17] The right of visit and search was ancillary to the right of capture rather than being independent.[18] Thus, if there was reliable evidence, extrinsic to the merchant vessel itself, indicating its liability to capture, it could be lawfully captured without visit and search.[19]

2. Objects: Enemy Ships and Goods

Under the traditional law as in the modern law, warships are subject to capture or destruction. It is, of course, lawful to attack warships without warning. Where an enemy public vessel is captured its title is immediately transferred to the captor state and prize proceedings are not necessary.[20]

There is a basic distinction in international law between the treatment of enemy property on land and the treatment of enemy property at sea. The law of land warfare makes a fundamental distinction between public and private property. The general rule is that private property on land is immune from capture by the enemy,[21] with some exceptions based upon urgent military necessity. The law of naval warfare does not provide immunity for enemy private property (ships and cargoes) at sea. The reason for this differential treatment is not difficult to ascertain. In land warfare, the military occupation of enemy territory prevents the enemy belligerent state from exercising control over the property and using it for war purposes.[22] In these circumstances no substantial military interest is frustrated by leaving private property with its private owner. In naval warfare, however, it is necessary to obtain control of enemy private property through capture or destruction in order to prevent its possible use in behalf of the enemy's war effort. Even where the enemy state does not control the transactions of its private traders, it is recognized that the net result of the transactions is to strengthen the enemy war effort. Enemy private property, consequently, has always been a lawful object of appropriation or destruction in naval warfare except for certain immunities.[23]

The traditional law required that enemy private ships which were captured must be brought to port and subjected to prize proceedings to determine on the evidence before the Court whether they were actually enemy

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[17] Hyde 2024.

[18] *Id.* at 1958.

[19] *Id.* at 1958–59.

[20] Oppenheim-Lauterpacht 475.

[21] Art. 46 of the Regulations Annexed to Hague Convention IV Respecting the Laws and Customs of War on Land (1907) provides in relevant part: "Private property cannot be confiscated."

[22] See generally McDougal & Feliciano 809–24.

[23] Tucker 74–75; Oppenheim-Lauterpacht 465.

ships and so subject to capture.[24] In exceptional circumstances it was legally permissible to destroy an enemy merchant ship after capture if the personnel and ship's papers were removed to a place of safety.[25] When this was done the Prize Court must be subsequently satisfied that both the capture and the destruction were legally justified.[26] Otherwise, the capturing state was liable in damages to the enemy owner.

A belligerent was traditionally entitled to capture enemy private goods carried under a neutral flag.[27] The British adhered to this view in the face of opposition from other states which argued for the principle of "free ships, free goods." [28] France, in opposition to Great Britain and other states, claimed the right to capture neutral goods on enemy vessels.[29]

The British and the French were allied against Russia during the Crimean War. As a wartime expedient they agreed that Great Britain would not seize enemy goods on neutral vessels and that France would not appropriate neutral goods on enemy vessels.[30] Both agreed that they would not employ privateers.[31] After the termination of the war the principal maritime powers agreed to the Declaration of Paris (1856) which provided:

1. Privateering is, and remains abolished;
2. The neutral flag covers enemy's goods, with the exception of contraband of war;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;
4. Blockades, in order to be binding, must be effective: that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.[32]

The Declaration of Paris did not purport to change the old rule that private enemy ships and private enemy goods on them could be captured.[33] The British had agreed to give up the right to seize enemy goods under the neutral flag in return for the French agreement to refrain from capture of neutral goods on enemy vessels. The agreement to abolish privateering was regarded as highly significant but in reality was less so since privateering was already technologically obsolescent in view of the

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[24] Oppenheim-Lauterpacht 482–86.
[25] *Id.* at 487–88.
[26] *Id.* at 488.
[27] Smith 158; Oppenheim-Lauterpacht 459.
[28] Smith 159.
[29] *Ibid.*
[30] *Id.* at 160; Oppenheim-Lauterpacht 460.
[31] Smith 160.
[32] The text of the Declaration appears in 1 Savage, *Policy of the United States Toward Maritime Commerce in War* 381, n.2 (Dept. of State, 1934).
[33] Oppenheim-Lauterpacht 462.

increasing specialization of warships. Since a principal purpose of the Declaration was to protect private property, it is probable that the enemy goods referred to in the second article did not include state-owned enemy goods.[34] The rule embodied in this article was substantially frustrated a few years later in the American Civil War by the development of the doctrine of continuous voyage.[35] This doctrine was used to look beyond the stated or nominal destination of goods to ascertain whether or not their ultimate destination was the enemy. The Declaration was abandoned by both sides in the early part of the First World War.[36]

3. Objects: Neutral Ships and Goods

The traditional law subjected neutral ships and goods to capture only where specific rights of the capturing belligerent had been violated.[37] The grounds for the capture of neutral ships included breach of blockade, resistance to visit and search, carriage of contraband, and some other types of assistance to the enemy belligerent which were characterized as "unneutral service." [38] In order to justify capture of a neutral merchant ship for breach of the traditional close-in blockade it was necessary to meet certain requirements including proper notification of the blockade to neutrals. In order to impose liability to capture for carriage of contraband, notification to neutrals of the contraband list was required. The threefold classification of free goods, conditional contraband, and absolute contraband was employed to determine the military value of the goods to the enemy.[39] "Unneutral service" included both the transportation of persons on behalf of the enemy and the transmission of intelligence to the enemy. These situations were regarded as roughly analogous to carrying contraband and resulted in subjecting the merchant vessel involved to treatment similar to that for carrying contraband.[40] Another type of unneutral service arose when the neutral merchant vessel toook a direct part in the hostilities or acted under the direct orders of an agent of the enemy government such as sailing in a convoy protected by enemy warships or transporting enemy troops. In such situations the status of the neutral merchant vessel was assimilated to that of an enemy one and it would thus be exposed to capture and condemnation in prize as if it were an enemy.[41]

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[34] See the commentary in Oppenheim-Lauterpacht 461, n. 1; Smith, "The Declaration of Paris in Modern War," 55 *L.Q. Rev.* 237, 238–42 (1939).

[35] Oppenheim-Lauterpacht 461; Savage, *op. cit. supra* note 32 at 117–18.

[36] Smith 163.

[37] Oppenheim-Lauterpacht 861.

[38] See generally Smith 127–28.

[39] The classification is considered in the text of Ch. III accompanying notes 8–11. See Oppenheim-Lauterpacht 799–808.

[40] Oppenheim-Lauterpacht 833–38.

[41] *Id.* at 839–40.

There were significant legal differences between the capture of enemy and neutral merchant vessels.[42] Enemy merchant vessels were subject to capture generally for the purpose of appropriating them and their cargo pursuant to the right of a belligerent to capture and appropriate enemy private property at sea. The capture itself was a provisional appropriation and it was subject to confirmation through the prize court proceedings. The neutral merchant vessel could be lawfully captured and condemned only where it had violated specific rights of the belligerent.

The unratified Declaration of London (1909)[43] represented an attempt to provide an international codification of the traditional law. Among other detailed provisions, it contained a list of free goods[44] which were "not susceptible of use in war" and which belligerents were prohibited from treating as either absolute or conditional contraband.[45] Mr. Arnold-Foster has commented critically upon this aspect of the Declaration:

> It put iron ore on the free list, so that all such ore would be free to pass straight through a British blockade to Krupps' munition works at Essen. Yet the foundation of modern war potential is steel: a nation's capacity to produce steel is one of the surest measures of its military strength.
>
> Rubber for motor tyres was on the free list, although, as was soon found in the war of 1914, much of the mobility of modern armies depends on motor transport. The Declaration authorized seizure of guns and shells, but not the metals for making them: explosives might be seized but not cotton or nitrates.[46]

At the beginning of the First World War the United States invited the belligerents to adhere to the Declaration.[47] Germany and Austria-Hungary agreed to do so conditioned upon Allied agreement which was not forthcoming.[48] Thereafter, the Declaration was swept away by the reprisal orders of the British and the actual economic warfare practices of the Germans.

In summary, the traditional law concerning objects and methods of attack was based upon certain factual conditions which actually existed

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[42] *Id.* at 862. See generally Colombos, *A Treatise on the Law of Prize* (3rd ed. 1949); Garner, *Prize Law During the World War* (1927).

[43] The text of the Declaration appears in 2 Savage, *Policy of the United States Toward Maritime Commerce in War* 163 (Dept. of State, 1936).

The U.S. Naval War Code (1900) was an earlier codification which was withdrawn in 1904. It was prepared by Admiral Stockton (President of the U.S. Naval War College and later President of The George Washington University). See *U.S. Naval War College, International Law Discussions 1903* 101 (1904).

[44] Art. 28.

[45] Art. 27.

[46] Arnold-Foster, *The New Freedom of the Seas* 42–43 (1942).

[47] Savage, *op. cit. supra* note 43 at 1.

[48] *Ibid.*

in the second half of the nineteenth century. The merchant vessel's immunity from attack without warning was based on its military impotence in relation to the warship. Merchant vessels were not only privately owned but were also privately controlled. Specifically, the private owner, whether in peacetime or in wartime, determined the voyage and the cargo. It is clear that these factual conditions only concerned surface vessels since submarines were not demonstrated to be effective naval units until 1914 and 1915. It is probable that the Declaration of London was obsolete in 1908 and 1909 when it was written. It was demonstrated to be obsolete beyond any reasonable doubt in the first half of the First World War.[49] During the same time, the international law of prize became increasingly obsolescent.[50]

B. CLAIMS CONCERNING OBJECTS AND METHODS OF ATTACK IN GENERAL WAR

In Chapter III some consideration was given to the objects and methods of belligerent attack which were closely related to submarine operational areas. It was there concluded that visit and search at sea was a hazardous undertaking for surface warships as well as for submarines in modern conditions of general war at sea.[51] It was also concluded that the utilization of Q-ships as an antisubmarine measure made it even more hazardous for submarines to undertake the traditional procedure of visit and search.[52] It will be recalled that Q-ships appeared to be innocent merchantmen but were in reality heavily armed warships.

1. Capture or Destruction of Enemy Warships

Only belligerent warships are legally empowered to make an attack upon warships of the enemy belligerent.[53] Since submarine warships have the same status as lawful combatant units possessed by surface warships they are similarly empowered to attack the warships of the enemy belligerent. One of the tactical functions of attack submarines is to attack enemy submarines.[54] The same basic legal doctrines apply to such naval engagements as to those between surface warships.

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[49] "From July 7, 1916, the Declaration was no longer applied, even in part." Oppenheim-Lauterpacht 634.

[50] Oppenheim-Lauterpacht 877.

> It would not therefore, it is believed, be consistent with the function of an impartial science of International Law to maintain that there exists at present a working body of generally agreed rules of prize law, in particular in its bearing upon the rights and duties of neutrals.

Id. at 877–78.

[51] See the text of Ch. III accompanying note 21.

[52] See the text of Ch. III accompanying notes 56, 57.

[53] Oppenheim-Lauterpacht 467.

[54] See Andrews, "Submarine Against Submarine," *Naval Review 1966* 42 (1965).

All enemy warships including naval auxiliaries, whether armed or unarmed, are lawful objects of attack without warning [55] and without regard to whether the attack takes place in a submarine operational area or elsewhere. Attack upon enemy warships may be made anywhere on the high seas or in the territorial waters of any belligerent state but not in neutral territorial waters.

During both World Wars warships were expensive and valuable vessels and their capture by the opposing belligerent would be militarily desirable. As a practical matter, however, there were relatively few instances of capture of warships. Among these instances, a small number of submarines were captured.[56] In spite of the desirability of capture, the naval technology during the World Wars and particularly the long-range effectiveness of both gunfire and torpedoes made the destruction of enemy warships the normal attack objective.

2. Capture or Destruction of Enemy Merchant Ships

An enemy merchant ship, as well as its cargo, represents considerable economic value. Consequently, the interests of a belligerent would be most obviously served by capturing such a ship and having it and its cargo condemned by the prize court.[57] Although this is a lawful procedure and there may still be rare occasions where it can be employed, it is clear that capture was a highly unusual situation in both World Wars.

a. WORLD WAR I

In 1913 the British Admiralty announced the arming of a number of merchant vessels.[58] The measure was stated to be a response to the danger presented by foreign powers which claimed the right to convert merchant ships into warships either in port or on the high seas. The announcement stressed that the British merchant vessels which were to be armed would retain their status as private merchantmen since they were armed for defensive purposes only. It was also emphasized that their status would be entirely different from that of the British armed merchant cruisers which would be commissioned as regular warships in the event of war. Thus, the United Kingdom at the beginning of the First World War had a number of merchant ships which were stated to be armed

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[55] Oppenheim-Lauterpacht 465–66.

[56] Submarine captures are described in Potter & Nimitz 562; Roskill 58–59; Roskill, *The Secret Capture* (1959); United Kingdom Central Office of Information, *The Battle of the Atlantic* 33 (1946).

[57] See Phillips, "Capture at Sea in Perspective," 91 *Nav. Inst. Proc.* No. 4, p. 60 (1965); Richmond, "The Value of the Right of Capture at Sea in Time of War," 9 *Brit. Y.B.I.L.* 50 (1928).

[58] The text of the announcement by Winston Churchill is in [1916] *Foreign Rel. U.S. Supp.* 187–88 (1929).

against other dangers but which, in the actual event, could use their arms against submarines.[59]

It has been stated previously that the principal objects of attack of German submarines at the beginning of the war were enemy warships and that the submarines were later redirected against enemy merchant vessels. In the early part of the war German submarines made at least some attempt to comply with the traditional procedures of visit and search. The arming of British merchant ships and the use of the arms against German submarines, along with other antisubmarine activities, did not facilitate this attempt. It soon became apparent that even a British armed merchant ship sailing alone presented a very real military danger to German submarines which attempted to comply with the traditional law. The predictable result of the new situation was that considerations of military necessity, as well as simple self-preservation, led to the submarines remaining submerged and making torpedo attacks without warning. The best-known case involving sinking without warning was the *Lusitania* which has been referred to earlier.[60] The only realistic alternative to this submarine tactic was to abandon effective use of the submarine. In this situation the British argued the inhumanity, and consequent illegality, of submarine attacks without warning on merchant vessels. While this had considerable impact as propaganda, it did not have a corresponding influence upon the actual conduct of naval warfare. After the convoying of merchant ships was adopted by the Allies during the First World War[61] it was difficult enough for a German submarine to avoid the naval escorts and make a successful attack without warning upon Allied merchant ships in a convoy. As a practical matter, it was impossible for submarines to capture convoyed ships. In both World Wars, Allied sea power drove German merchant ships from the high seas in a very short time.[62] When the capture of a German merchant ship was attempted, the practice of attempting scuttling to avoid capture was usually employed.[63]

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[59] McDougal & Feliciano 563 state that the "defensive" arming of merchant ships represents a revival of "an ancient usage that had disappeared with the abolition of privateering and the development of modern naval forces." (footnote omitted)

[60] See the text of Ch. III accompanying notes 39–42.

The sinking of the *Sussex* on March 24, 1916 was also an important case. The principal United States note on this case is in [1916] *Foreign Rel. U.S. Supp.* 232 (1929). See also Buehrig 48–55.

[61] Convoy was not adopted until mid-1917. Potter & Nimitz 466–70; 3 Fayle, *Seaborne Trade: The Period of Unrestricted Submarine Warfare* 128–47 (1924).

The role of Admiral Sims, the Commander of U.S. Naval Forces in European Waters, in obtaining adoption of the convoy is described in Morison, *Admiral Sims and the Modern American Navy* 337–63 (1942).

[62] Roskill 36.

[63] See e.g. the attempted scuttling of the German blockade runner *Odenwald* on Nov. 6, 1941 described in Karig, *Battle Report: The Atlantic War* 148 (1946).

The result of this, as stated previously, was that the Declarations of Paris and London were no longer susceptible of application in the new factual context. Professor H. A. Smith has provided apt summary concerning the Declaration of Paris, after indicating that it must be interpreted "in the light of the political and economic structure of the mid-nineteenth century":

> If we are again confronted with the facts for which the Declaration laid down the law, then that law must be applied to those facts. That is to say, if we can discover a genuine enemy private merchant carrying on his own trade in his own way for his own profit, then we must admit that his non-contraband goods carried in neutral ships are immune from capture at sea. Under the conditions of the modern socialistic world such a person is not easily to be found. In the books of the last generation he was commonly called the 'innocent merchant', and the disappearance of this phrase from the literature of our day has its own significance. To-day he has become a disciplined individual mobilised in the vast military organization of the totalitarian State. It would be a defiance both of the letter and the spirit of the Declaration of Paris to bring within its protection the mobilised forces of the enemy.[64]

In its role as the honest neutral broker between the naval belligerents the United States sought a *modus vivendi* which would be acceptable to both the United Kingdom and Germany.[65] On January 18, 1916 Secretary of State Lansing made a proposal to the British Government which was designed to "bring submarine warfare within the general rules of international law and the principles of humanity without destroying its efficiency in the destruction of commerce . . . ." [66] If the British accepted he would then press it upon the Germans. Its central part stated:

> [S]ubmarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and passengers to places of safety before sinking the vesssels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever.[67]

Among the propositions upon which the note was stated to be based were these two:

> A merchant vessel of enemy nationality should not be attacked without being ordered to stop.

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[64] Smith, "The Declaration of Paris in Modern War," 55 *L.Q. Rev.* 237, 249 (1939).

[65] See Buehrig 40–44.

[66] [1916] *Foreign Rel. U.S. Supp.* 146 (1929).

[67] *Id.* at 147–48.

An enemy merchant vessel, when ordered to do so by a belligerent submarine, should immediately stop.[68]

In concluding the note Secretary Lansing observed:

I should add that my Government is impressed with the reasonableness of the argument that a merchant vessel carrying an armament of any sort, in view of the character of submarine warfare and the defensive weakness of undersea craft, should be held to be an auxiliary cruiser and so treated by a neutral as well as by a belligerent government, and is seriously considering instructing its officials accordingly.[69]

The proposal appeared to be a compromise which would exact concessions from each side while providing some recompense. The Allies were to be required to disarm their merchant ships and to cooperate with submarines attempting to exercise visit and search. Since the traditional law permitted capture, Germany would be legally entitled to capture Allied merchantmen. In return, the merchant ships of the Allies were not to be subjected to attack without warning. Further, it was possible that the United States would treat a merchant vessel with any kind of armament as "an auxiliary cruiser," that is, a warship.

Certain practical considerations, however, made the concessions to Germany more apparent than real. German submarines could not carry prize crews to place aboard captured merchantmen. In addition, with Allied supremacy on the surface of the seas, such a captured merchantman would shortly be recaptured or sunk by Allied naval forces. Germany could not sink the merchant vessels as prizes unless the ship's boats were to be considered a place of safety.[70] It is difficult to envision any situation other than calm weather and close proximity to land where the lifeboats actually would be such a place of safety. In view of these factors, it is doubtful that Germany could have accepted the proposal even if the Allies had done so. There was, however, no disposition on the part of either the United Kingdom or France to agree to it. The United States Ambassador in London reported that the proposal was regarded there as wholly in favor of Germany[71] and that if the United States persisted in advancing it this action would be viewed as "unfriendly interference."[72] Secretary Lansing had invoked humanity in presenting the proposal, but it was not realistic to expect the belligerents to give humanity priority over considerations of military efficiency.

One result of the United States proposal was that it gave Germany an

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[68] *Id.* at 147.

[69] *Id.* at 148.

[70] Prof. G. G. Wilson has emphasized that safety refers not to the same comforts enjoyed before destruction of the vessel but to "the same absence of risk to life." "The Submarine and Place of Safety," 35 *A.J.I.L.* 496, 497 (1941).

[71] [1916] *Foreign Rel. U.S. Supp.* 151 (1929).

[72] *Id.* at 152, 153.

opportunity to reevaluate its position on armed merchant vessels. Germany had captured a set of British Admiralty confidential instructions to armed merchant ships on the British steamer *Woodfield*. These instructions, in the German view, provided conclusive evidence of the illegal methods of warfare employed by British armed merchantmen. The *Woodfield* instructions provided in part:

> If a submarine is obviously pursuing a ship by day, and it is evident to the master that she has hostile intentions, the ship pursued should open fire in self-defense, notwithstanding the submarine may not have committed a definite hostile act, such as firing a gun or torpedo.[73]

It is interesting to apply this instruction to the situation where a submarine attempts to exercise the right of visit and search. The merchant ship master may reasonably believe that the submarine has "hostile intentions," so he may open fire first. In fact, almost any approach by a submarine could be regarded as pursuit of the merchant ship under the instructions.[74]

On February 10, 1916 the United States Ambassador in Germany sent the Secretary of State a German Government memorandum on the treatment of armed merchantmen. It stated, *inter alia:*

> The German Government has no doubt that a merchantman assumes a warlike character by armament with guns, regardless of whether the guns are intended to serve for defense or attack. It considers any warlike activity of an enemy merchantman contrary to international law, although it accords consideration to the opposite view by treating the crew of such a vessel not as pirates but as belligerents.[75]

The conclusion was that:

> In the circumstances set forth above, enemy merchantmen armed with guns no longer have any right to be considered as peaceable vessels of commerce. Therefore the German naval forces will receive orders, within a short period, paying consideration to the interests of the neutrals, to treat such vessels as belligerents.[76]

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[73] *Id.* at 191, 196.

[74] Shortly after the start of the First World War the British had given the United States Government:

> the fullest assurances that British merchant vessels will never be used for purposes of attack, that they are merely peaceful traders armed only for defence, that they will never fire unless first fired upon, and that they will never under any circumstances attack any vessel.

Id. at 188.

[75] [1916] *Foreign Rel. U.S. Supp.* 163, 164 (1929).

[76] *Id.* at 165.

The German memorandum of February 10, 1916 was modified slightly in a further note of February 28, 1916 which stated in relevant part:

> The orders issued to the German naval commanders are so formulated that

The German reevaluation concerning merchant ships as the objects of submarine attack set forth in this note was based principally upon the distinction between armed and unarmed merchant ships. This placed the burden upon the submarine commander to make sure that a particular merchantman was armed before the submarine could attack without warning. As a practical matter, this probably resulted in a number of Allied armed merchant ships not being subjected to attack without warning because of uncertainty concerning their armament. Consistent with this note, Germany could still apologize for sinking the unarmed belligerent merchant ship *Lusitania* and state that it was contrary to instructions for German submarines to sink unarmed merchantmen.[77]

The United States Government issued a further statement on the status of armed merchant ships on March 25, 1916. This "memorandum," which was not labeled a reply to the German memorandum, provided, *inter alia*:

> A presumption based solely on the presence of an armament on a merchant vessel of an enemy is not a sufficient reason for a belligerent to declare it to be a warship and proceed to attack it without regard to the rights of the persons on board. Conclusive evidence of a purpose to use the armament for aggression is essential . . . . [A] belligerent warship can on the high seas test by actual experience the purpose of an armament on an enemy merchant vessel, and so determine by direct evidence the status of the vessel.[78]

This United States memorandum represented a return to pro-Allied policy in the guise of a return to the traditional law.[79] The German memorandum had accepted full responsibility for determining whether or not particular merchant ships were armed. The United States memorandum went further. Where the submarine was able to ascertain that the merchant ship was armed, this was only the beginning of the inquiry. It must then "test by actual experience the purpose of an armament on an enemy merchant vessel." In other words, the submarine was to give the armed merchant ship the opportunity to attack first. If the merchant ship attacked and the submarine was not sunk, it would then be free to treat the merchant ship as a warship and counterattack. If the merchant ship did not use its armament to attack the submarine, the submarine could presumably proceed with visit and search to determine whether the merchant ship was subject to capture. It does not require extended analysis to conclude that the United States memorandum, if actually applied,

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enemy liners may not be destroyed on account of their armament unless such armament is proved.

Id. at 181–82.

[77] The German note of May 4, 1916 concerning the *Lusitania* is quoted in part in the text of Ch. III accompanying notes 41, 42.

[78] [1916] *Foreign Rel. U.S. Supp.* 245, 246 (1929).

[79] See generally Buehrig 42–43, 86–87 and *passim*.

would have imposed a wholly unreasonable burden upon Germany and its submarine warships. In many situations the result of a submarine attempting to obtain "direct evidence" would be the sinking of the submarine. In addition, the "direct evidence" was not necessary. The assumption, implicit in the memorandum, that each British merchant ship master decided *ad hoc* as to the employment of the armament was false. The purpose of the comprehensive instructions captured on the *Woodfield* was to substitute British Government control for the discretion of the individual master or ship owner.[80]

Thereafter, as is well known, the United States went to war against Germany. The ostensible reason was alleged German violations of the law of naval warfare. President Wilson in his address to the Congress on April 2, 1916 recommending a declaration of war stated, *inter alia:*

> The new [German] policy has swept every restriction aside. Vessels of every kind, whatever their flag, their character, their cargo, their destination, their errand, have been ruthlessly sent to the bottom without warning and without thought of help or mercy for those on board, the vessels of friendly neutrals along with those of belligerents . . . .
>
> . . . I am not now thinking of the loss of property involved, immense and serious as that is, but only of the wanton and wholesale destruction of the lives of non-combatants, men, women, and children, engaged in pursuits which have always, even in the darkest periods of modern history, been deemed innocent and legitimate. Property can be paid for; the lives of peaceful and innocent people can not be. The present German submarine warfare against commerce is a warfare against mankind.[81]

One cannot help but sympathize with the "noncombatants" who through acts of more or less volition went to sea and became the victims of the naval war. In the same way one must sympathize with German civilians who, without volition, became the victims of the long-distance blockade. In explaining the basis for treating foodstuffs to Germany as contraband, the British Foreign Secretary stated in early 1915:

> The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears.[82]

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[80] In addition to the *Woodfield* instructions quoted in the text accompanying *supra* note 73, see Hurd, *The Merchant Navy* (3 vols. 1921, 1924, 1929); Salter, *Allied Shipping Control* (1921); J. R. Smith, *Influence of the Great War Upon Shipping* 153–84 (Carnegie Endowment for Int'l Peace, Preliminary Economic Studies of the War No. 9, 1919).

[81] [1917] *Foreign Rel. U.S. Supp.* No. 1, 195, 196 (1931).

[82] [1915] *Foreign Rel. U.S. Supp.* 324, 332 (1928).

As a belligerent the United States helped the United Kingdom to perfect the merchant ship as an effective combatant unit. The United States, like the United Kingdom, armed its merchant ships [83] and sailed them in convoys escorted by naval vessels. In addition, the United States exercised comprehensive government control over the voyages sailed and the cargoes carried by merchant shipping to insure that it was employed in the most efficient manner possible in behalf of the war effort.[84]

The outcome of the combat interactions between merchant ships and submarines in the First World War was that each treated the other as a lawful object of attack which could be sunk without warning. This reciprocal situation was summarized in the report of the United States Advisory Committee at the Washington Conference on the Limitation of Armament which stated:

> The merchant ship sank the submarine if it came near enough; the submarine sought and destroyed the merchant ship without even a knowledge of nationality or guilt. . . . Defensive [merchant ship] armament was almost sure to be used offensively in an attempt to strike a first blow.[85]

b. WORLD WAR II

At the beginning of the Second World War the naval belligerents on both sides took up where matters had been left in 1918. For example, they acted without any regard to the Declaration of London. The contraband lists published by the principal belligerents in September 1939 were even more comprehensive in scope than those employed in the latter part of the First World War.[86] The British Government put into effect all of

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[83] The "Regulations Governing the Conduct of American Merchant Vessels on Which Armed Guards Have Been Placed" are set forth in 2 Savage, *Policy of the United States Toward Maritime Commerce in War* 582 (1936).

[84] J. R. Smith, *op. cit. supra* note 80 at 185–216; Salter, *op. cit. supra* note 80 *passim*. See Wilson, *U.S. Naval War College, International Law Situations 1930* 44–48 (1931).

The decisions of the post-World War I United States-German Mixed Claims Commission are of little value concerning the status of United States merchant ships participating in the naval war effort. The decisions of the Commission were based upon the terms of the postwar settlement rather than upon accepted principles of international law. See Wilson, *op. cit. supra* at 48–50.

[85] *Wash. Conf.* 274. Prof. Higgins has written a very traditional defense of the legal rights and immunities of armed merchant ships which minimizes the facts quoted in the text: "Defensively Armed Merchant Ships" in Higgins, *Studies in International Law and Relations* Pt. I, 239; Pt. II, 265 (1928).

[86] The British and German contraband lists of 1939 are set forth in 7 Hackworth 24–26. The result was to change the conception of contraband from a compromise between neutral and belligerent interests to a consideration of the latter only.

The *Law of Naval Warfare* art. 631(b) (footnote omitted) states:

> The precise nature of a belligerent's contraband list may vary according to the particular circumstances of the armed conflict.

the techniques of merchant ship warfare which it had learned so slowly and painfully during the First World War as well as some new ones.[87] British merchant ships were armed [88] and were sailed in that most effective of offensive and defensive antisubmarine warfare methods: the convoy escorted by antisubmarine warships and aircraft.[89] All British merchant ships were subject to comprehensive direction and control by the British Government.[90] Captain Roskill has summarized the pattern of government control over merchant shipping:

> On 26th August 1939 there was issued in Whitehall an order which established the pattern under which the whole of the British Merchant Navy was to work for the next six years. It stated that the Cabinet Committee responsible for 'Defence Preparedness' had, in consultation with the Foreign Office and the Board of Trade, authorised the Admiralty 'to adopt compulsory control of movements of merchant shipping. . . .' Parallel with this assumption of operational control by the Admiralty, other government directives transferred the responsibility for the loading and unloading of all merchant ships from their owners to the Ministry of Shipping.[91]

It is significant that the strategic control of British merchant ships, like that of warships, was vested directly in the Admiralty.[92] British instructions concerning the tactical employment of armed merchant ships, which had been prepared before the war, were put into effect. One portion of the *Defense of Merchant Shipping Handbook* (1938) concerned "reporting the enemy" and provided that it is the merchant ship master's

> first and most important duty to report the nature and position of the enemy by wireless telegraphy. Such a report promptly made may be the means of saving not only the ship herself but many others; for it may give an opportunity for the destruction of her assailant by our warships or aircraft, an opportunity which might not recur.[93]

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[87] See generally Roskill 35–36, 117–19. Merchant ships with a catapult-mounted aircraft are described in *id.* at 118. Apparently this was a temporary measure until sufficient escort aircraft carriers were available.

[88] The arming is described in *id.* at 46–47.

[89] Captain Roskill has described the offensive tactical characteristics of convoy as a method of antisubmarine warfare in *"Capros* not Convoy: Counter-Attack and Destroy!" 82 *Nav. Inst. Proc.* 1047 (1956). CAPROS=Counter Attack Protection and Routing of Shipping.

[90] See generally United Kingdom Ministry of Information, *Merchantmen at War: The Official Story of the Merchant Navy 1939–1944* (undated; circa 1945).

[91] Roskill, *A Merchant Fleet in War: Alfred Holt & Co. 1939–1945* 19–20 (1962).

[92] This control was under the direction of "the Trade Division" which was "one of the largest organisations within the Naval Staff under its own Assistant Chief of Naval Staff." 1 Roskill, *The War at Sea 1939–1945: The Defensive* 21 (1954).

[93] 40 *I.M.T.* 88.

On the important subject, "conditions under which fire may be opened," the *Handbook* stated that if the enemy adopts a policy of sinking merchant ships without warning

> it will then be permissible to open fire on an enemy surface vessel, submarine or aircraft, even before she has attacked or demanded surrender, if to do so will tend to prevent her gaining a favourable position for attacking.[94]

Subsequent instructions stated that the enemy had adopted such a policy of sinking without warning.[95]

At the beginning of the war the German Navy used the Protocol of 1936 as the basis for the conduct of submarine warfare. The Protocol was incorporated almost verbatim into article 74 of the German Prize Code of 1939.[96] Thereafter, changes were introduced by degrees until "an order was issued on 17 October 1939 to attack all enemy merchant ships without warning." [97] Thus, quite early in the Second World War merchant ships and submarines of the opposing belligerents were attacking one another without warning. The judgment of the International Military Tribunal in the case of Admiral Donitz summarizes the steps involved in the progressive utilization of German submarines:

> Donitz insists that at all times the Navy remained within the confines of international law and of the Protocol. He testified that when the war began, the guide to submarine warfare was the German Prize Ordinance taken almost literally from the Protocol, that pursuant to the German view, he ordered submarines to attack all merchant ships in convoy, and all that refused to stop or used their radio upon sighting a submarine. When his reports indicated that British merchant ships were being used to give information by wireless, were being armed, and were attacking submarines on sight, he ordered his submarines on 17 October 1939 to attack all enemy merchant ships without warning on the ground that resistance was to be expected. Orders already had been issued on 21 September 1939 to attack all ships,

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[94] *Id.* at 89.

[95] *Id.* at 90.

[96] Art. 74 appears in 7 Hackworth 248.

[97] The words are Kranzbuhler's in his final argument to the Tribunal in behalf of Admiral Donitz. 18 *I.M.T.* 312, 323. See Captain Roskill's statement of the events summarized in the text in Roskill, *op. cit. supra* note 92 at 103, 104. A German perspective appears in Ruge, *Der Seekrieg: The German Navy's Story 1939–1945* 63, 65 (1957).

German official documents concerning the intensification of submarine warfare early in the war appear in 8 U.S. Dept. of State, *Documents on German Foreign Policy 1918–1945, Series D: The War Years, September 4, 1939-March 18, 1940* 319–20, 417–18 (1954).

Admiral Donitz' views on this subject appear in U.S. Office of Naval Intelligence, *The Conduct of the War at Sea: an Essay by Admiral Karl Doenitz* 4 (1946).

including neutrals, sailing at night without lights in the English Channel.[98]

Admiral Donitz was charged generally with "waging unrestricted submarine warfare contrary to the Naval Protocol of 1936." [99] The aspects of the case concerning submarine operational areas have been appraised previously.[100] The charges concerning objects and methods of attack related to the sinking of merchant ships and the treatment of survivors of sunken ships.

In his argument on behalf of Admiral Donitz, Flottenrichter Kranzbuhler referred to the "great struggle which took place between the U-boats on the one hand, and the armed merchant vessels equipped with guns and depth charges on the other hand, as equal military opponents." [101] He contended that:

> According to German legal opinion a ship which is equipped and utilized for battle does not come under the provisions granting protection against sinking without warning as laid down by the London Protocol for merchant ships. I wish to stress the fact that the right of the merchant ship to carry weapons and to fight is not thereby contested. The conclusion drawn from this fact is reflected in the well-known formula: "He who resorts to weapons must expect to be answered by weapons." [102]

His argument, it should be mentioned, accurately reflects the close relationship between lawful combatants and lawful objects of attack. The prosecution merely responded that it was "untenable" to regard the sinking of Allied merchant ships without warning as legally justified by the Allied merchant ship tactics.[103] The Tribunal dealt with British armed merchant ships in the following passage:

> Shortly after the outbreak of war the British Admiralty, in accordance with its *Handbook of Instructions* of 1938 to the Merchant Navy, armed its merchant vessels, in many cases convoyed them with armed escort, gave orders to send position reports upon sighting submarines, thus integrating merchant vessels into the warning network of naval intelligence. On 1 October 1939 the British Admiralty announced that British merchant ships had been ordered to ram U-boats if possible.
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> In the actual circumstances of this case, the Tribunal is not prepared

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[98] 1 *I.M.T.* 311–12.

[99] *Id.* at 311.

[100] See the text of Ch. III accompanying notes 112–31.

[101] 18 *I.M.T.* 315.

[102] *Ibid.*

[103] 19 *I.M.T.* 487.

to hold Donitz guilty for his conduct of submarine warfare against British armed merchant ships.[104]

According to its terms this holding applied to "British armed merchant ships." It is a wise holding in the light of the full participation of these merchant ships in combat.[105] Writing in 1940 Professor Borchard recalled that the historic immunity of merchant ships had been based upon their military weakness in relation to warships and stated:

> [W]hen merchant ships became speedy, powerful and armed and the vulnerable submarine appeared on the scene, the reason for immunity from unwarned attack disappeared. It is elementary that an armed belligerent merchant ship, especially when under orders to attack submarines at sight, is a fighting ship, subject to all the dangers of the belligerent character. . . .[106]

The Tribunal made no specific holding concerning British unarmed merchant ships. It is possible that the broad term "armed merchant ships" may have been used to apply to all British merchant ships actually participating in the British naval war effort, such as sailing in convoy or sending submarine position reports, without regard to whether a particular ship was armed. It is important for the purpose of accurate legal analysis to determine whether only armed merchant ships or any merchant ships participating in the naval war effort may be sunk without warning. An analysis of the Protocol is essential in this inquiry.

The Protocol has been set forth in Chapter III in connection with submarine operational areas.[107] Its first paragraph provides that in their action with regard to "merchant ships" submarines must obey the same international law rules which are applicable to surface vessels. Its second paragraph enunciates a general rule concerning methods of attack to be employed against "a merchant vessel" by both submarine and surface

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[104] 1 *I.M.T.* 312.

[105] Prof. Lauterpacht has manifested some ambivalence concerning this subject:

> In so far as the Tribunal attached decisive importance to the circumstance that merchant vessels were armed for defensive purposes or engaged in activities and received assistance of essentially defensive character, its judgment is not likely to command general assent.

Oppenheim-Lauterpacht 492.

Compare his views expressed in the text accompanying notes 228, 229 *infra*.

[106] Borchard, "Armed Merchantmen," 34 *A.J.I.L.* 107, 110 (1940).

[107] See the text of Ch. III accompanying note 114. The Protocol is set forth there except for its preamble which states: "The following are accepted as established rules of International Law." This appears to suggest that the parties merely declared in treaty form that which had been previously agreed to as customary law. The Root Resolutions embodied in the unratified Submarine Treaty (1922) stated that certain other rules were a "part of international law." See the text of Ch. II accompanying note 85. It is unlikely that these inconsistent rules could all be part of the pre-existing law.

warships. This general rule is that the warship "may not sink or render incapable of navigation" a merchant ship without first placing "passengers, crew, and ship's papers in a place of safety." It is further specified that the ship's boats may not be regarded as a place of safety unless, taking account of weather conditions, the proximity of land or the presence of a potential rescue vessel makes them safe. The general rule enunciated is subjected to these two exceptions in which, it should be noticed, the adjectives "persistent" and "active" are used: [108] (1) "persistent refusal to stop on being duly summoned"; (2) "active resistance to visit and search."

The black letter statement in the Harvard Research, *Draft Convention on the Law of Treaties* enunciates well-established criteria to be used in treaty interpretation. It provides:

> A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux preparatories,* the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.[109]

The multifactor approach set forth is designed, *inter alia,* to avoid the oversimplistic "plain meaning" approach to treaty interpretation. It should require no extended analysis here to indicate the intellectual inadequacy of the "plain meaning" device in dealing with a serious interpretative problem.[110] In the words of the late Judge Anzilotti of the International Court:

> But I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto.[111]

The most general purpose of article 22 of the London Naval Treaty of 1930 and of the Protocol of 1936, which embodies the same rules,[112] was to provide some regulation of submarine warships in view of the nonratification of Senator Root's resolutions which were set forth in the ill-

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[108] These adjectives did not usually appear in the similar formulations in the traditional law.

[109] Harvard Research, *Treaties* 937.

[110] Compare the impressionistic "plain meaning" interpretation of art. 51 of the United Nations Charter in Henkin, "Force, Intervention, and Neutrality in Contemporary International Law," 57 *Proc. A.S.I.L.* 146 (1963) with the careful analysis employing the legislative history of art. 51 in McDougal & Feliciano 232–41.

[111] Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, [1932] *P.C.I.J.,* ser. A/B, No. 50, dissenting opinion at 383.

[112] The relation between Treaty and Protocol is described in Ch. III, note 114.

fated Submarine Treaty of 1922.[113] It may be suggested, in consequence, that the regulation of submarines contemplated was not to be so stringent as to preclude ratification. The United States, the United Kingdom, Japan, France, and Italy were the parties to the London Naval Treaty of 1930. Perhaps the clearest feature of their "subsequent conduct" in "applying the provisions of the treaty" in World War II is that they did not regard its protection as being extended to merchant ships, whether armed or not, which participated in the conduct of the naval war. It is reasonable to expect that this unanimous working interpretation of all five of the parties to the Treaty would have been entitled to the greatest deference by the International Military Tribunal if it had considered specifically the status of unarmed belligerent merchant ships participating in the naval war effort. In addition, Germany, which adhered to the Protocol, employed the same interpretation during the war.

As to "the conditions prevailing at the time interpretation is being made," the Tribunal should have been aware that the Protocol had not actually precluded the effective use of the submarine against merchant ships participating in the war or hostilities either in the Atlantic or in the Pacific. There is no reason to believe that the prohibition of the effective use of submarines against such merchant ships was part of the general purpose of the Treaty and the Protocol. If it had been, it is most probable that France would not have adhered to the Treaty[114] and that Germany would not have adhered to the same provisions subsequently embodied in the Protocol.

The first paragraph of the Treaty, by requiring submarines to comply with the rules applicable to surface warships, does compel the submarine to come to the surface and lose its capability of surprise attack. From a naval tactical viewpoint such a requirement is reasonable provided only that the "merchant ship" involved is not participating in the war or hostilites. It has been stated concerning the Treaty that "merchant ships" in the first paragraph and "a merchant vessel" in the second paragraph are highly ambiguous terms.[115] Much of the ambiguity is resolved by the "Report of the Committee of Jurists" (April 3, 1930) concerning the wording of article 22 of the London Naval Treaty of 1930. This report, prepared by the lawyers who drafted the Treaty, states in relevant part:

The Committee wish to place it on record that the expression "mer-

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[113] See the text of Ch. II accompanying notes 85–87.

[114] The role of France as a supporter of efficient use of submarines has been described in Ch. II *passim*.

[115] Admiral Rickover has criticized the unratified Washington Submarine Treaty and the London Naval Treaty for not considering the problem of the armed merchantman. Rickover, "International Law and the Submarine," 61 *Nav. Inst. Proc.* 1213, 1221 (1935). It is probable that the armed merchantman as an effective combatant unit was considered and left outside the scope of the London Treaty.

chant vessel," where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.[116]

The stated criteria is considerably more realistic than a test which attempts to distinguish only between armed and unarmed merchant vessels. The criteria should certainly include, *inter alia*, any armed merchant vessel and no consideration should be given to the purported distinction between "defensive" and "offensive" armament. It should not, however, be limited to armed vessels because there are many modes of unarmed participation in hostilities. For example, a fast unarmed passenger liner employed as a troop transport during war or hostilities should not be entitled to "the immunities of a merchant vessel." [117] During the Second World War the *Queen Mary* and *Queen Elizabeth* were so employed in behalf of the Allied war effort.[118] It is clear that they represented a very substantial addition of military power to the Allied side. Such a vessel, though unarmed, is a far more effective participant in the hostilites than many slower and smaller armed vessels. In addition, if the fast liner engaged in carrying troops were to sail at a much slower speed and be escorted by a small warship, it would be subject to attack without warning.

Reference has been made to the military significance of an enemy mercant ship making radio reports of submarine sightings.[119] In particular combat contexts it is probably far more important for the efficient conduct of antisubmarine warfare to have radio reports made by merchant ships than to have such ships armed.

In summary, the juridical criteria to determine whether or not a merchant vessel is participating in the war or hostilities in a way which results in losing "the immunities of a merchant vessel" should be determined by the fact of such participation and not by the particular method of participation. In a general war in which almost all belligerent merchant ships are so participating, it may, as a practical matter of tactics, be necessary for belligerent submarines to treat all enemy merchant ships as lawful objects of attack without warning. In unusual circumstances, perhaps involving a solitary merchantman far from the regular trade routes,[120] where it is possible for submarines to determine the nonparticipant status of a particular ship, it is clear that they are legally obligated to do so.

The consequence of the foregoing appraisal, that the Protocol is designed to protect only those merchant ships which are not participating in the

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[116] *London Conf.* 189.

[117] See Prof. Hyde's different conclusion in a related situation. Hyde 1991.

[118] Roskill 43, 243, 357.

[119] See the text accompanying *supra* note 93.

[120] See McDougal & Feliciano 631. See also the text accompanying note 242 *infra*.

war or hostilities, is the conclusion that there was not consistent violation of the Protocol by any of the major naval belligerents during the Second World War.

Professor Tucker has reached different conclusions concerning this subject. He has written concerning the Protocol in the Atlantic war:

> Despite this reaffirmation of the traditional law in the 1936 London Protocol, the record of belligerent measures with respect to enemy merchant vessels during World War II fell far below the standards set in the preceding conflict. In the Atlantic Germany resorted to unrestricted submarine and aerial warfare against British merchant vessels almost from the very start of hostilities. . . .[121]
>
> . . . In the final stages of the conflict the measures taken by Great Britain against enemy shipping wherever encountered were only barely distinguishable from a policy of unrestricted warfare.[122]

Concerning the role of the Protocol in the Pacific war, Professor Tucker has written:

> In the Pacific no attempt was made by either of the major naval belligerents to observe the obligations laid down by the 1936 London Protocol. Immediately upon the outbreak of war the United States initiated a policy of unrestricted aerial and submarine warfare against Japanese merchant vessels, and consistently pursued this policy throughout the course of hostilities. Japan, in turn, furnished no evidence of a willingness to abide by the provisions of the Protocol. . . .[123]

Professor Tucker has apparently assumed that the Protocol is designed to protect merchant vessels which are participating in the naval war effort. This does not take adequate account of the close relationship between the performance of combatant functions and the ensuing liability to attack without warning. In addition, it is inconsistent with the legislative history concerning the interpretaton of "merchant vessel" as used in the Protocol.[124]

The comprehensive participation of Allied merchant ships in the Atlantic war has been described. There is no reason to believe that Allied merchant ships were employed differently in the Pacific war.[125] As to

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[121] Tucker 64.

[122] *Id.* at 66.

[123] *Ibid.*

[124] See the text accompanying *supra* note 116.

Prof. Tucker offers the comforting suggestion that the traditional law remains valid *"under the condition that belligerents refrain from incorporating merchant vessels in any way into their military effort at sea. . . ."* Tucker 69, n. 53. Unless maintaining the traditional law is an end in itself, it is more useful to apply the law as developed to the actual facts concerning the use of merchant ships in two World Wars.

[125] See generally Reisenberg, *Sea War: The Story of the U.S. Merchant Marine in World War II* (1956).

Japanese merchant ships in the Pacific war, a U.S. Navy press release in 1946 stated in part:

> [T]he conditions under which Japan employed her so-called merchant shipping was [*sic*] such that it would be impossible to distinguish between "merchant ships" and Japanese Army and Navy auxiliaries. . . .[126]

c. THE LAW OF NAVAL WARFARE

The U.S. Navy official instructions concerning objects of attack should be examined. Article 503(b)(3) of the *Law of Naval Warfare* [127] provides:

> Enemy merchant vessels may be attacked and destroyed, either with or without prior warning, in any of the following circumstances:
> 1. Actively resisting visit and search or capture.
> 2. Refusing to stop upon being duly summoned.
> 3. Sailing under convoy of enemy warships or enemy military aircraft.
> 4. If armed, and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy.
> 5. If incorporated into, or assisting in any way, the intelligence system of an enemy's armed forces.
> 6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces.

The first paragraph is consistent with the second exception to the general rule set forth in the Protocol.[128] Paragraph (2) would be consistent with the first exception to the general rule in the Protocol if it stressed the persistent character of the refusal to stop.[129] As stated previously, the adjectives "persistent" and "active" in the second paragraph of the Protocol must be given full effect since they, or equivalent expressions, were not usually employed in the traditional law. Paragraph (3) accurately reflects the traditional law as well as the uniform practice of the two World Wars. Unfortunately, paragraph (4) appears to reflect the confused claims and counterclaims advanced during the First World War concerning the purported distinction between offensive and defensive armament. The attempt to employ this supposed criterion now, and in the foreseeable future, is even more futile than the attempt to use it between 1914 and 1918. The traditional law as it was developed during the two World Wars is adequately reflected in paragraph (5). Its comprehensive formulation

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[126] Press release entitled, "United States Submarine Contributions to Victory in the Pacific" 14 (Feb. 1, 1946).

[127] The title of art. 503(b)(3) is "Destruction of Enemy Merchant Vessels Prior to Capture." Perhaps the phrase "without the necessity of capture" should have been substituted for the last three words.

[128] See the text accompanying note 108 *supra*.

[129] *Ibid.*

is particularly appropriate in view of the military importance in antisubmarine warfare of submarine position reports made by merchant ships.

Paragraphs (3) through (6) appear to refer to typical situations in which enemy merchant vessels have been employed in general war. For example, the fast troop transports come under paragraph (6).[130] But this paragraph, in spite of its broad formulation, probably does not reflect fully the law developed during the World Wars. Unless the paragraph is construed more broadly than the term "naval or military auxiliary to an enemy's armed forces" has usually been construed, it might well be possible to have an enemy merchant ship designed for carrying cargo and actually engaged in carrying a cargo of substantial military importance to the enemy which does not come under paragraphs (1) through (5) and which would not be included under (6). The result of this type of ship not coming under any provision of article 503(b)(3) would be that it could not be attacked without warning and could only be captured. The ship and its cargo would then pass unharmed by United States submarines unless, in some highly unusual situation, a United States submarine should be carrying a prize crew and be able to comply with the traditional method of capture.[131]

The provisions of this article are accurate as far as they go but are inadequate in covering this one particular situation. During the past general wars enemy cargo ships were attacked without warning even if they did not participate otherwise in the enemy war effort.[132] They were attacked without warning because they were cargo vessels carrying cargoes of military importance. There is, unfortunately, no reason to believe that such cargo ships which comply rigorously with the requirements of article 503(b)(3) will be immune from attack without warning in future general wars. This article, however, could provide specific grounds for claims and counterclaims based upon charges of illegality. If this occurs, the next steps could involve the invocation of reprisals and counterreprisals so that a future general war could be conducted, thereafter, without regard to this article of the *Law of Naval Warfare*.

3. Immune Enemy Ships

It is clear that the military necessity principle is honored in the doctrines relating to enemy warships and enemy merchant ships as objects of attack. The doctrines concerning the immunity of certain enemy ships reflect the attempt to provide implementation of the humanity principle. Although these ships enjoy immunity from attack by all naval forces,

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[130] See the text accompanying note 118 *supra*.

[131] It is more likely that a large surface warship would be able to effect capture.

[132] See the German reference to "enemy freight ships" in the text of Ch. III accompanying note 42.

it is appropriate to consider this subject briefly in a study of the law applicable to submarine warships.

a. HOSPITAL SHIPS

Hospital ships comprise the most important category of immune ships. Under the Geneva Sea Convention of 1949 [133] they must be painted white with dark red crosses as distinguishing marks which are designed to facilitate recognition by both surface vessels and aircraft.[134]

Hague Convention X (1907)[135] was based upon the assumption that hospital ships accompanied battle fleets and waited nearby during the battle. When the battle was over they speedily provided assistance to the wounded, shipwrecked, and drowning. In World War II hospital ships performed other functions and did not usually accompany the combatant naval forces. It is clear that the mere presence of a hospital ship in white paint in the daytime and additionally lighted at night might inform the enemy of important naval activities. Even a solitary hospital ship sailing into a militarily important harbor or base in or near the battle zone would serve to call the enemy's attention to it. The usual practice in World War II, consequently, was to transport the wounded while in the battle zone on armed naval vessels, including transports which had discharged their troops. After arrival at rear areas the wounded were transferred to the hospital ships which were protected by Hague Convention X.[136]

This change in the function of hospital ships is taken into account in the Geneva Sea Convention.[137] The principal type of hospital ship recognized by it is the military hospital ship which is built or equipped "specially and wholly with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them." [138] The Convention provides that these ships "may in no circumstances be attacked or captured but shall at all times be respected and protected." [139] The same standards of protection are extended to private hospital ships such as those utilized

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[133] Citation appears in Ch. I note 66.

[134] Art. 43.

[135] Entitled: Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention. Text in 2 Scott 447. The predecessor of the foregoing 1907 Convention was the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864 (Hague Peace Conference of 1899). Text in 2 Scott 142.

[136] Mossop, "Hospital Ships in the Second World War," 24 *Brit. Y.B.I.L.* 398, 399 (1947).

[137] Pictet, *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (International Committee of the Red Cross, 1960) provides useful analysis and legislative history.

[138] Art. 22.

[139] *Ibid.*

by National Red Cross Societies of states which are parties to the conflict or of neutral states.[140] Aid must be rendered without distinction as to the nationality of the wounded, sick, and shipwrecked.[141]

It is not surprising that the Geneva Sea Convention provides for the protection of the military interests of the belligerents. If it did not, it would probably be impossible to attain its central humanitarian objectives. All warships of a belligerent party to the Convention may demand the surrender and removal from hospital ships of the wounded, sick, and shipwrecked in order to make them prisoners of war and to prevent the enemy belligerents from employing them subsequently for military purposes.[142] This authority is conditioned upon the wounded and sick being in a fit state to be moved and the warship having adequate medical facilities.[143] Because of their inadequate passenger carrying facilities, submarines could not provide the requisite adequate medical facilities except in unusual circumstances.

During 1944 and 1945 an example arose concerning capture of the wounded under Hague Convention X.[144] The Allies allowed Germany to send the hospital ships *Tubingen* and *Gradisca* through Allied-controlled waters to embark sick and wounded troops in Salonica. On the return voyage the ships were diverted to Allied ports and about 4,000 prisoners were taken. A large percentage of the prisoners thus captured were only slightly wounded. The action was specifically authorized by Hague Convention X [145] and no protest was made by Germany.

In summary, the Geneva Sea Convention gives belligerents a right to control and search hospital ships in order to insure their use for humanitarian purposes only. In broad language, it prohibits the use of hospital ships "for any military purpose" [146] or for any acts "harmful to the enemy." [147] They may not possess or use secret communications codes.[148] The Convention provides that:

> They [the parties to the conflict] can refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires.[149]

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[140] Arts. 24, 25.
[141] Art. 30.
[142] Art. 14.
[143] *Ibid.*
[144] The textual paragraph is based upon Mossop, *op. cit. supra* note 136 at 405.
[145] Art. 12.
[146] Art. 30.
[147] Art. 34.
[148] Art. 34, paragraph 2.
[149] Art. 31.

b. *CARTEL AND SIMILAR SHIPS*

Historically, the term cartel referred to an agreement between enemy belligerents to regulate the exchange of prisoners of war.[150] In the same way, cartel ships referred to vessels which were designated for use in such an exchange.[151] In a broader sense, the term cartel is now used to refer to other kinds of nonhostile relations regulated by special agreement between enemy belligerents.[152]

An illustration of such an arrangement and the difficulties involved in carrying it out arose in the later part of the Second World War. In 1945 the Japanese merchant ship *Awa Maru* undertook a voyage agreed upon between the United States and Japanese Governments whereby it was to carry relief supplies furnished by the United States to United States and Allied nationals held in Japanese custody upon the Asian mainland.[153] The vessel had been granted a safe conduct by the United States and the other Allied powers. It had completed its outward voyage from Japan to Hong Kong, Singapore and other ports carrying the relief supplies. On its homeward-bound voyage it was entitled, according to the agreement, to the full measure of immunity while following the prescribed route. On April 1, 1945 the *Awa Maru* was torpedoed without warning by the United States submarine *Queenfish*. At the time of the sinking the ship had deviated slightly from its prescribed route but, after an investigation, the United States assumed full responsibility for the sinking. The commanding officer of the *Queenfish* was apparently unaware that the ship attacked had been granted safe conduct by the Allies. He was relieved of his command and convicted by general court-martial for, *inter alia,* negligence in carrying out orders. During the course of the ensuing diplomatic interchange, the United States offered to provide Japan with a vessel of similar size and characteristics to replace the *Awa Maru.*

c. COASTAL FISHING BOATS

The case of *The Paquete Habana* has been referred to as an example of customary law which is applicable in naval warfare.[154] In this case the United States Supreme Court held that small coastal fishing boats operating out of Havana during the Spanish-American War were not liable to capture and condemnation in prize. In justifying the decision, Mr. Justice Gray referred to the "considerations of humanity [due] to a

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[150] Oppenheim-Lauterpacht 542.

[151] *Ibid.*

[152] Tucker 98.

[153] The textual account is based upon "Sinking of the 'Awa Maru'," *U.S. Naval War College, International Law Documents 1944–45* 125 (1946); Voge, "Too Much Accuracy," 76 *Nav. Inst. Proc.* 257 (1950).

[154] See the text of Ch. I accompanying notes 73, 74.

poor and industrious order of men. . . ." [155] He also explained:

> The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.[156]

A few years later the customary law reflected in *The Paquete Habana* decision was set forth in treaty form in Hague Convention XI (1907). The exemption was expanded beyond coastal fishing boats to include also "small boats in local trade." [157] These limitations were stated to apply to both exempt categories:

> They cease to be exempt as soon as they take any part whatever in hostilities.
>
> The contracting powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.[158]

It is difficult to avoid the conclusion that even coastal fishing and trade contribute to some extent to the enemy war effort. Apparently this was the situation during the Korean War even though it is regarded as a limited war. During that war a traditional close-in naval blockade was in effect [159] and the United Nations Command prohibited coastal as well as deep-sea fishing by the North Koreans.[160] Among the reasons justifying the prohibition were the following:

> Rear Admiral Smith took the attitude that this sea food was legitimate contraband and should be stringently denied [to] the Communists. The restriction of fishing by the UN blockading force would seriously add to the Communist's logistics problems ashore, and force them to import fish from Chinese and Russian sources.[161]

The result was that the great importance of fish in the North Korean diet made fishing a matter of military importance which outweighed the considerations of humanity referred to by Mr. Justice Gray. In addition, it was pointed out that a great many of the supposed North Korean fishing boats were actually engaged in laying mines.[162] Such boats would not, of course, be exempt under the holding in *The Paquete Habana* or in the conventional formulation of fishing boat immunity in Hague Convention XI. There is no reason to believe that boats performing functions similar

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[155] 175 U.S. 677, 708 (1900).
[156] *Ibid.*
[157] Art. 3.
[158] *Ibid.* The text of the Convention appears in 2 Scott 463.
[159] Cagle & Manson 281–84 and *passim.*
[160] *Id.* at 297.
[161] *Id.* at 296.
[162] *Ibid.*

to those of the North Korean fishing and mining boats would be accorded immunity in a general war.

d. OTHER IMMUNE VESSELS

Hague Convention XI (1907) prescribes a general immunity from capture for "vessels charged with religious, scientific, or philanthropic missions." [163] As a practical matter, this provision has not been often invoked in the World Wars and, when it has been invoked, narrow interpretations have been applied to it.[164] Philanthropic missions have been carried out pursuant to special cartel arrangements entered into by the enemy belligerents rather than under the convention.

The assumption in Hague Convention XI that scientific missions are devoid of military significance is contrary to contemporary expectations concerning the use of scientific knowledge. The immunity granted to vessels on scientific missions was based upon the assumption that scientific inquiry has only a peaceful importance. In many fields scientific knowledge is as readily adaptable for military as for peaceful purposes.[165] At the present time, for example, there is inadequate charting of ocean floor depths and contours. As nuclear submarines are enabled to submerge to greater depths this type of oceanographic information will be of military as well as of peaceful significance.

Further problems will arise in the near future when there will be research submarines and submersibles which are not warships operating in the oceans of the world.[166] Many of these research vessels will be highly specialized and not suitable for use as warships, and cannot be treated as such. The Geneva Convention on the Territorial Sea and the Contiguous Zone (1958) provides that, while engaged in innocent passage through territorial waters, "submarines are required to navigate on the surface and to show their flag." [167] It is possible that a submersible research ship, perhaps due to an error in navigation or because of the view that it is immune as a result of its scientific character, may fail to comply with this rule.[168] In order to ascertain the character of the submarine or submersible and

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[163] Art. 4.

[164] See the cases summarized in 6 Hackworth 544–46.

[165] See generally Craven, "Sea Power and the Sea Bed," 92 *Nav. Inst. Proc.* No. 4, p. 36 (1966).

[166] The First Report of the President to the Congress on Marine Resources and Engineering Development, *Marine Science Affairs—A Year of Transition* 92–94 (1967).

[167] Art. 14(b). The text of the Convention appears in McDougal & Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* 1143–52 (1962).

[168] It is widely assumed that the four Geneva Conventions on the Law of the Sea (1958) deal only with the law of the sea in time of peace but this is not stated expressly in the Conventions.

the possible military aspects of its mission, it may be lawfully ordered to the surface.

An illustration of communications with submerged submarines was provided by Special Warning No. 32 issued by the U.S. Navy Oceanographic Office during the quarantine-interdiction of Soviet missiles to Cuba in 1962. It concerned submarine surfacing and identification procedures when in contact with "Quarantine Forces in the general vicinity of Cuba" and provided in part:

> U.S. Forces coming in contact with unidentified submerged submarines will make the following signals to inform the sub that he may surface in order to identify himself: Signals follow—Quarantine forces will drop 4 to 5 harmless explosive sound signals which may be accompanied by the International Code signal "IDKCA" meaning "Rise to Surface." This sonar signal is normally made on underwater communications equipment in the 8 kc. frequency range. Procedure on receipt of signal: Submerged submarines, on hearing this signal, should surface on easterly course. Signals and procedures employed are harmless.[169]

It must be recognized that research submarines and submersibles may not have communication facilities comparable to those of submarine warships.

4. Capture or Destruction of Neutral Merchant Ships

Historically, neutral merchant ships have not been claimed as objects of direct military attack to as great a degree as have enemy merchant vessels. It is clear that this situation was drastically changed during the World Wars. The use of mines against enemy merchant vessels, for example, amounted to a claim to attack neutral merchant vessels as well since mines do not discriminate between belligerents and neutrals.[170]

a. NEUTRALS WHICH ARE INTEGRATED INTO THE ENEMY WAR EFFORT

It seems clear on the basis of moral and legal principles as well as upon the customary law developed in both World Wars, that neutral merchant vessels which are integrated into the enemy war effort may be lawfully accorded the same treatment as enemy merchant vessels which are so integrated. It has been demonstrated that the Protocol does not protect enemy merchant ships which are participating in the war or hostilities.

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[169] Paragraph No. 5982 in Notice to Mariners No. 45 (1962). For indication of the factual context in which the communications were employed see Mallison, "Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law," 31 *Geo. Wash. L. Rev.* 335, 390–92 (1962).

[170] The effectiveness of modern types of sea mines is described in Roskill 47–48.

There is no reason in either experience or logic why the Protocol should be interpreted as protecting neutral merchant ships which are engaged in the same functional activities that result in lack of protection for an enemy merchant ship.[171]

It will be recalled that the International Military Tribunal held that Admiral Donitz violated the Protocol in ordering the sinking of neutral merchant ships in the submarine operational area. This aspect of the judgment has been criticized insofar as it extended to neutral merchant ships not engaged in genuine interneutral trade.[172]

The British use of ship warrants and the accompanying coercion imposed upon neutrals have been carefully described by Miss Behrens:

> In the summer of 1940 the ship warrant scheme was launched, both to further the purposes of economic warfare and in order to force neutral ships into British service or into trades elsewhere that were held to be esssential. No ship, it was ordained . . . was to be allowed any facilities in any port of the British Commonwealth unless the British had furnished her with a warrant. For the ill-disposed there were to be no bunkers, or stores, or insurance, or water or credit, no access to dry-docks, no Admiralty charts, no help or guidance or supplies of any sort. Since the British Commonwealth covered a very large area, and since various neutral countries, and particularly the United States, soon began from goodwill or self-interest to co-operate in the arrangements, trade for the ill-disposed though sometimes possible became exceedingly difficult.[173]

Certainly in a general war similar to the World Wars neutrals are not in an enviable position. Compliance with the demands of one belligerent will lead the opposing belligerent to regard the neutral merchant vesssel concerned as participating in the first belligerent's war effort and so subject to treatment as though it were an enemy.[174] Whether particular neutral merchant ships obtained ship warrants because of coercion or because of a desire to cooperate, they were effectively integrated into the British and Allied war effort. It is difficult to find any sound reason why neutral merchant ships so integrated should not be subject to the same procedures of attack, including sinking without warning, to which enemy merchant ships may be subjected lawfully.

The ship warrant system and the effective sanctions to enforce it de-

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[171] A conclusion contrary to that stated in the text would appear necessarily to place exaggerated emphasis upon the word symbol "neutral." Even under the traditional law neutrals were assimilated to enemies in some situations. See the text accompanying note 41 *supra*.

[172] See the text of Ch. III accompanying notes 121–27.

[173] Behrens, *Merchant Shipping and The Demands of War* 96 (History of the Second World War, United Kingdom Civil Series 1955).

[174] See McDougal & Feliciano 512–13.

scribed by Miss Behrens are a part of the comprehensive administrative methods of economic warfare practiced by the Allies during the Second World War. The British Ministry of Economic Warfare characterized this as a matter of changing the emphasis "from control on the seas to control on the quays." [175] The fact was that, even assuming that visit and search was otherwise feasible, boarding officers could not obtain adequate information concerning the voyages, cargoes, and destinations of particular neutral ships and they were even less able to obtain an overall view of the attempted enemy commerce in particular contraband items. The obtaining of accurate commercial intelligence was transferred from boarding officers at sea to ministries or boards of economic warfare operating at home and in neutral countries. The comprehensive economic warfare techniques including ship warrants, ship navicerts, and navicerts were not primarily designed to intercept contraband goods en route to the enemy. They were designed, rather, to prevent contraband goods from even being loaded upon a ship in a neutral port. In the same way, the certificates of enemy origin and interest were designed to prevent any neutral shipper from giving serious consideration to carrying enemy exports. In order to implement these techniques, British or Allied officers examined the cargo which was loaded in neutral ports and issued certificates stating compliance with contraband control or with enemy export control.[176]

It is clear, at least as a matter of theory, that neutrals need not cooperate with a belligerent which is enforcing a comprehensive economic warfare system. Noncooperation, however, would result in much more dangerous and destructive enforcement of economic warfare regulations. The traditional techniques of enforcement at sea would be much more onerous to the neutral ship owner. The possession of the necessary certificates under the comprehensive system prevented neutral vessels from being subjected to the time-consuming, costly, and dangerous procedure of diversion to port for examination of the cargo and possible condemnation of the vessel and cargo. In addition, the neutral merchant ship which cooperated with the required procedures received the benefits of all the British and Allied facilities which were essential to the operation of a merchant vessel. These were, of course, the same facilities which were withheld from noncooperating neutral merchant ships under the ship warrant system. In short, the comprehensive economic control system provides substantial benefits to cooperating neutrals.[177]

From the standpoint of the belligerent, the modern comprehensive system offers many advantages. Among these are a more complete and effici-

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[175] 1 Medlicott 416.

[176] The textual paragraph is based upon 1 Medlicott 415–659; 2 Medlicott 1–25, 381–418 and *passim;* McDougal & Feliciano 509–19.

[177] *Ibid.*

ent interdiction of commerce to and from the enemy. In addition, the system results in an economy in the use of naval vessels which would otherwise be required for implementing the traditional enforcement techniques at sea. Military efficiency is advanced by the high degree of effectiveness achieved by the comprehensive system. At the same time considerations of humanity are advanced by its substantially less destructive characteristics in comparison with the traditional methods.[178] In summary, the system operates in an eminently reasonable manner and it is consequently as unrealistic to attempt to declare its illegality as between the enforcing belligerents and the neutrals as it would be to attempt to do so between the opposing belligerents.

b. NEUTRALS WHICH ARE NOT PARTICIPATING IN THE WAR OR HOSTILITIES

In appraising submarine operational areas in general war it was stated that belligerent states utilizing such areas had a legal obligation to provide safe lanes or routes for neutral merchant ships engaged in genuine interneutral trade.[179] In considering neutral merchant ships as objects of attack, it is clear that everything possible should be done by the belligerents to protect such ships which are engaged in genuine interneutral trade. By definition, this trade does not enhance the economic war strength of one or the other belligerent. An attack upon a neutral merchant ship known to be engaged in interneutral trade is, therefore, a violation of law. It should be mentioned that even though this principle is clear there are substantial difficulties involved in actually protecting such ships in a general war where many merchant ships are integrated into the war effort of a belligerent. It is reasonable to expect that more effective protection for neutral ships which are not participating in the war or hostilities can be provided in limited war situations.

5. Enemy Personnel as Objects of Attack

It is lawful to kill or wound enemy combatants, that is, naval or merchant marine personnel, pursuant to a lawful attack upon an enemy

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[178] Sea power was the ultimate sanction for the comprehensive system of economic warfare as it was the immediate sanction for the traditional system. 1 & 2 Medlicott *passim*. The British also considered sanctioning devices which they did not employ:

> The legal advisers to the Ministry [of Economic Warfare] and Foreign Office pointed out that if it were announced that ships without navicerts 'would be liable after seizure to be sent in or sunk according to circumstances,' this would not necessarily involve action outside international law, although a plain announcement that ships without navicerts would be liable to be sunk would not be justified under existing principles or any admissible extension of them.

1 Medlicott 434.

[179] See the text of Ch. III accompanying note 98.

warship or merchant ship. During such an attack it is not only lawful to kill or wound the combatant personnel, but it is also lawful to kill or wound the otherwise especially protected medical and religious personnel incidental to the attack on the ship.[180] In general, the legal doctrines concerning personnel as objects of attack perform the relatively modest role of prohibiting violence which is already unnecessary to achieve the military objective of an attack. As a rule, enemy naval or merchant marine personnel who have become helpless or who have come under the power of a belligerent are no longer lawful objects of attack. The result is that subsequent or continuing violence which is directed against them is illegal.

a. THE DUTY TO GIVE QUARTER

The duty to grant quarter when an enemy surrenders is as applicable to sea warfare as it is to land warfare.[181] In sea warfare there are special problems including the mode of manifesting surrender. The *Trial of Von Ruchteschell,*[182] where the defendant was the commander of a German surface raider, illustrates some of the issues arising in connection with the duty to give quarter at sea. There were two charges that the defendant had continued the attack after the enemy merchant ship had indicated surrender. The first charge involved a daylight attack against the *Davisian* in which its wireless aerial was destroyed with the raider's first salvo.[183] The raider maintained heavy fire and signaled that the ship attacked was not to use its radio. The report states: "The captain of the *Davisian* stopped his engines, hoisted an answering pennant and acknowledged the signal." [184] The gunfire continued fifteen minutes longer, however, and wounded several members of the crew while they were trying to abandon ship. The basis of the conviction of the accused on this charge was apparently that the ship attacked had given an unequivocal indication of surrender.

The second charge involving refusal to give quarter involved a night attack upon the *Empire Dawn* in which the raider's first salvo set the

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[180] See Oppenheim-Lauterpacht 498–99, where "stokers" are classified with medical and religious personnel. Neither stokers nor nuclear propulsion specialists should be classified as noncombatants.

See generally Watson, "Status of Medical and Religious Personnel in International Law," 20 *JAG J.* 41 (1965).

[181] Oppenheim-Lauterpacht 474.

[182] 1 *Reps. U.N. Comm.* 82 (1947).

It is fair to mention here that, with one conspicuous exception [Von Ruchteschell], the captains of the German disguised raiders conducted their operations, which were a perfectly legitimate form of warfare, with due regard to international law.

Roskill 97.

[183] 1 *Reps. U.N. Comm.* 82, 83.

[184] *Id.* at 82.

bridge on fire and destroyed the wireless.[185] Even though the ship under attack was rendered powerless by the first salvo, it continued to move through the water and was still moving when it began to sink. The *Empire Dawn* did not open fire and its captain signaled by torch that he was abandoning ship. During these events the raider's fire continued while the lifeboats were being lowered and cut the lines of one of the lifeboats. It crashed into the sea and several members of the crew were killed. The accused was not convicted on this charge and the apparent distinction was that the *Empire Dawn* had not given an unequivocal manifestation of surrender. In addition, it seems probable that the torch signal from the burning ship could not have been seen on the raider. The fact that the ship was actually sinking while the raider's fire continued appears to have been inadequate consideration.

In this case two naval officers, one British and one German, appeared as expert witnesses. Their common evidence concerning manifestation of surrender was summarized as follows:

> (1) the attacked ship must stop her engines; (2) if the attacker signals, the signal must be answered—if the wireless is out of action, it must be answered by a signalling pennant by day or by a torch or flashlight by night; (3) the guns must not be manned, the crew should be amidships and taking to the lifeboats; (4) the white flag may be hoisted by day and by night, all the ship's lights should be put on.[186]

The duty to give quarter is, of course, the same in submarine warfare as it is in other naval warfare. There are undoubtedly unusual problems which occur concerning manifestations of surrender in submarine warfare. A submarine even when fully surfaced lies low in the water. There may be, consequently, particular difficulties in observing a submarine's manifestation of surrender. Where a submarine is forced to the surface following depth charging, it seems reasonable that the submarine's commander should be given an opportunity to surrender unless an unequivocal intention of fighting it out on the surface is manifested. The attempt of a surface ship to indicate surrender to a submerged submarine also raises problems. For example, it is clear that the submerged submarine at periscope depth has only limited visibility.

b. DUTIES TO SURVIVORS

The rescue of survivors is particularly important in sea warfare. If the survivors are not rescued within a short period of time, their chance of survival is greatly reduced. The common interest of states in rescuing survivors is reflected in the Geneva Sea Convention:

> After each engagement, Parties to the conflict shall, without delay,

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[185] *Id.* at 83.

[186] *Id.* at 89.

take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.[187]

The notes to the *Trial of Von Ruchteschell* state the following propositions concerning duties to survivors:

(1) [I]f the raider is aware of survivors who have taken to their lifeboats, he must make reasonable efforts to rescue them; (2) it is no defence that the survivors did not draw attention to their boats if they had reasonable grounds to believe that no quarter was being given.[188]

There can be no doubt concerning the urgency of rescue in submarine warfare. Rescue in such a context, unfortunately, appears to be particularly difficult. It is especially dangerous to attempt the rescue of submarine personnel if other submarines are in the vicinity. Where the rescue by submarines of surviving personnel is in issue, the grim facts are that submarines in both World Wars were small vessels without adequate passenger facilities.

Admiral Donitz was charged before the International Military Tribunal with ordering the killing of survivors and issuing orders prohibiting rescue.[189] It will be recalled that the basic rule in the second paragraph of the Protocol prohibits a warship from sinking "a merchant vessel" unless the passengers and crew are first put in a place of safety. In its application of this provision of the Protocol in its judgment in the case of Admiral Donitz, the Tribunal stated:

The evidence further shows that the rescue provisions [of the Protocol] were not carried out and that the Defendant ordered that they should not be carried out. The argument of the Defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Donitz is guilty of a violation of the Protocol.[190]

Perhaps the most obvious inadequacy of the quoted portion of the judgment is that the Protocol, as demonstrated above, only applies to merchant vessels which are not participating in the war or hostilities. One may seriously question, consequently, whether or not among the merchant ships sunk by German submarines during the Second World War there were any significant number of cases where the Protocol, including its rescue

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[187] Art. 18, paragraph 1.

[188] 1 *Reps. U.N. Comm.* 88.

[189] 1 *I.M.T.* 313.

[190] *Ibid.*

provisions, was applicable. In addition, the opinion of the Tribunal ignores the facts of submarine warfare including the lack of space for passengers in submarines.

An adequate sense of reality on this subject may be achieved by consideration of Admiral Nimitz' answer to a question propounded on behalf of Admiral Donitz by the International Military Tribunal:

> 13. **Q.** Were, by order or on general principles, the U.S. submarines prohibited from carrying out rescue measures toward passengers and crews of ships sunk without warning in those cases where by doing so the safety of the own boat was endangered?
>
> **A.** On general principles the U.S. submarines did not rescue enemy survivors if undue additional hazard to the submarine resulted or the submarine would thereby be prevented from accomplishing its further mission. U.S. submarines were limited in rescue measures by small passenger-carrying facilities combined with the known desperate and suicidal character of the enemy. Therefore it was unsafe to pick up many survivors. Frequently the survivors were given rubber boats and/or provisions. Almost invariably survivors did not come aboard the submarine voluntarily and it was necessary to take them prisoner by force.[191]

Thus, according to Admiral Nimitz, United States submarines did not attempt rescue if either additional danger existed or if the submarine's military mission would be frustrated. It seems neither reasonable nor just to require a different standard on the part of German submarines. Even if more were to be required as a matter of legal doctrine it is difficult to see how such a rule could be sanctioned unless submarines were provided with more adequate passenger-carrying facilities.

It should be mentioned also that there were apparently numerous instances when it was not feasible for surface warships to make rescue attempts even though they had adequate passenger facilities. The British heavy cruiser *Devonshire,* operating in the South Atlantic, sank the German raider *Atlantis* on November 22, 1941 and the German supply ship *Python* on November 30, 1941. In neither case was rescue attempted since it was thought that U-boats might be in the vicinity.[192]

To say that rescue cannot be attempted by submarines in the two situations stated by Admiral Nimitz is not to say that submarines cannot render other assistance to survivors. Admiral Nimitz referred to giving "rubber boats and/or provisions" to the survivors. There is no reason why assistance of this kind should not be regarded as legally obligatory when rescue is not

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[191] 40 *I.M.T.* 108, 110.

[192] *Id.* at 99; Ruge, *Der Seekreig: The German Navy's Story 1939–1945* 175–76 (1957).

possible and when military necessity permits. In summary, there is an obligation to rescue survivors when there is neither undue hazard to the submarine nor an interference with its military mission. When these conditions exist there is a particular obligation to assist survivors short of rescue, as by righting overturned lifeboats and providing rubber boats, food, and medical supplies. Humanitarian considerations and acts must be encouraged in every practical way even though they have had a secondary role to military necessity in combat situations.

The German attempt to establish a rescue zone of immunity during the period September 12-16, 1942 following the sinking of the British troopship *Laconia* and its frustration by the United States aircraft bombing attack has been described.[193] On September 17, 1942 the German U-boat Command issued the "*Laconia* Order." [194] It was not given to U-boat captains in writing but it was regularly read or stated to them as a part of the briefing they received before leaving on war patrols. It provided:

> (1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
>
> (2) Orders for bringing in captains and chief engineers still apply.
>
> (3) Rescue the shipwrecked only if their statements would be of importance for your boat.
>
> (4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities.[195]

It should be taken into consideration that at the time of the issuance of the quoted order Admiral Donitz must have been under severe psychological pressure in view of the attack made upon the German submarines engaged in the *Laconia* rescue operations. It is apparent that the quoted order is inconsistent internally. Paragraph (1) appears to prohibit rescue while paragraphs (2) and (3) seem to justify, or even to order, rescue in particular circumstances. The admonition of harshness contained in paragraph (4) is subject to diverse interpretations.

In its judgment concerning Admiral Donitz the Tribunal stated:

> It is also asserted that the German U-boat arm not only did not carry out the warning and rescue provisions of the Protocol but that Donitz deliberately ordered the killing of survivors of shipwrecked vessels, whether enemy or neutral. . . . The Defense argues that these orders [including the *Laconia* order] and the evidence supporting

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[193] See the text of Ch. III accompanying notes 132–39.

[194] Text of order in Trial of Moehle, 9 *Reps. U.N. Comm.* 75 (1946).

[195] *Ibid.* The same formulation of the order appears in The *Peleus* Trial, 1 *Reps. U.N. Comm.* 1, 5 (1945).

them do not show such a policy and introduced much evidence to the contrary. The Tribunal is of the opinion that the evidence does not establish with the certainty required that Donitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.[196]

There are some aspects of the quoted judgment which present difficulties. It is possible that the Tribunal regarded the ambiguity of the order as arising from doubt as to whether the purpose of the order was to forbid rescue or was to direct the killing of survivors. If it was the latter, it was unlawful but the Tribunal acted with restraint in resolving the ambiguity in favor of Admiral Donitz in the criminal proceedings. If the *Laconia* order was an attempt to prohibit the rescue of survivors in the situations of operational necessity in which Admiral Nimitz indicated that survivors were not rescued by United States submarines in the Pacific, the order was lawful in this respect.[197]

The real basis for criticism of the order is the reference in the first paragraph to not assisting survivors as by putting them in lifeboats and giving them provisions. These statements are contrary to the legal obligations of submarine personnel to assist survivors when military necessity prevents their conducting rescue operations. This illegal portion of the *Laconia* order should not be justified as a reprisal measure to the aircraft attack upon the German submarines engaged in the rescue operations. During the Second World War Hague Convention X (1907) was in effect and it contained no specific prohibition concerning directing reprisals at survivors. Elementary considerations of humanity and morality would, nevertheless, indicate conclusively that reprisals should not be directed at helpless survivors of a sunken ship. Reprisals against survivors including the wounded, sick, and shipwrecked are expressly prohibited by the Geneva Sea Convention.[198]

In the *Trial of Moehle* [199] the defendant was a German U-boat flotilla commander who was charged with a war crime in the contents of the instructions he gave to his commanding officers prior to their departure on war patrols. The briefing consisted primarily of technical matters but the defendant read the *Laconia* order. If questions were asked, he provided two examples.[200] The first concerned a U-boat commander who reported seeing a raft with five British airmen on it in the Bay of Biscay. It was stated that he was severely reprimanded by the U-boat Command and was told that the correct action would have been to destroy the raft since

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[196] 1 *I.M.T.* 313.

[197] The conclusion of the illegality of the order as a whole is stated in Tucker 73.

[198] Art. 47.

[199] 9 *Reps. U.N. Comm.* 75 (1946).

[200] *Id.* at 75

otherwise it was probable that the airmen would be rescued and go into action again. The second example involved the sinking of American ships near land. The official criticism directed against the submarine commanders was said to be that the crews had not been destroyed but probably reached the coast and manned new ships. After giving these examples, the defendant said that each commander must act according to the dictates of his conscience and that the safety of his boat should be his primary consideration.

The defense argued that the *Laconia* order was ambiguous but that its purpose was to impress upon submarine commanders that they should not rescue survivors since doing so endangered the submarines.[201] It was thus regarded as a legal order based upon operational necessity. The prosecution contended that the purpose of the order was to direct the killing of survivors.[202] The central legal issue, however, concerned Moehle's role in commenting upon the order. The court apparently regarded his stated examples as resolving its ambiguities and thereby changing it into an order to kill survivors and he was convicted.[203]

Perhaps the most obvious duty to survivors is to refrain from killing them. Unfortunately this duty has been violated in some instances. The importance of the subject justifies separate consideration.

c. THE PROHIBITION OF KILLING SURVIVORS

Survivors struggling in the water or seeking safety on life rafts or in lifeboats are no longer effective instruments of enemy military power. It should be abundantly clear that they are not lawful objects of attack.

In *The Peleus Trial* [204] the commander of the German submarine *U-852* and three officers and a rating of the same submarine were charged with:

> Committing a war crime in that you in the Atlantic Ocean on the night of 13/14th March, 1944, when Captain and members of the crew of Unterseeboot 852 which had sunk the steamship *Peleus* in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them.[205]

The prosecution resolved the uncertainty in the charge by stating that the

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[201] *Id.* at 77, 80.

[202] *Id.* at 76.

[203] *Id.* at 80. He was sentenced to imprisonment for five years. *Id.* at 78.

[204] This case, also known as the "Trial of Eck," is reported in (1) the entire vol. 1 of *War Crimes Trials* (Maxwell Fyfe, gen. ed.; Cameron, ed. of vol. 1; decision 1945; pub. 1948); (2) 1 *Reps. U.N. Comm.* 1 (1945).

The present analysis of the case is based principally upon the report in 1 *War Crimes Trials* which apparently contains the complete or almost complete record of the proceedings.

[205] 1 *War Crimes Trials* 3; 1 *Reps. U.N. Comm.* 2.

defendants were not accused of sinking the merchant ship without warning but of killing its survivors.[206]

The crew of the *Peleus* consisted of thirty-five individuals comprising eight nationalities. The ship was of Greek registration and was under charter to the British Ministry of War Transport. Following the sinking of the ship many of the surviving crew members climbed aboard rafts or floating wreckage. The submarine cruised about the scene for approximately five hours after the sinking while the survivors and the wreckage were made the objects of machine gun and hand grenade attack. Practically all of the survivors were either killed or subsequently died of wounds except for three who managed to conceal themselves and stay alive. They were rescued about a month later and recounted these grim events.[207] The *U-852* was, thereafter, beached under air attack on the east coast of Africa and its log revealed the sinking of a merchant ship at the location where the *Peleus* was sunk. The prosecution relied upon affidavits prepared by the three survivors of the *Peleus* as well as upon testimony of members of the crew of the U-boat who were not directly involved in the killing. The evidence indicated that the defendant, Eck, the captain of the U-boat, ordered the shooting and throwing of hand grenades at the rafts and the wreckage and that the other accused carried out his orders.

The defense of Eck was based principally upon the claim that it was operationally necessary for him to eliminate all traces of the sinking in order to save the U-boat from Allied antisubmarine warfare measures.[208] Eck was aware of the aircraft bombing attack on the submarines which were rescuing the survivors of the *Laconia*. He testified on this subject:

> This case showed me that on the enemy's side military reasons take precedence over human reasons before saving the lives of survivors. For that reason I thought my measures justified.[209]

Eck was also aware of the *Laconia* order but he did not invoke it as a superior order which directed his actions.[210] If he had done so it would have had very unfavorable consequences for Admiral Donitz in the later

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[206] *Ibid.* It is clear, by inference, that the sinking without warning was not regarded as illegal. In the same way, in the Trial of Von Ruchteschell (see the text accompanying note 181 *supra*) there was no charge concerning sinking without warning although the defendant, as a raider commander, was responsible for the sinking of several ships without warning.

[207] The facts stated in the textual paragraph were developed in the case of the prosecution and not controverted in any material respect by the defense: 1 *War Crimes Trials* 7–38; 1 *Reps. U.N. Comm.* 2–4.

[208] 1 *War Crimes Trials* 105–07; 1 *Reps. U.N. Comm.* 4.

[209] 1 *War Crimes Trials* 55.

[210] 1 *War Crimes Trials* 42–47 (opening argument for Eck), 47–64 (evidence for Eck), 103–07 (closing argument for Eck); 1 *Reps. U.N. Comm.* 4–5.

Shortly before his execution Eck gave a deposition to be used in behalf of Admiral Donitz before the I.M.T. in which Eck stated that he had received no orders to

trial before the International Military Tribunal.[211] The other accused relied principally upon the plea of superior orders, specifically, Eck's orders to them.[212]

An experienced U-boat commander testified in behalf of the defense.[213] He emphasized the efficiency and rapidity of Allied antisubmarine counter-attack measures at the time and in the area of the sinking of the *Peleus*. Under questioning by the judge advocate this officer conceded that he would not have done the same thing that Eck did in the circumstances.[214] Apparently he would have followed the usual U-boat procedure of leaving the scene of a sinking at high speed. Since the particular sinking took place at night it would have been relatively safe for the U-boat to use its high-surface speed during the hours of darkness. Whatever defensive action was taken by the U-boat following the sinking it is probable that even if all of the wreckage had been destroyed the place of the sinking would have been marked by an oil slick easily visible from the air.[215]

Eck and two of the accused officers (one was the ship's medical officer) were found guilty and condemned to death.[216] The remaining two accused were also found guilty but received lesser sentences because of mitigating circumstances.[217] Eck's defense of operational necessity was not justified and this was conceded even by the veteran submarine commander called by the defense. The facts demonstrate that helpless survivors were murdered on the high seas.[218] It is also clear that the plea of superior orders did

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kill survivors. 1 *War Crimes Trials* 226–29 (appendix 22); 40 *I.M.T.* 51 (Donitz Document—36).

Prof. Tucker states that "the illegality of the [*Laconia*] order should be placed beyond question" because of its interpretation and application in the Moehle and *Peleus* cases. Tucker 73. This conclusion does not take account of the fact summarized above and also the fact that Eck did not invoke superior orders as a defense in the *Peleus* case. In addition, the Moehle case involved Moehle's misinterpretation of the *Laconia* order rather than the order itself. See the text accompanying notes 199–203 *supra*.

[211] The prosecution before the I.M.T. could then have claimed that the *Peleus* case was an implementation of the *Laconia* order.

[212] 1 *War Crimes Trials* 107–17; 1 *Reps. U.N. Comm.* 4, 9–10.

[213] *Id.* at 65–71; *id.* at 6–7.

[214] *Id.* at 69–70; *id.* at 6.

[215] There would not have been a large oil slick if the *Peleus* were a coal-burning ship. Eck referred to this in his testimony. 1 *War Crimes Trials* 59.

[216] 1 *War Crimes Trials* 132, 139; 1 *Reps. U.N. Comm.* 12–13.

[217] *Ibid.*

[218] The related Case of Dithmar and Boldt (the *Llandovery Castle* case), German Reichsgericht (July 16, 1921), reported in 16 *A.J.I.L.* 708 (1922), concerned the situation of a German submarine firing upon the lifeboats of a sunken British hospital ship and resulted in the conviction of two officers of the submarine who acted under the orders of the captain (who was not before the court). This case was decided by a municipal court applying international law doctrines. It is an apt precedent for the

not justify the actions of the other defendants since Eck's orders were illegal upon their face.

The judgment of the International Military Tribunal for the Far East states:

> Inhumane, illegal warfare at sea was waged by the Japanese Navy in 1943 and 1944. Survivors of passengers and crews of torpedoed ships were murdered.[219]

The Far East Tribunal judgment quotes a command in an order issued by the Commander of the Japanese First Submarine Force at Truk on March 20, 1943:

> All submarines shall act together in order to concentrate their attacks against enemy convoys and shall totally destroy them. Do not stop with the sinking of enemy ships and cargoes; at the same time, you will carry out the complete destruction of the crews of the enemy's ships; if possible, seize part of the crew and endeavor to secure information about the enemy.[220]

There is convincing evidence that this order was carried out on several occasions. A number of examples are referred to in the judgment of the Far East Tribunal.[221] One which is summarized involved the sinking of the United States Liberty-type merchant ship *Jean Nicolet* which had an armament manned by a U.S. Navy Armed Guard.[222] The judgment states:

> The massacre of survivors of the American ship "Jean Nicolet" is another example of methods employed by the Japanese Navy. This ship was travelling from Australia to Ceylon in July 1944 when she was torpedoed at night by a Japanese submarine while some 600 miles from land. Her ship's company was about 100 of whom about 90 were taken aboard the submarine. The ship was sunk and her boats were also smashed by gun fire although all did not sink. The hands of the survivors were tied behind their backs. A few of the officers were taken below and their fate is not known to the Tribunal. The remainder were made to sit on the forward deck of the submarine as she cruised searching for survivors. During this time some were washed overboard and others were beaten with wooden and metal bludgeons

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decision in the *Peleus* case and was so argued by the prosecution. 1 *War Crimes Trials* 117–19; 1 *Reps. U.N. Comm.* 19, 20.

The *Baralong* incident should also be mentioned. It was alleged that this British Q-ship killed German submarine survivors in the water. Oppenheim-Lauterpacht 510, n.2; Sheer, *Germany's High Sea Fleet in the World War* 232 (1920); [1915] *Foreign Rel. U.S. Supp.* 527–29, 575–77, 650–51 (1928).

[219] *F.E.I.M.T. Judg.* p. 1,072 (one thousand seventy-two).

[220] *Id.* at p. 1,073.

[221] *Id.* at pp. 1,073–74.

[222] Further details on the *Jean Nicolet* incident appear in *F.E.I.M.T. Proc.* pp. 15,095–148 (fifteen thousand ninety-five through one hundred forty eight).

and robbed of personal property such as watches and rings. Then they were required to proceed singly towards the stern between lines of Japanese who beat them as they passed between their ranks. Thus they were forced into the water to drown. Before all the prisoners had been forced to run the gauntlet the vessel submerged leaving the remaining prisoners on her deck to their fate. Some, however, did survive by swimming. These and their comrades whom they kept afloat were discovered the next day by aircraft which directed a rescuing ship to them. Thus twenty-two survived this terrible experience, from some of whom this Tribunal received testimony of this inhumane conduct of the Japanese Navy.[223]

The attacks upon the surviving personnel of the *Peleus* and the *Jean Nicolet* have been examined here because both of the incidents have major significance for the international law of sea warfare. The central point is that the enemy, particularly when he is helpless and struggling for survival, must be regarded as within the broad scope of the common humanity of all mankind.[224] Only when the victims are dehumanized in the view of their enemy are they likely to be treated as were the survivors of the *Peleus* and the *Jean Nicolet*. There is the urgent need for worldwide recognition and effective implementation of the right of all individuals to fair and nondiscriminatory treatment, even in situations of coercion and violence. A concrete step toward this goal can be achieved by enforcing the Geneva Conventions for the Protection of War Victims and the elementary prohibition of killing survivors.

6. Objects and Methods of Attack in Future General War

The same types of general war which have been postulated previously in this study are now employed to appraise objects and methods of attack. These types are a nonnuclear general war similar to the World Wars or the same type of war with a restricted use of nuclear weapons.[225] The principal legal issue arising concerning the objects and methods of attack of

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[223] *F.E.I.M.T. Judg.* pp. 1074–75.

Beach, *Run Silent, Run Deep* 319–22 (Permabook ed. 1956) describes a United States submarine sinking by ramming each of the lifeboats of a sunken Japanese Q-ship. Even though the account appears in a novel, it provides accurate illustration of the murder of survivors and the psychological attitudes which cause it.

[224] From your perspective or mine the creative opportunity is to achieve a self-system larger than the primary ego; larger than the ego components of family, friends, profession, or nation; and inclusive of mankind.

Lasswell, "Introduction: Universality Versus Parochialism," in McDougal & Feliciano xix, xxiv.

[225] Admiral Biorklund of the Swedish Navy postulates a general war involving restricted use of nuclear weapons in which merchant ships would be principal objects of attack in "Sea-Air Strategy and Submarine Warfare II," 104 *J. Royal United Serv. Inst.* 203 (1959).

submarines in such a future war is whether or not merchant ships participating in the naval war effort may be attacked lawfully without warning. In resolving this issue, appropriate weight must be accorded to the past process of legal decision in general war.

During the First World War there was, without doubt, widespread shock and revulsion at the destruction of the "noncombatant" human values involved in the German use of submarines.[226] In commenting upon that German unrestricted submarine warfare, Professor Garner has written:

> The rule referred to [concerning safety] was adopted for the protection of innocent non-combatants, not for the benefit of belligerents, and it cannot be admitted that the invention of new instruments repeals or modifies the rule. The use of the [submarine] instrument must be adjusted to the requirements of the law of nations and of humanity and not they to the instrument.[227]

There can be no dispute concerning the desirability of according priority to the principle of humanity. It is apparent, nevertheless, that enforceable legal doctrines which accord some consideration to humanity are better than unenforceable ones which accord all consideration to it. The only difficulty presented by Professor Garner's demand for humanity is that it cannot be enforced in combat situations, even to a modest degree, without taking full account of the complementary principle of military necessity.

In the Second World War the United States adopted the same methods of submarine warfare which it had regarded as indefensible in the earlier war. The military utility of the submarine against the merchant ship when attacks were made without warning was of decisive importance. Even if doubt remained after the First World War, it is clear now that the principle of humanity has been adjusted to the requirements of the efficient military use of submarines. As Professor Lauterpacht has recognized, the problem of "unrestricted submarine warfare" is a part of the larger question concerning the validity of the combatant-noncombatant distinction in general war.[228] In referring to civilians on land who were the victims of the long-distance blockade, he has stated:

> The practice of two world wars was based on the view that no such sacrosanctity attaches to the civilian population at large as to make illegal the effort to starve it alongside the miltary forces of the enemy as a means of inducing him to surrender.[229]

It is certainly regrettable, but nevertheless a fact, that civilians who have

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[226] Concerning the sinking of the *Lusitania:* "The American public was horrified." Buehrig 30.

[227] 1 Garner 378.

[228] Lauterpacht, "The Problem of the Revision of the Law of War," 29 *Brit. Y.B.I.L.* 360, 374 (1952).

[229] *Ibid.*

embarked upon merchant ships which are engaged in the naval war effort in one way or another have shared the fate of those ships.[230]

In identifying objects of attack in the event of a future general war, it must be recalled that the nuclear-powered and nuclear-armed attack submarine is a much more efficient combatant unit than its predecessors of the World Wars. In general war it is most unlikely that other considerations will be given priority over those concerning military efficiency in the use of such submarines. It is probable, therefore, that merchant ships participating in the naval war effort of one belligerent will be subject to attack without warning by the submarines of the opposing belligerent. This has been appraised as lawful under the Protocol in World War II and it will be lawful also in a future general war if the past process of decision is a reliable guide.[231] The destructiveness of human values involved in the use of nuclear attack submarines would be even less disproportionate to their military efficiency than was the situation involving the use of traditional submarines in both World Wars.

Writing in 1934, Admiral Richmond stated:

> Effective as the submarine may be in attack upon mercantile shipping, she is of negligible use in its direct defense. A convoy cannot be defended by submarines. . . .[232]

The statement was not only accurate when made but remained valid during World War II. The advent of nuclear-powered submarines with high underwater speeds has probably changed the situation drastically. The contemporary nuclear attack submarine may be susceptible of efficient utilization in protecting surface merchant ships from enemy attack submarines. If submarine merchant ships and nonpowered towed submarine cargo carriers[233] are to be escorted effectively, the escorts must be submarines. In this context of possible future submarine warfare it is probable that submarine merchant ships will be subject to sinking without warning as their surface predecessors have been in two World Wars. There is no basis upon which to conclude that such sinkings would be a violation of the Protocol if the objects of attack were participating in any way in the war or hostilities.[234]

The world community interest in limiting violence is not advanced by

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[230] See the text accompanying *supra* notes 81, 82.

[231] Compare the view in Barnes, "Submarine Warfare and International Law," 2 *World Polity* 121, 189–90 (1960): "International Law as pertaining to submarine warfare would be immediately and consistently violated [in a future war]." "A change in the law of the sea, encompassing the submarine problem, is badly needed." *Id.* at 201.

[232] Richmond, *Sea Power in the Modern World* 177 (1934).

[233] Towed submarine cargo carriers were employed by the Japanese in World War II as stated in the text of Ch. I accompanying note 29.

[234] See the discussion in Hyde 1992–93.

the practice of subjecting merchant ships participating in the war or hostilities to submarine attack without warning even though the practice must be appraised as lawful. This situation is, however, only a part of the overall community interest. This broader community interest in limiting violence is not advanced by general war. The attempt to find a further limitation of violence in submarine warfare must be made in the context of limited war.

C. CLAIMS CONCERNING OBJECTS AND METHODS OF ATTACK IN LIMITED WAR

The Harvard Research, *Rights and Duties of Neutral States in Naval and Aerial War* states:

> It seems obviously impossible to distinguish in a Draft Convention between "small" wars and "large" wars and it is accordingly impossible to lay down two set of rules applicable to the two different types of situations.[235]

Draft conventions and other "restatements" often reveal excessive concern with abstract doctrinal formulations without sufficient regard to the great variations in the factual context which exist.[236] Considering the importance of the human values which are involved, it is worth the effort to consider objects and methods of attack in limited war situations. In addition, Professor Osgood has stated the important point that: "The decisive limitation upon war is the limitation of the objectives of war." [237] The same two types of limited war context which have been considered previously will be employed again.

1. Claims by Major Powers in Limited War

In a limited war between major powers involving the use of submarines, it may be confidently predicted that the newest and most efficient

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[235] Harvard Research, *Naval War* 487.

[236] See e.g. American Law Institute, *Restatement of the Foreign Relations Law of the United States passim* (1965). See the thoughtful criticism of the portions of this restatement concerning international agreements in Lissitzyn, "The Law of International Agreements in the Restatement," 41 *N.Y. Univ. L. Rev.* 98, 123–24 (1966):

> It is apparent that the Restatement format does not lend itself well to the clarification of the law in an area as rapidly changing and as little developed by judicial authority as that of international agreements The Restatement format makes impossible a really challenging and enlightening discussion of the many uncertainties and the probable direction of development of the law in light of the needs of the world community. . . . The result is an unfortunate impression of dogmatism and of a static conception of a highly dynamic branch of law—in short, of "a frozen cake of doctrine".

[237] Osgood 4.

types of nuclear attack submarines will be involved.[238] The central question concerns the mutual restraints relating to objects of attack which the major belligerent powers would recognize. A hopeful condition which may be postulated is that the enemy commerce at sea would be likely to be a much less significant object of attack than it was during the World Wars. There are several factors which tend to make this postulate a realistic one. First, a limited war between major Powers is unlikely to require a full effort by the productive forces of the economy. Second, it would probably not be necessary to devote a large proportion of a state's merchant marine to the functions of supplying the economy with necessary raw materials and of transporting troops and supplies to the battle areas. Third, to attempt to achieve complete interdiction of enemy commerce at sea, as was done during the World Wars, would make it very difficult to retain the limited characteristics of the war.

If the enemy commerce at sea were a less important object of attack, the risks involved in an all-out attack against enemy merchant shipping, including sinking without warning, would not be proportionate to the value of the military objective sought. In these circumstances, rational belligerents mindful of their self-interests would refrain from attacks upon enemy merchant vessels without warning.

It has been concluded that the Protocol does not extend its protection to merchant ships participating in the naval war effort.[239] This interpretation was made with reference to the context of general war and should not be applied automatically in limited war. In addition, the commerce in limited war which has just been described is not participating directly in the naval war effort. The merchant ships involved are actually performing functions closer to those which are regarded as peaceful than those deemed warlike. In this factual context, there are good reasons to extend the protection of the Protocol to them. The reasons are more persuasive if it is postulated that these merchant ships present no military danger to submarines. Consequently, the Protocol should be interpreted as applying to and protecting such merchant ships.

It is probable, even where sea commerce in general is not an important object of attack, that sea transportation to the actual battle areas will continue to be militarily necessary in order to maintain a flow of troops and supplies. Merchant ships engaged in such transportation could reasonably be regarded as subject to attack without warning. Since these merchant ships are participating in the war or hostilities, they should be deemed to be lawful objects of attack without warning under the Protocol. All merchant ships would, of course, be exempt from such attack if the major belligerents agreed, either expressly or by implication, only to regard

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[238] See Kuenne 177–92.

[239] See the text accompanying note 120 *supra*.

regular warships as the objects of attack without warning. If this were to be done, it would be a significant indication that the war was to be kept limited.[240]

2. Claims by Minor Powers in Limited War

In this type of limited war it is also possible that the enemy commerce at sea would not be a particularly important object of attack. In addition, there are other factors which can be expected to be especially effective as to minor powers. Such powers will probably not acquire the expensive and efficient nuclear attack submarines in the near future. The relative military inefficiency of their submarines in comparison with nuclear submarines may cause them to limit the scope of the objects of attack and the severity of the methods of attack. The particular objects of attack which are selected by minor powers should be influenced by their restricted military capabilities. There is little point in proclaiming enemy merchant ships to be objects of attack without warning if there is an inadequate submarine capability to carry out such attacks.

In this type of war the dangers of escalation from sinking without warning should also be considered. Further, if neutral merchant ships are sunk without warning as a result of errors in identification it could lead to possible further military involvement by a minor power which may be already involved near the limits of its military capability. It may be expected also that minor powers must take into consideration the interests of major powers which are not participants in the war. The common interests of the world community would be served effectively if the major powers indicated as overriding interest in restricting the war or hostilities.[241]

It has been suggested that there are some situations remote from the well-traveled sea lanes where the protection of the Protocol can be extended to merchant ships during a general war.[242] Such situations should certainly exist in a limited war between major powers, and there should be even more opportunities to apply the Protocol in a limited war between minor powers. The principal reason for this conclusion is that such a war may well present a number of fact situations in which merchant ships are not participating in the war or hostilities. In a situation involving a single merchant ship the tactical context may permit, and even obligate, a submarine to comply with all the requirements of the Protocol applicable to

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[240] See generally Cagle, "Sea Power and Limited War," 84 *Nav. Inst. Proc.* No. 7, p. 23 (1958).

[241] The role of the United States and the Soviet Union in the Anglo-French-Israeli invasion of the Sinai-Suez area is regarded as an example of the point made in the text. See Campbell, *Defense of the Middle East: Problems of American Policy* 109 (Rev. ed. 1960).

[242] See the text accompanying note 120 *supra*.

merchant ships which are not participating in the war or hostilities. In such situations the submarine commander would be required to make an evaluation of the particular case, considering its tactical context and balancing and applying the principles of military necessity and humanity. The fact that such individualized evaluations were not feasible in the World Wars is not a persuasive reason to fail to attempt them in the different contexts of some limited war situations.

Finally, the obligations to survivors in this type of limited war, as well as in one between major Powers, should be emphasized. Aside from situations of urgent military necessity of the kind referred to by Admiral Nimitz [243] which are more typical of general war situations, a legal obligation should be recognized to put personnel in a place of safety before sinking or, at the least, to rescue survivors after sinking and accord them status as prisoners of war or as protected persons.[244]

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[243] See the text accompanying note 191 *supra*.

[244] Geneva Convention Relative to the Treatment of Prisoners of War, art. 4 (1949); Geneva Sea Convention, art. 13.

CHAPTER V

CLAIMS CONCERNING LAWFUL WEAPONS OF BELLIGERENT ATTACK

The chapters of the present study appraising the claims and counter-claims concerning combatants, areas of operation, and objects and methods of belligerent attack each considered subject matter which is highly specialized in terms of submarines and submarine warfare. Modern submarines, however, do not possess completely distinctive weapons. The traditional gunnery, torpedo, and mine weapons of submarines which employ non-nuclear explosives are also used by surface warships. In the same way, the nuclear and thermonuclear weapons, or substantially similar ones, which are employed by modern attack and missile submarines may also be used by other combatant units including surface warships, military aircraft, and land- or space-based launching systems.[1]

A consideration of the law applicable to submarines must necessarily include a juridical appraisal of the weapons which these warships are capable of using. This is a matter of particular urgency in connection with the contemporary "weapons of mass destruction." [2] The existence of such weapons has changed the quoted phrase from a figure of speech to a fact.

A. THE HISTORIC EXPERIENCE CONCERNING THE ABOLITION OR LIMITATION OF WEAPONS

Although international law has not been particularly successful in abolishing or controlling weapons of war in the past, it is nevertheless essential to have an awareness of the historic experience. It should provide meaningful background to the contemporary attempts to achieve juridical con-

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[1] The nuclear and thermonuclear weapons of modern submarines are surveyed in the text of Ch. I accompanying notes 39–43. For a prescient prediction of the offensive capabilities of modern submarines see Bush, *Modern Arms and Free Men* 68–70 (1949). Concerning space-launching systems see *infra* note 30.

[2] Such weapons are regarded as including biological, chemical, and nuclear ones. See generally Dept. of Defense, *The Effects of Nuclear Weapons* (rev. ed. 1962); Dept. of the Army, *Chemical, Biological and Radiological Operations* (FM 3–5; 1961).

trol of weapons.[3] This history should indicate, at the least, that modern problems concerning this subject are not entirely novel.

In early warfare, knights had substantial military advantages over peasant soldiers. Dr. Royse states that, prior to the introduction of the crossbow, "not a single knight would be killed in a battle, due to the heavy protecting armour." [4] When the crossbow came into use, it appeared to be a terrible and indiscriminate weapon of destruction since it could be used to kill mounted knights as well as humble foot soldiers.[5] The Second Lateran Council of the Roman Church (1139) prohibited the use of the crossbow and described it as a weapon which was "hateful to God and unfit for Christians." [6] In spite of this formal interdiction, the crossbow remained in general military use until more efficient weapons employing gunpowder replaced it. Dr. Royse has summarized the result of this advance in weapons technology:

> Powder and firearms in early times were also cursed as the devil's implements, and the Chevalier Bayard, fatally wounded in 1524 by a bullet, found some satisfaction in the thought that he had never given quarter to a musketeer. There was no pause, however, in the use of explosives and firearms.[7]

The principal limitation upon weapons stated by Hugo Grotius in 1625 in his classic study of *The Law of War and Peace* was the prohibition of the use of poison.[8] He stated that this prohibition existed "from old times."[9] It probably reflected the inefficiency of poison as a weapon. The Grotian interdiction was formulated in broad terms so as to include poisoning food and water as well as using weapons the points of which were tipped with poison.[10] The contemporary prohibition is stated in the Regulations Annexed to Hague Convention IV (1907) and prohibits the employment of "poison or poisoned weapons." [11] Neither of these is likely to be efficient in modern war but they are probably still employed upon occasion by guerrilla and tribal military forces.

The Declaration of Paris (1856) has been examined in the considera-

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[3] See e.g. *Sixth Annual Report of the U.S. Arms Control and Disarmament Agency,* H.R. Doc. No. 58, 90th Cong., 1st Sess. (1967); U.S. Arms Control and Disarmament Agency, *Documents on Disarmament 1965* (1966).

[4] Royse 166 (footnote omitted).

[5] Royse 166. The crossbow was a leveler since it deprived knights of their prior status of "equal but . . . more equal." See Orwell, *Animal Farm* 148 (1946).

[6] Royse 166; see also Nussbaum, *A Concise History of the Law of Nations* 18 (rev. ed. 1954).

[7] Royse 167 (footnotes omitted).

[8] Grotius, *De Jure Belli ac Pacis Libris Tres,* Bk. III, Ch. 4, sections 15–16, 2 *Classics of International Law* 651–53 (Kelsey transl. 1925).

[9] *Id.* at Ch. 4, section 15, p. 652.

[10] *Id.* at Ch. 4, sections 15–16, pp. 651–53.

[11] Art. 23(a).

tion of the traditional law of naval warfare.[12] Its first article provided for the abolition of privateering. In spite of the abuses connected with privateering which sometimes made it very similar to piracy,[13] the United States refused to accede to the Declaration. In his Message to the Congress of December 2, 1856, President Pierce stated:

> The aggressive capacity of great naval powers would be thereby [through the abolition of privateering] augmented, while the defensive ability of others would be reduced.[14]

The Declaration of St. Petersburg (1868) [15] prohibited the use of projectiles or bullets of a weight below 400 grammes (approximately fourteen ounces) which were explosive or which contained "fulminating or inflammable substances." [16] At the time of the Declaration, such bullets would have caused more serious wounds and a greater probability of death to troops against whom they were used than would the non-explosive bullets then in use. After the development of flying vehicles for military purposes, it became apparent that such projectiles had great military efficiency and they have been used in aerial warfare starting with the First World War.[17]

The Hague Conferences of 1899 and 1907 have been examined from the standpoint of the combatant status of submarine warships.[18] Another significant aspect of the Conferences concerns the treatment of aerial bombardment. This subject is particularly suitable for brief examination here because the strategic bombardment capability of the modern fleet ballistic missile submarine is one contemporary method of conducting aerial bombardment.

Although the 1899 Conference was not successful in "abolishing" submarines, it produced a Declaration concerning aerial bombardment which provided:

> The Contracting Powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature.[19]

The balloon had not been used for the launching of projectiles or explosives although it had been employed in war for purposes of observation. Neither the free nor the captive balloon could be controlled in a way which made it likely to be an efficient bombing instrumentality. Con-

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[12] The Declaration is set forth in the text of Ch. IV accompanying note 32.

[13] Colombos 471–72.

[14] 1 Savage, *Policy of the United States Toward Maritime Commerce in War* 394, 395 (Dept. of State 1934).

[15] Text in 2 Dept. of the Army, *International Law* 40 (Pamphlet 27–161–2; 1962).

[16] *Ibid.* Larger explosive or shrapnel projectiles were not prohibited.

[17] Royse 144.

[18] See the text of Ch. II accompanying notes 11–24.

[19] 2 Scott 153.

sequently, its use could be prohibited for a time without imposing a military detriment upon any of the major powers. These considerations were persuasive in bringing about the unanimous vote for a temporary interdiction of it as an instrument of aerial bombardment.[20]

The "other new methods of a similar nature" referred to in the Declaration were of particular significance. Since the Wright brothers' heavier-than-air flight experiments were not successful until 1903, it seems probable that this reference to new methods concerned lighter-than-air dirigibles. The interdiction of aerial bombardment proposed by Russia had been at a time when Russian dirigible efforts had failed but experiments conducted by other states were being successful in varying degrees.[21] Since the dirigible could be maneuvered and controlled, except in unfavorable weather conditions involving high winds, it could probably become an efficient aerial bombing vehicle. This prospective technical improvement in dirigibles was the principal reason for changing the original Russian proposal of permanent interdiction to a five-year term.[22] During the five-year period, there was no inhibition upon further experiments with dirigibles and the matter of "new methods" of aerial bombing could be considered again after the expiration of the term in 1904.

The Hague Conference of 1907 met in an atmosphere which was not conducive to the restriction of efficient weapons.[23] In addition, substantial technical improvements had been made in dirigibles.[24] A number of the major European military powers had such "airships" in use. In Germany, the famous Count Zeppelin was demonstrating their technical capabilities.[25] France had an airship program second to none.[26] Although it had no actual wartime experience to its credit, it was becoming clear that the dirigible airship had significant military potential. Like the balloon, it had a weight-lifting ability but it had the added advantage of being able to direct its bombs to a particular military objective. The airship's then relatively great altitude capability and the lack of antiaircraft guns and other surface-to-air weapons made it almost immune from ground attack. It should also be mentioned that the heavier-than-air airplane was in such a primitive stage of development that its subsequent effectiveness as an antiairship device was not then foreseen.

In the military context just described, the minor military powers joined with Great Britain in favoring a renewal of the 1899 ban on aerial bom-

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[20] 1 *id.* 651.
[21] Royse 39.
[22] *Id.* at 40.
[23] *Id.* at 54–55.
[24] *Id.* at 56–59.
[25] *Id.* at 63–64.
[26] *Id.* at 67–68.

bardment.[27] The British correctly foresaw the de facto end of their military advantages based on their geographical situation as an island, and the smaller powers with comparatively inadequate scientific capabilities recognized that the major powers would quickly achieve superiority in airships. The continental powers, and in particular France and Germany, were eager to retain and improve the airship.[28] The result was that no limitations were placed upon aerial bombardment.

The lack of restrictions upon aerial bombardment at the 1907 Conference gave at least some indication that the airship and the heavier-than-air aircraft would be accorded status as lawful combatant units in future war or hostilities. Such status was subsequently established beyond any doubt.[29] As shown in Chapter II, the lawful combatant status of the submarine warship has been firmly established after a long decisional process. Thus in the present century combatant units which have been found to function with military efficiency in relatively new warfare environments, the air and under the sea, have been accorded lawful status.[30]

Dr. Royse has accurately summarized the results of attempted weapons limitation at the Hague Conferences.

> Such destructive weapons, for instance, as the high explosive shell, the shrapnel, mines or torpedoes, were retained as legitimate means of warfare, whereas the inefficient expanding and explosive bullets were condemned along with the perfectly useless free balloons. The proceedings of the Hague Conference[s] demonstrate rather that a weapon will be restricted in inverse proportion, more or less, to its effectiveness; that the more efficient a weapon or method of warfare the less likelihood there is of its being restricted in action by rules of war.[31]

Unfortunately, this analysis does not provide a realistic basis for a favorable prediction concerning present and future weapons abolition or limitation. The tremendous capabilities of modern weapons of mass destruction, however, make the objective of their effectively sanctioned abolition much more urgent now than was weapons abolition at the time of the Hague Conferences. Until this objective is reached the juridical control of such weapons remains a vital goal.[32]

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[27] *Id.* at 59, 66.

[28] *Id.* at 67.

[29] Spaight 76–107 considers the "combatant quality" or status of aircraft.

[30] "Objects" carrying weapons in space are prohibited by art. 4 of the United Nations draft Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. Text in 55 *Dept. of State Bull.* 952, 953 (Dec. 26, 1966).

[31] Royse 131–32.

[32] See the recommendation concerning disarmament in the Preface to this study.

B. CLAIMS CONCERNING WEAPONS OF ATTACK IN GENERAL WAR

In appraising juridical control of weapons of attack it is necessary to distinguish between the claims concerning the legality of particular weapons per se and the related claims concerning the legality of the use of the weapons. It is clear that a weapon (or a combatant unit) otherwise legal can be employed in an illegal manner.[33]

It is probably accurate to state that the juridical criteria which has been developed to determine the lawfulness of particular weapons is based upon both the principles of military necessity and of humanity.[34] In the application of this criteria, however, the principle of humanity is usually considered only after the principle of military necessity is given controlling weight. The result is, in general, that only weapons which cause destruction and injury which is unnecessary for the attainment of military objectives are deemed unlawful.

Professor Hyde stresses the role of military decision in stating the "underlying legal principle" in determining the lawfulness of weapons:

> The task of specification is primarily a military rather than a legal one, calling for technical opinion whether the blows to be inflicted by new instrumentalities such as those designed and employed in the course of World War I possess a military value which outweighs in significance the severity and magnitude of the suffering caused by their use and likely to be incidentally felt by non-combatants.[35]

In a comparable formulation of the basic criteria, Professor Garner states:

> The employment of new and powerful inventions of destruction or of new methods is, of course, not to be condemned and ruled out merely because they are new or because they are more effective than those formerly employed, as a few sentimentalists in every age have wished to do. The true test of their lawfulness is rather whether they can be employed without inflicting superfluous injury upon those against whom they are employed, whether they "uselessly aggravate the sufferings of disabled men," whether their effect is cruel and inhumane, and the like.[36]

Dr. Spaight has also set forth the same accepted criteria in an unusually blunt formulation:

It is really by its fruits that the engine of war is judged. The test

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[33] The appraisal in Ch. II, for example, was restricted to the submarine's combatant status and left open the issues relating to the lawfulness of its various uses.

[34] Dr. Royse refers to the same principles functionally as "utilitarian grounds" and "social sanction." Royse 137 and *passim*.

[35] Hyde 1814.

[36] 1 Garner 282. Prof. Garner argued the unlawfulness of particular uses of German submarines in World War I but did not question their lawful combatant status. *Id.* at 355–83.

> of lawfulness of any weapon or projectile is practically the answer one can give to the question—What is its "bag"? Does it disable so many of the enemy that the military end thus gained condones the suffering it causes? [37]

The criteria for a weapon to meet the test of lawfulness may be summarized by stating that it must not cause a destruction of values which is disproportionate to the military advantage gained through its use.[38] The historical experience in applying the criteria appears to indicate that weapons will be upheld as lawful except where there is a great disparity between the ensuing destruction of values and the military advantage gained. An obvious example of illegal weapon use would be a delayed action bomb which is dropped by an aircraft during the war but explodes, killing and wounding civilians, after the war has ended.

Conventional rules elucidate, but do not appear to change, the customary law criteria stated by the writers. The Regulations Annexed to Hague Convention IV (1907), for example, provide that it is especially forbidden "to employ arms, projectiles, or material calculated to cause unnecessary suffering." [39] Since it is clear that the use of all efficient weapons of war causes human suffering, this conventional rule should be interpreted reasonably as prohibiting only that suffering which is "unnecessary" in relation to the military advantage derived from the use of the weapon. The U.S. Army's official publication on land warfare law provides helpful interpretation:

> What weapons cause "unnecessary injury" can only be determined in the light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect.[40]

There is little or no indication in "the practice of States" that efficient weapons which bring substantial net military advantage of their belligerent users have not been used because of ancillary injury and suffering caused to the enemy belligerent. In the instances where efficient weapons have not been used it is probable that other reasons have existed such as the potential threat of the use of the same weapon by the enemy and consequent doubts as to its net military advantage.[41]

1. Traditional Naval Weapons

The appraisal under the present heading examines the lawfulness of traditional weapons and excludes consideration of weapons with mass destruction capabilities. Early naval warfare often involved the maneuver-

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[37] Spaight, *War Rights on Land* 76–77 (1911).

[38] See the statement of the test by Prof. McDougal and Dr. Feliciano quoted in the text accompanying *infra* note 128.

[39] Art. 23(e). Art. 22 of the same Regulations provides this general admonition: "The right of belligerents to adopt means of injuring the enemy is not unlimited."

[40] *Law of Land Warfare* paragraph 34(b).

[41] E.g. the nonuse of gas weapons in combat in World War II.

ing of warships with the object of boarding enemy vessels and capturing them through procedures which included hand-to-hand combat.[42] An interesting early form of chemical weapon for use in naval warfare, "Greek fire," was invented about 600 B.C.[43] Its significant characteristic was that it burst into flames spontaneously upon contact with water. Apparently the destruction of values involved in its use was not considered disproportionate to its efficiency.

Guns, torpedoes, and mines are among the most traditional naval weapons which are still in use and they have been employed by surface and submarine warships alike.[44] Their legality appears to have been simply assumed rather than argued. The muzzle loading naval gun dealt terrible destruction to the opposing enemy in the days of sailing warships, but its efficiency apparently justified it juridically. It is well known that the naval gun and its projectiles have been greatly improved in range, accuracy, and destructive power in the present century. Thus the long-range guns firing projectiles weighing about one ton which were used at Jutland and at Surigao Strait destroyed enemy capital ships and killed and wounded enemy personnel. No question was raised concerning their lawfulness. Had such questions been raised, they would have been rejected because of the undoubted military efficiency of the guns.

The torpedoes which were immortalized by Admiral Farragut at Mobile Bay were stationary explosive devices.[45] Hague Convention VIII (1907) recognized generally the lawful status of self-propelled torpedoes by forbidding the use of such torpedoes which "do not become harmless when they have missed their mark."[46] In both World Wars torpedoes were high-speed devices with high-explosive warheads which could be accurately aimed at the selected object of attack. They constituted the principal armament of submarines and their legality as weapons was not challenged.[47] During the Second World War the Japanese developed and used a much larger and more efficient torpedo than those generally in use at the time. It was termed a "Kaiten" or "long lance torpedo" and may be described accurately as either a large torpedo or a small submarine manned by a single crewman who guided the device to the target and was killed

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[42] See Potter & Nimitz 1–20.

[43] Report of the House Committee on Science and Astronautics, *Research in CBR (Chemical, Biological, and Radiological Warfare)*, H.R. Rep. No. 815, 86th Cong., 1st Sess., 3 (1959).

[44] The naval aspects of weapons considered in the textual paragraph are based upon Potter & Nimitz *passim*.

[45] The words attributed to the Admiral are: "Damn the torpedoes! Full steam ahead!" The Admiral stated that he sought guidance through prayer. Potter & Nimitz 320.

[46] Art. 1, paragraph 3. The text of the Convention is in 2 Scott 428.

[47] The lawfulness of some of their selected objects of attack was, of course, challenged as indicated in Ch. IV *passim*.

in the ensuing explosion.[48] Even though it carried a larger explosive charge and created greater destruction than smaller torpedoes, its lawfulness was assured because its destructiveness was not disparate in relation to its military efficiency. By the same reasoning, the British midget submarines or "X-craft" which carried out successful attacks upon the German battleship *Tirpitz*[49] are lawful whether they are regarded as weapons or as submarine combatant units.

The military efficiency of the automatic sea mine was demonstrated during the Russo-Japanese War shortly before the opening of the Hague Conference of 1907.[50] The British delegation to this Conference initially proposed a total interdiction against the use of unanchored mines but later retreated to a more moderate position and, although expressing grave doubts about it,[51] adhered to the ensuing Convention. The German delegation regarded the mine as a necessary and efficient instrument of warfare.[52] Hague Convention VIII provides in part:

> It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.[53]

It was always possible, of course, for a belligerent employing mine warfare to claim that the mines were laid for additional purposes beyond that of intercepting commercial shipping. The ineffectiveness of the conventional provision was demonstrated by the experience in both World Wars where mines caused great destruction of human and material values. Mines were scattered off enemy coasts and were systematically employed in minefields and mine barrages.[54] The most notable example of the latter was the great North Sea Mine Barrage laid by the United States which has been referred to previously.[55] Mines were also employed in both World Wars as an ancillary method of enforcing submarine operational areas.

Hague Convention VIII provides further that anchored automatic contact mines must be so constructed as to become harmless when they have broken from their moorings[56] and that similar unanchored mines must be constructed so as to become harmless within an hour of their launch-

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[48] The technical statements concerning the "Kaiten" are based upon Yokota & Harrington, *Suicide Submarine!* (1962); Yokota & Harrington, "Kaiten—Japan's Human Torpedoes," 88 *Nav. Inst. Proc.* No. 1, p. 55 (1962).

[49] Factual description appears in Wilkinson, "*Tirpitz* Tale," 80 *Nav. Inst. Proc.* 375 (1954).

[50] Potter & Nimitz 354.

[51] 1 Scott 581, 585–86.

[52] *Id.* at 586–87.

[53] Art. 2.

[54] See e.g. Potter & Nimitz 456, 470.

[55] See the text of Ch. III accompanying note 62.

[56] Art. 1, paragraph 2.

ing.[57] It is clear that the military efficiency of uncontrolled mines which are drifting about is doubtful since they might do substantial harm to the launching belligerent as well as to the enemy belligerent. There is no doubt that drifting mines subjected neutral shipping to hazards and damage which continued after the conclusion of active hostilities.[58] This continuing sea-mine danger in time of peace demonstrated violation of these conventional law doctrines.

Sea mines, like other traditional naval weapons, have undergone continuing technical improvement. In the Second World War acoustic and magnetic mines, among other types, were employed.[59] None of these technological improvements have deprived sea mines of their status as lawful weapons since their increased destructiveness is not disproportionate to their military efficiency.

2. Traditional Naval Bombardment

Surface warships are the typical vessels which conduct traditional bombardment but submarines with deck-mounted guns have a bombardment capability.[60] The conventional rules concerning naval bombardment of objects of attack located upon land are formulated in Hague Convention IX Respecting Bombardments by Naval Forces in Time of War (1907).[61] The first article prohibits the bombardment by naval forces of undefended places. Article 2, however, provides for a substantial modification of the prohibition:

> Military works, military or naval establishments, depots of arms or war *materiel,* workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition.[62]

Thus, military objectives could be bombarded lawfully even though located in undefended towns and ports. In bombarding such undefended locations the naval commander was required to "take all due measures in order that the town may suffer as little harm as possible." [63] In summary, these conventional doctrines embody the test of the lawful military objective which is based upon the primacy of factors of military efficiency. The

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[57] Art. 1, paragraph 1.

[58] Reference is made to such hazards following the Russo-Japanese War in 6 Hackworth 503.

[59] Roskill 47–48, 117, 379.

[60] The three largest pre-World War II U.S. Navy submarines, the *Argonaut, Narwhal,* and *Nautilus,* each mounted two 6-inch guns (the same size typical of light cruisers). Parkes (ed.), *Jane's Fighting Ships 1934* 493. Shore bombardment by the *Nautilus* during World War II is described in Potter & Nimitz 799.

[61] Text in 2 Scott 436.

[62] Art. 2, paragraph 1.

[63] Art. 2, paragraph 3.

humanitarian factors involved in the concept of "undefended places" are given, at best, subordinate consideration.

Since Hague Convention IX did not specifically provide for the situation concerning defended places, it seems clear that even the modest limitations upon the naval bombardment of undefended places do not apply to places which are defended. In modern combat situations where a coastal state has some military air power, it is likely to be assumed that the state is defended.

In the juridical application of Hague Convention IX in both World Wars, defended land areas were lawful objects of attack. As a practical matter, of course, they could not be bombarded unless they were within the range of naval gunfire.[64] If the places on land were undefended, they were also lawful objects of attack providing that the military objectives referred to in article 2 of the Convention could be identified as targets. In this latter situation, harm to the civilian population which was incidental to the attack upon the lawful military objective was not prohibited. During the Second World War in both the Pacific and European theatres Allied naval gun power was employed as an effective part of the great amphibious attacks upon enemy-defended locations.[65]

3. Biological and Chemical Weapons

The principal weapons of the fleet ballistic missile submarine are Polaris missiles with the capability of carrying warheads containing either traditional explosives or nuclear or thermonuclear explosives.[66] Since these are the typical weapons, they may be regarded mistakenly as the only weapons of these submarines. General Rothschild, however, has written:

> As far as missiles are concerned, it is obvious to anyone with an acquaintance with toxic munitions, and who has seen a picture of a Polaris, that it could carry biological, and possibly chemical, agents.[67]

Chemical warfare and biological warfare have been defined as follows:

> Chemical warfare is the intentional employment of toxic gases, liquids, or solids to produce casualties, and the use of screening smoke

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[64] For example, the U.S.S. *Colorado,* a battleship which participated in ten major amphibious operations in the Pacific War, had a main battery of eight 16-inch guns. These guns had a maximum range of 33,300 yards. Parkes, *op. cit. supra* note 60 at 467.

[65] See Potter & Nimitz 745–48 and *passim.*

[66] These weapons are described in the text of Ch. I accompanying notes 39–40.

[67] Rothschild, *Tomorrow's Weapons: Chemical and Biological* xiv (1964). Prior to his retirement, General Rothschild was Commanding General, U.S. Army Chemical Corps Research and Development Command. *Id.* at xi. The same writer refers also to other U.S. Navy chemical warfare capabilities. *Id.* at 78.

> or incendiaries. Biological warfare is the military use of living organisms or their toxic products to cause death, disability, or damage to man, his domestic animals, or crops.[68]

An unusual feature of a biological weapon is that its first impact is designed to lead to successive ones.[69] Thus, a germ weapon which leads to a mass epidemic is like fire in that it is self-propagating. It is also like fire in that it does not distinguish between belligerent users of the weapon, the opposing belligerents, and neutrals among its victims. It is probably much less subject to effective military control by its belligerent user than is fire. Because of this, it is necessary to question the net military advantage to the belligerent user of a weapon which may inflict devastating injury upon friend and foe alike. While such biological weapons may be "efficient" in the sense of causing indiscriminate mass destruction, that efficiency which is relied upon as a factor in establishing the lawfulness of a weapon is military efficacy in the controlled destruction of lawful military objectives. In addition, it is clear that weapons which make civilians direct objects of attack are unlawful.[70]

The Hague Conference of 1899 agreed to a Declaration concerning chemical warfare which provided:

> The Contracting Powers agree to abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases.[71]

The gases referred to are now recognized to be but a part of the comprehensive arsenal of chemical warfare. At the time the Declaration was adopted there had been no adequate experimentation much less use, concerning gas shells, and the action of the Conference, consequently, was taken without knowledge as to whether the destructiveness caused by gas shells would be in excess of that necessary to attain a lawful military objective. Captain Mahan has indicated the inadequacy of the knowledge on the subject.[72]

The military effectiveness of poison gas was demonstrated during the First World War.[73] Even though this chemical weapon presents some of the same problems concerning indiscriminate destruction as do biological weapons, it seems probable that chemical weapons are more controllable than biological ones.

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[68] *Op. cit. supra* note 43 at 3.

[69] See e.g. the hypothetical biological warfare attack upon the United States where the weapons are assumed to be launched from submarines. It is described in the [Washington] Evening Star, Feb. 9, 1967, A–12, cols. 1–7.

[70] See the criteria quoted in the text accompanying *infra* note 128.

[71] Text in 2 Scott 155.

[72] Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1899* 283 (1920).

[73] *Op. cit. supra* note 43 at 3–4.

In initiating the use of gas in land warfare in 1915 Germany avoided the precise wording of the Hague Declaration by disseminating the gas through canisters fixed to the ground with favorable wind conditions being relied upon to direct the gas against the enemy.[74] The Allied Powers retaliated in kind, and before long gas attacks were carried out by the use of cylinders and bombs as well as by the projectiles forbidden by the Hague Declaration.[75] In addition to the claims of legal right, reprisals were invoked by both sides.[76] By the end of the war gas attacks were in common use, although regarded with considerable reprobation except when used against the enemy.[77]

At the end of World War I gas weapons were abolished for the defeated powers. The Treaty of Versailles with Germany, for example, provided in relevant part:

> The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.[78]

Similar prohibitions were placed in the other peace treaties.[79]

The principal attempt to abolish gas as a weapon is set forth in the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (1925).[80] This Gas Protocol, using language substantially identical to that in the unratified Washington Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare (1922),[81] provides:

> Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world . . .[82]

The parties to the Gas Protocol agreed to "accept the prohibition" and also agreed "to extend this prohibition to the use of bacteriological methods of warfare. . . ." [83] Most of the great powers, except the United States and Japan, became parties to the Gas Protocol.

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[74] 1 Garner 272.

[75] *Id.* at 272–73.

[76] *Id.* at 273.

[77] The propaganda and psychological attitudes of the time concerning the use of gas, and submarines as well, are described in Lasswell, *Propaganda Technique in the World War* 111–12 (1927).

[78] Art. 171.

[79] The Treaty of St. Germain with Austria, art. 135; the Treaty of Trianon with Hungary, art. 119; the Treaty of Neuilly with Bulgaria, art. 82; the Treaty of Sevres with Turkey, art. 176. The cited treaties appear in 1 & 2 Carnegie Endowment for International Peace, *The Treaties of Peace 1919–1923* (1924).

[80] Text in 3 Hudson, *International Legislation* 1670 (1931).

[81] Art. 5. Text in *Wash. Conf.* 888.

[82] *Op. cit. supra* note 80 at 1671.

[83] *Ibid.* The Gas Protocol does not provide for any inspection procedures.

There is convincing evidence that Fascist Italy used gas warfare against primitively armed tribesmen during the attack upon Ethiopia.[84] There is also evidence that Japan used it from time to time against the Chinese.[85] It is usually stated that gas warfare was not employed during the Second World War. This statement is accurate if it is interpreted as restricted to the use of gas in combat situations. During the war, President Roosevelt indicated that the United States would not employ gas warfare unless it was first used by the Axis Powers.[86] Since both sides had a substantial chemical warfare capability, it is probable that the Axis Powers could not foresee a net military advantage in using gas. The result was an effective deterrence of the use of gas weapons [87] not unlike the present deterrence of the use of nuclear weapons.

The Nazi murder of millions of innocent men, women, and children is one of the most terrible and tragic events in history. It is well known that poison gas was one of the principal weapons used in perpetrating these crimes against victims who were regarded as "inferior" in the Nazi ideology. The reports of the various war crimes tribunals are replete with the details of these atrocities.[88]

Chemical and biological weapons, along with nuclear ones, comprise the principal instruments of mass destruction in the contemporary arsenal for total war. The nerve gases, developed by Germany during the Second World War, are among the most significant in the current chemical warfare stockpiles.[89] They include Tabun (GA) and Sarin (GB). Less than a minute of exposure to either of these gases is fatal and casualties are created before the presence of the gas can be detected.[90] They penetrate the body mechanism either through inhalation or by liquid drops which enter through the skin and disrupt nerve signals to the muscles.[91]

It may not be assumed accurately that the chemical and biological arsenal only comprises weapons of lethal characteristics. It also includes weapons which are only temporarily disabling. A riot-control device such

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[84] *Op. cit. supra* note 43 at 4.

[85] *Ibid.*

[86] See 8 *Dept. of State Bull.* 507 (1943).

[87] Prof. Schelling regards the nonuse of gas in World War II as enforced by the threat of reciprocal use: *Arms and Influence* 131 (1966).

[88] See e.g. 1 *I.M.T.* 251–53; United States v. Ohlendorf ("The Einsatzgruppen Case"), 4 *Trials of War Crims.* 1, 199, 213; United States v. Brandt ("The Medical Case"), 1 *Trials of War Crims.* 1, 314–54 (this case involved "medical"experiments with gas used upon the victims); The Zyklon B Case ("Trial of Tesch"), 1 *Reps. U.N. Comm.* 93.

[89] *Op. cit. supra* note 67 at 32–35.

[90] *Op. cit. supra* note 43 at 6.

[91] *Ibid.* Description of the clinical symptoms appear in *ibid.*

as tear gas is a well-known example.[92] Whether in a general war or in a limited one, it is obviously more humanitarian to disable guerrilla troops who are located in a cave or a similar position by the use of tear gas rather than to incinerate them with a flamethrower.

General Rothschild recommends the use of gas warfare for humanitarian reasons as well as for military ones. Referring specifically to the United States amphibious attack upon Betio Island, Tarawa Atoll in 1943, he emphasizes the almost complete destruction of the defending Japanese forces and the heavy casualties among U.S. Marines.[93] These casualties among the attackers took place in spite of the tremendous aerial and gunfire bombardment preceding the landing. General Rothschild states that a gas warfare attack upon Betio would have drastically reduced both United States and Japanese casualties. In his view, many "more [Japanese] probably would have lived and recovered completely, following gas attacks" even if mustard gas had been used.[94] He inquires:

> In fighting without toxic [chemical] weapons, then, we are being humane to whom? To the Americans who were killed or wounded unnecessarily? To the Japanese who were killed almost to a man by being burned out of their shelters with flame throwers, or forced out with white phosphorous grenades or hand grenades so they could be shot? [95]

The sources of the doctrines concerning the control of biological and chemical warfare comprise both conventional and customary law. The principal conventional source is, of course, the Geneva Gas Protocol (1925) which prohibits the initial use of biological and chemical warfare between the adhering states. A significant issue concerning customary international law as a source of relevant doctrines must be considered. Has the Gas Protocol been accepted as customary law so that all states, including those which did not adhere to it, are now forbidden the initial use of chemical warfare? Based upon the substantial nonuse of chemical warfare in combat situations since the conclusion of the First World War, Professor O'Brien has made a careful argument that there now exists customary law binding upon all states which forbids the first use of such warfare.[96] There

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[92] A brief description is provided in *op. cit. supra* note 43 at 6, paragraph 4.

Defoliation agents come under the heading of chemicals but are harmless to humans.

[93] *Op. cit. supra* note 67 at 4–5.

[94] *Id.* at 5.

[95] *Ibid.* Statistics which indicate a higher rate of survival in World War I among troops injured by gas than among those injured by other weapons appear in *op. cit. supra* note 43 at 4, paragraph 1.

[96] O'Brien, "Biological/Chemical Warfare and the International Law of War," 51 *Geo. L.J.* 1, 32–36 (1962).

Prof. Tucker states generally that there is a customary rule prohibiting poison gas. Tucker 52. He considers weapons in *id.* at 50–55.

is no doubt as to the desirability of this conclusion concerning the existence of a comprehensive prohibition based upon the customary law. Unfortunately, there is serious doubt as to whether or not the nonuse of gas relied upon indicates customary lawmaking. It seems more probable that it reflects rather the common conviction of belligerents as to the lack of net military advantage in employing chemical weapons in situations where these are possessed by both sides.[97]

The Gas Protocol also prohibits the use of "bacteriological methods of warfare." [98] It is clear, therefore, that the first use of biological warfare is also prohibited as between the adherents to the Gas Protocol. It is rather difficult, however, to attempt to make a customary law argument based upon the nonuse of biological warfare analogous to that which Professor O'Brien has made concerning chemical warfare. One reason is that biological warfare has not been used at all. Its nonuse since the Gas Protocol in 1925, consequently, cannot be claimed with much conviction to demonstrate the development of applicable customary law. The result of this is that the first use of biological warfare is prohibited only to the states which adhere to the Gas Protocol.

The contemporary situation may be summarized by stating that there is a conventional and possibly also a customary prohibition upon the first use of chemical warfare and a conventional prohibition only upon the first use of biological warfare. As Professor O'Brien has demonstrated, these prohibitions are more apparent than effective.[99] There are convincing reasons which support this conclusion of the lack of effectiveness or sanction of the prohibitions. For example, there are apparently substantial stockpiles of biological and chemical weapons. In addition, there is no limitation upon scientific inquiry and development of these weapons in the existing doctrines. There are, indeed, no inspection procedures whatsoever to implement the Geneva Gas Protocol. In this context, peaceful states which neglect research and development in biological and chemical weapons for both defensive and offensive purposes act at their peril.[100]

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[97] Prof. O'Brien recognizes some of the considerations stated in the text but he regards them as consistent with customary lawmaking in this situation. O'Brien, *op. cit. supra* note 96.

[98] The context of the quoted words is indicated in the text accompanying *supra* notes 82–83.

[99] O'Brien, *op. cit. supra* note 96 at 55–56.

[100] Description and criticism of such research and development appears in Langer, "Chemical and Biological Warfare (I): The Research Program," 155 *Science* (pub. of the Amer. Assoc. for the Advancement of Science) 174 (Jan. 13, 1967); Langer, "Chemical and Biological Warfare (II): The Weapons and the Policies," 155 *id.* 299 (Jan. 20, 1967). The concern of some scientists about the subject as expressed in a petition to President Johnson states, in part: "The employment of any one CB weapon weakens the barriers to the use of others." *Id.* at 302. See also the inserted comment entitled "University of Pennsylvania: It's Hard to Kick the Habit." *Id.* at

The neglect of such research and development could result in placing the most peaceful states in the world community at the mercy of the least peaceful ones.[101]

The relevant prohibitions upon the use of biological and chemical warfare extend, as stated above, only to an interdiction of the first use of these weapons. This interpretation is required by the availability of the doctrines of legitimate reprisal which legalize the use of otherwise unlawful weapons in response to the prior use of such weapons. Where a biological or a chemical weapon is used illegally in violation of the applicable doctrines, it seems clear that the use of these weapons, or either of them, in retaliation could be justified juridically as legitimate reprisals.[102] This assumes, of course, that the retaliatory use is directed and controlled and does not involve militarily meaningless mass destruction.

4. Nuclear Weapons

a. THE LAWFULNESS OF NUCLEAR WEAPONS

In the foregoing subheadings and in the ensuing text the word "nuclear" is used broadly to cover both nuclear and thermonuclear weapons except where a distinction is made between them explicitly or through the context. It is a commonplace observation that a nuclear weapon, because of its massive destructive capability, is not "just another weapon." Such a basic energy weapon involves the very rapid release of a tremendous amount of energy within a small space by the fission or fusion of atomic nuclei.[103] It is difficult to conceive the force and ensuing damage from the resulting explosions which may now be produced. All individuals who cherish moral values, and human life itself, must be appalled by the destructiveness of these weapons. A useful explanation in relatively nontechnical language of the blast and other effects involved appears in the latest revision of *The Effects of Nuclear Weapons*.[104]

The legal scholar who values human dignity and consensual as opposed to coercive procedures has a particular obligation to attempt to advance the effective legal control of these weapons. Unless international lawyers provide constructive leadership in solving this central challenge of our

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177. The University of Pennsylvania responded to the pressure campaign against chemical and biological research contracts with the U.S. Government by giving them up. See "Spice Rack and Summit: A Season's Discontent over Classified Research," 65 *Pennsylvania Gazette* No. 7, p. 14 (1967).

[101] See generally Stowell, "The Laws of War and the Atomic Bomb," 39 *A.J.I.L.* 784 (1945).

[102] See Prof. O'Brien's treatment of reprisals in this context: *op. cit. supra* note 96 at 43–49, 58–59.

[103] Nuclear explosions are the result of fission and thermonuclear ones are the result of fusion.

[104] U.S. Dept. of Defense, *The Effects of Nuclear Weapons* (rev. ed. 1962).

times, the result could be the destruction of human life and social processes on a massive scale.

The present appraisal focuses narrowly upon the issue of the lawfuless of nuclear weapons per se. Subsequent appraisal will conisider the issues involved in determining the lawfulness of some of the uses of these weapons. Their capability of mass destruction [105] and other characteristics must compel humanitarians to wish devoutly that they may be accurately characterized as illegal. One should not, however, summarily appraise these weapons as "unlawful" without consideration of the several relevant issues including, for example, the availability of sanctions to make the appraisal meaningful.

Some international lawyers, acting upon humanitarian motives, have attempted to declare the existing illegality of nuclear weapons. These lawyers have placed heavy reliance upon certain international conventions as well as general principles of customary international law. Since the conventions and principles which are invoked long preceded the existence, or even the serious contemplation, of nuclear weapons, the arguments to support the claim of illegality must necessarily employ analogy and extrapolation.

The St. Petersburg Declaration (1868) prohibiting the use of weapons "which would uselessly aggravate the sufferings of disabled men, or render their death inevitable" [106] is one of the conventions relied upon. Another conventional formulation which is functionally similar to the first clause of the Declaration appears in the Hague Regulations (1907). It especially prohibits the use of "arms, projectiles, or material calculated to cause unnecessary suffering." [107] Both of these provisions are usually interpreted as manifestations of the basic principle requiring a reasonable proportionality between the military efficiency of the weapon and the ancillary destruction of human values. Dr. Singh, however, reasons that even if the other destructive effects of nuclear weapons explosions are not considered, nuclear radiation combined with the radioactive fallout come within the quoted prohibition in the Hague Regulations.[108] Perhaps the

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[105] In a single strike, naval aircraft could exceed, by several times, the weapon power delivered by more than 204,000 offensive naval air sorties during three years of the Korean War. Indeed, on a single modern carrier, in the space of a few steps, one could walk about and pat the lethal warheads of weapons whose destructive power exceeded all the ordnance the U.S. Navy had exploded in its entire history.

Cagle, "A Philosophy for Naval Atomic Warfare," 83 *Nav. Inst. Proc.* 249, 251 (1957).

Nef, *War and Human Progress,* 254 (1950) warns against the illusory view that more frightful weapons of destruction might impose limits on war.

[106] Text in Greenspan, *The Modern Law of Land Warfare* 315 (1959); 2 Dept. of the Army, *International Law* 40 (Pamphlet No. 27–171–2; 1962).

[107] Art. 23(e).

[108] Singh, *Nuclear Weapons and International Law* 150–52 (1959).

principal inadequacy of this argument is that it does not include a demonstration that the use of these weapons results necessarily in the destruction of human values which is out of all proportion to their military efficiency. In order to be persuasive, such a demonstration should extend to the varying factual contexts of future coercive situations involving the use of nuclear weapons including the magnitude of the explosions and the character of the objects of attack.

The second clause of the St. Petersburg Declaration refers to rendering the death of disabled men "inevitable." Professor McDougal and Dr. Feliciano have pointed out that this conventional rule does not prohibit weapons which kill as opposed to those which only wound since all weapons, including the bow and arrow for example, can under certain conditions render death inevitable.[109] Dr. Spaight, however, as one aspect of an argument which concludes that nuclear weapons are illegal, suggests that this reference is to weapons which have the effect of leaving the wounded victim "with no hope of survival." [110] It has been accurately pointed out that the presence or absence of "hope of survival" by an individual depends upon a number of variables in the specific factual context including the gravity of the particular injury and the ready availability of medical services.[111] These factors are operative whether the injuries involved result from gunfire, radiation, or other causes.

Dr. Schwarzenberger, who also places his analysis upon basic humanitarian considerations, has reached the same conclusion that nuclear weapons are illegal.[112] While he relies upon other rules as well, he puts principal emphasis upon the customary and conventional doctrines which prohibit the use of poison and poisoned weapons. The "true *ratio legis*," [113] in his view, is that radiation and poison are substantially the same thing. He states:

> [A] fairly strong case can be made for the assimilation of radiation and radioactive fall-out to poison. If introduced into the body in sufficiently large doses, they produce symptoms which are indistinguishable from those of poisoning and inflict death or serious damage to health in, as Gentili would have put it, a manner more befitting demons than civilised human beings.[114]

Dr. Schwarzenberger is correct, of course, in pointing out that sufficiently large amounts of radiation can cause death. It is also true that sufficiently large gunshot wounds can produce death. It is not suggested, however,

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[109] McDougal & Feliciano 660–61.
[110] Spaight 275, n. 5.
[111] McDougal & Feliciano 661–62.
[112] Schwarzenberger, *The Legality of Nuclear Weapons passim* (1958).
[113] *Id.* at 33.
[114] *Id.* at 35 (footnote omitted).

that guns should be deemed unlawful weapons of war. Radiation effects are usually associated with nuclear explosions but they are regarded as ancillary to the principal blast effects.[115]

In an analogy drawn from the prohibition upon the use of poison gas, Dr. Schwarzenberger relies upon the Geneva Gas Protocol which, it will be recalled, prohibits "asphixiating, poisonous, or other gases" and, in addition, "all analogous liquids, materials or devices." Dr. Schwarzenberger states:

> If the radiation and fall-out effects of nuclear weapons can be likened to poison, all the more can they be likened to poison gas which is but an even more closely analogous species of the genus "poison." [116]

These interesting analogies and derivations drawn from the use of the word-symbols "poison" and "poisonous, or other gases" in earlier and different contexts reflect accurately the revulsion which all humanitarians share regarding nuclear weapons. The central issue concerning lawfulness which must be resolved, however, is whether or not all possible uses of nuclear weapons, taking into account the wide variations in the possible factual contexts, must always involve disproportionate destruction of human values in relation to the military efficiency of the weapons.

The utility of an analogy drawn from past experience in solving a new problem depends, of course, upon whether the fundamental values and policies in the analogy are similar to those involved in the new problem. The historic and contemporary prohibition upon the use of poison appears to be based upon its inefficiency as a weapon.[117] Such an analogy does not seem to be particularly helpful in ascertaining the lawfulness of nuclear weapons since it does not consider the issue of their efficiency. In the same way, the prohibition upon the initial use of poison gas, and its observance in combat during the Second World War appear to be based upon substantial doubt as to the net military utility where both sides possess the weapon.[118] The question as to the net military utility of nuclear weapons in different factual contexts raises issues which go beyond the poison gas analogy. In addition, nuclear weapons with distinctive characteristics of their own are of such importance that they necessitate direct appraisal. In view of these fundamental considerations, analogies, even though based upon humanitarian objectives, provide an inadequate problem-solving methodology in determining the lawfulness of nuclear weapons. Even if it is assumed that the analogies invoked possess some contemporary relevance, they should be employed only as ancillary analytical techniques. There is, in summary, no adequate alternative to a direct analysis which

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[115] The principal character of the blast effects is indicated in *op. cit. supra* note 104 at 102–315.

[116] *Op. cit. supra* note 112 at 38 (footnote omitted).

[117] See the text accompanying *supra* notes 8–11.

[118] See the text accompanying *supra* notes 80–83; 100.

considers the characteristics and the uses of the wide range of weapons which are subsumed under the label of "nuclear." [119]

There are further persuasive reasons to doubt that nuclear weapons are now illegal without qualification. Two nuclear weapons, as is well known, were actually employed just before the end of the Second World War. In addition, large numbers of these weapons exist in the military stockpiles of the two military "superpowers" as well as in smaller numbers in the stockpiles of three other major powers. However distressing it may be, the existence of these weapons indicates the possibility, or even the probability, of their use in certain types of future coercive situations.

It is ancient juridical wisdom that legal analysis involves more than logic.[120] Even if it were assumed that the analogies of writers arguing the illegality of nuclear weapons were logically unexceptionable, this would only be a portion of the necessary analysis. Experience suggests that the concept of "law" is more meaningful when associated with at least the possibility of some enforcement or sanction than when used without reference to enforceability.[121] The writers urging the illegality of nuclear weapons appear to give little or no consideration to the sanctions problems. The determination of such illegality without even a remote prospect of enforcement creates illusion rather than the type of more effective social control usually associated with the concept of "law." [122] It is a particularly dangerous illusion since it could lead to the belief that the difficult and complex processes involved in the effective control of nuclear weapons have already been achieved. It appears to be the wiser juridical analysis, as well as the safer one, to determine the issue of the lawfulness of nuclear weapons with full regard for the necessity to combine doctrines with sanctions to achieve enforceable law.

Unlike the situation concerning biological and chemical weapons, there are no conventional rules which even purport to prohibit or limit nuclear weapons. It seems unsound and dangerous to assume illegality in the absence of express and direct conventional agreement.[123] In addition, it

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[119] The analysis by Cagle in *op. cit. supra* note 105 is based upon the existence of weapons ranging from small "tactical" to large "strategic" ones.

[120] If citation of authority is needed, the classic statement is: "The life of the law has not been logic: it has been experience." Holmes, *The Common Law* 1 (1881; reprint 1938).

[121] The centrality of sanctions in maintaining at least minimum world public order is demonstrated in McDougal & Feliciano 261–383.

[122] If "law" is not used to include at least a modicum of sanction, a distinction must be made between law which can be enforced and that which cannot to promote necessary clarity in meaning.

[123] The same conclusion is reached in O'Brien, "Legitimate Military Necessity in Nuclear War," 2 *World Polity* 35, 116 (1960).

The present validity of nuclear weapons is upheld by Prof. Stone in a brief analysis. Stone 343–44.

is probable that the nonuse of nuclear weapons since 1945 indicates considerations such as the absence of a general war rather than the development of customary agreement prohibiting these weapons.

It is well known that the three principal nuclear powers, the United States, the Soviet Union, and the United Kingdom, have been engaged over a considerable period of time in diplomatic negotiations which are designed to achieve an international agreement under which nuclear weapons would be effectively "outlawed" or "abolished." [124] This tends to support the view that nuclear weapons are lawful, at least in some contexts, until the negotiations result in such an agreement. Such weapons appear to be valid now in the same way that the persistent claims designed to make the submarine an unlawful combatant unit conceded its lawful status by necessary implication, at least pending the achievement of a prohibitory agreement.

b. THE LAWFULNESS OF PARTICULAR USES OF NUCLEAR WEAPONS

The use of biological and chemical weapons as legitimate reprisals in response to the illegal use of these same weapons has already been considered.[125] Even if it is assumed that nuclear weapons are unlawful, it seems clear that they may be lawfully used as legitimate reprisals in retaliation to the unlawful use of such weapons. There may also be other grim situations in which their use should be upheld juridically under the doctrines concerning legitimate reprisals. Professor Lauterpacht has provided this example:

> [I]f during the Second World War it had become established beyond all reasonable doubt that Germany was engaged in a systematic plan of putting to death of millions of civilians in occupied territory, the use of the atomic bomb might have been justifiable as a deterrent instrument of punishment.[126]

It does not, of course, require extended legal argument to demonstrate that the Nazi killings of millions of innocent civilians were mass murders. It is well established that the purpose of reprisal measures is to deter illegal acts and it is obvious that these particular illegal acts should have been deterred if at all possible. Only one qualification, therefore, is suggested concerning Professor Lauterpacht's statement. If the atomic bomb had been used as a deterrent, it could be justified properly as a reprisal only if it had been directed with the greatest possible precision at the Nazi murderers so as to minimize, and if possible eliminate completely, the ancillary killing of the victims of the Nazis and of other civilians.

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[124] The principal contemporary proposals and counterproposals appear in U.S. Arms Control and Disarmament Agency, *Documents on Disarmament 1965* (1966).

[125] See the text accomanying *supra* note 102.

[126] Oppenheim-Lauterpacht 351.

It will be recalled that, aside from the doctrines regarding reprisals, the accepted test concerning the lawfulness of the use of a weapon is that it must not create value destruction which is out of proportion to the military advantage achieved by it.[127] A different test to determine the lawfulness of nuclear weapons has not been developed in either conventional or customary international law and, consequently, the traditional test must be applied to these new weapons. Professor McDougal and Dr. Feliciano have made this careful formulation of the test:

> [T]he fundamental policy of minimum unnecessary destruction may be seen to underlie questions of legitimacy. . . . [W]here the suffering or deprivation of values incidental to the use of a particular weapon is not excessively disproportionate to the military advantage accruing to the belligerent user, the violence and the weapon by which it is effected may be regarded as permissible. All war instruments are "cruel" and "inhuman" in the sense that they cause destruction and human suffering. It is not, however, the simple fact of destruction, nor even the amount thereof, that is relevant in the appraisal of such instruments; it is rather the needlessness, the superfluity of harm, the gross imbalance between the military result and the incidental injury that is commonly regarded as decisive of illegitimacy.[128]

Claims relating to the lawfulness of particular uses of nuclear weapons may be considered conveniently in two subsidiary categories. The first consists of claims concerning the fact situations which may occur in naval warfare in a future general war. The second comprises claims concerning the fact situations which may occur in "strategic" nuclear bombardment in such a war.[129]

(1) *Claims Concerning Nuclear Weapons in Naval Warfare*

Relatively small atomic weapons of the type usually characterized as "tactical" have been developed for specialized use in naval warfare.[130] In addition to the homing high-speed torpedoes with nuclear warheads which comprise significant submarine offensive weapons, there are also nuclear weapons which have particular significance in antisubmarine warfare. Professor Kuenne has described one of these as follows:

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[127] See the statements of the test which are quoted in the text accompanying *supra* notes 35–37.

The *Law of Naval Warfare* states concerning nuclear weapons:

> There is at present no rule of international law expressly prohibiting states from the use of nuclear weapons in warfare. In the absence of express prohibition, the use of such weapons against enemy combatants and other military objectives is permitted.

Section 613 (footnote omitted).

[128] McDougal & Feliciano 615–16.

[129] Subheadings making specific reference to future general war are used in Chs. III and IV. The future oriented character of much of the ensuing text is apparent.

[130] See the text of Ch. I accompanying notes 42–43.

The atomic depth charge, Lulu, which can kill a submarine within two or three miles of its detonation point, can be dropped only if friendly surface craft are not in the vicinity.[131]

A traditional depth charge with TNT explosive which is directed with precision at a submerged submarine will most usually sink the submarine and result in the killing or drowning of its entire crew. In achieving such destruction, the nuclear depth charge is very similar to the traditional one. The greatly enhanced efficiency of the nuclear charge, however, is evident in its ability to "kill" a submarine within a radius of "two or three miles of its detonation point." The military result is that one nuclear depth charge, even when employed with imprecise aiming is probably more likely to destroy a submarine than a number of better aimed traditional charges. In a general naval war in which both attack submarines and fleet ballistic missile submarines are employed, it is difficult to believe that only traditional depth charges and torpedoes will be employed in attacking them. The reasons for this conclusion include the existing stockpiles of these "tactical" weapons and the naval expectations concerning their use.[132] There is no doubt, of course, concerning the status of such belligerent warships as lawful objects of attack.

In view of the great military efficiency of "tactical" nuclear depth charges, torpedoes, and similar weapons in the situation described, they will probably be appraised as lawful providing that the ancillary destruction of values is not disproportionate to their military efficiency. There is no doubt that there would be some ocean water contamination involved in the use of these and other nuclear weapons at sea. In addition, the sinking of a nuclear-powered submarine would probably cause further water contamination.[133] In view of the primacy which has been historically accorded to military efficiency in general war, there is reason to believe that the traditional criteria would be applied to uphold the lawfulness of "tactical" nuclear weapons at sea in future general wars. This tentative prediction, it must be emphasized, assumes the minimization of ancillary injuries to both of the belligerent sides and to the neutrals.

The use of the "strategic" or very large thermonuclear weapons at sea, however, would probably be unlawful in the tactical naval warfare situa-

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[131] Kuenne, *The Polaris Missile Strike: A General Economic Systems Analysis* 57 (1966).

See the emphasis on the importance of antisubmarine warfare in Demyanov (Eng.-Capt. 2nd Rank, U.S.S.R. Navy), "A Soviet View of Antisubmarine Warfare" [transl. from Russian], 9 *Navy: The Magazine of Sea Power* No. 10, p. 21 (1966).

[132] See Cagle, *op. cit. supra* note 105 *passim*.

[133] The spread of radiation following "a shallow underwater burst" is described in *op. cit. supra* note 104 at 469, section 9–128. In the situation described in the text it is assumed that there would also be some contamination of fish and other living organisms of the sea.

tions just described. Such large weapons would produce much greater environmental contamination. Where a tactical nuclear weapon would achieve the same military purpose, such excessive contamination as well as other excessive ancillary damage is unnecessary and therefore unlawful. In the same way, such large weapons could result in an unlawful "overkill" by the destruction of values beyond those necessary to obtain the military objective.

There are different naval warfare contexts in which it is even possible that the use of "strategic" thermonuclear weapons may meet the test of lawfulness. Prior to the Second World War, naval battles were conducted typically with each of the battle fleets within visual sight of the other. The Battle of the Coral Sea in the early part of the Second World War was the first major naval engagement in which the principal combatant ships did not come within visual contact.[134] The decisive aspect of the battle was the attacks made by airplanes from the fleet aircraft carriers. It is not impossible in a future general war at sea that a squadron of submerged fleet ballistic missile submarines may employ thermonuclear weapons in attacking a similar squadron of the enemy belligerent. Polaris missiles, as is well known, may be launched while the submarine is submerged. There are apparently no technical reasons why these or similar weapons could not reenter the water environment after their flight and seek out their submarine targets.[135] The present issue concerns the lawfulness of the employment of thermonuclear weapons in the assumed situation. If it could be demonstrated that these weapons possess the efficiency which is necessary to achieve the military objective and, further, that tactical nuclear weapons lack such efficiency, it would be persuasive as to the lawfulness of this use of thermonuclear weapons. If it could also be demonstrated that the ancillary destruction of values injuring the belligerents and the neutrals was minimal, it would further strengthen an argument of lawfulness. In making such a determination concerning the issue of legality, it would be necessary to give full consideration, *inter alia,* to both the short-range and long-range effects of envirnomental contamination.[136]

(2) *Claims Concerning Strategic Nuclear Bombardment*

One of the principal military capabilities of the fleet ballistic missile submarine is the bombardment of targets located on land with nuclear or traditional explosives. Because of this, the ensuing legal analysis is functionally similar to that usually described as "aerial bombardment" or "strategic bombardment." In a juridical appraisal the particular type of launching vehicle, vessel, or device for a nuclear weapon, whether a sub-

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[134] Potter & Nimitz 667.

[135] The contemporary Polaris missiles are described in Kuenne 178.

[136] See *op. cit. supra* note 104 at 316–501.

marine warship, a surface one, an aircraft, a land-based installation, or a launching system in space [137] would not appear to be of major significance.

(a) Claims Concerning Target Selection

The hypothetical situations considered concerning nuclear war at sea were relatively simple in one respect because they involved only military targets. Target selection in land areas where civilian populations reside presents more difficult issues.

The only treaty law concerning target selection in aerial bombardment appears in the Regulations Annexed to Hague Convention No. IV (1907):

> The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.[138]

The words, "by whatever means," were probably designed to refer to dirigibles and heavier-than-air aircraft at the time they were written. It would be a rather extreme over-extrapolation to interpret them as somehow referring to ballistic missiles with nuclear warheads and other contemporary weapons which were not even thought of in 1907.[139] This conventional doctrine was an attempt to apply by analogy the land warfare test of "undefended" towns used at the turn of the century to the different problems involved in aerial bombardment. Land warfare rules concerning bombardment at that time were formulated on the basis of the technology of land artillery which was then probably more efficient than the aerial bombardment methods. It is well known that this provision of the Hague Regulations was not observed in aerial bombardment in either of the World Wars.[140]

The somewhat more relevant analogy which has been employed in actual practice in aerial target selection is drawn from the naval bombardment test of "military objectives." This test as applied to traditional naval bombardment was limited technologically by the range of naval gunfire. In applying the test of "military objectives" to nuclear bombardment by modern military aircraft, Polaris missiles, and space-launching devices, it is apparent that there is no place upon the earth which cannot be reached. A place, however, cannot lawfully be subjected to bombardment unless a military objective is located in it.

Although they are not conventional law, the draft Hague Rules of Aerial Warfare (1923) [141] adopt this military objective test which has been applied in both World Wars:

> Aerial bombardment is legitimate only when directed at a military

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[137] See *supra* note 30.

[138] Art. 25.

[139] Prof. Scott stated that the words "by whatever means" meant that "bombardment by balloons, if and when possible, is to be controlled and regulated as other bombardments." 1 Scott 652.

[140] As to World War I see 1 Garner 458–67.

[141] Text in 17 *A.J.I.L. Supp.* 245 (1923).

> objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.[142]

An obvious example of a target which is a lawful military objective is a naval shipyard. An equally obvious example of unlawful target selection was involved in the German use of the V-1 (flying bomb) and V-2 (long-range rocket) weapons near the end of the Second World War. These weapons were simply directed at a general area comprising metropolitan London without regard to any military objective.[143]

The actual historical facts indicate, however unpleasant the contemplation of this may be, that considerable ancillary civilian destruction has been tolerated in the application of the test providing that the target is a lawful military objective. This is, nevertheless, better than a doctrine which would allow civilians to be made direct objects of attack. Professor Lauterpacht's characterization of the fundamental principle of customary international law prohibiting the use of terror directed against civilians as "an absolute rule of law" has been referred to previously.[144] Unless this basic humanitarian doctrine is effectively sanctioned, it is futile to attempt to maintain that there is a meaningful international law of war. If this single principle is violated systematically, the subsidiary doctrines which are designed to protect humanitarian values are rendered meaningless.[145] In an era of weapons of mass destruction with rapid missile delivery techniques there is a measure of sanction to enforce this principle at least in the decisions of rational government officials. If one side can employ terror against the civilian population in a general war situation, it is apparent that the other can do the same thing. This is a negative sanction to implement a humanitarian doctrine but it is of use nonetheless if it operates with some effectiveness. The positive sanctions include a mental perspective of common humanity which encompasses the enemy civilians as well as those of the same nationality as the decision-maker. The conjoining of these sanctions, with any other available ones added, constitute only *ad hoc* devices to provide some measure of protection for humanity pending the construction of a better world public order system which, at the least, effectively prevents general war.[146]

(b) Claims Concerning The Limitation of Destruction

The present analysis concerns the issues involving the limitation of ancillary destruction where it is assumed that a lawful target is

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[142] Art. 24, paragraph 1.

[143] Description appears in Spaight 214–17.

[144] See the text of Ch. IV accompanying note 2.

[145] The prohibition of the use of nuclear weapons for the terrorization "of the general enemy population" is stressed in McDougal & Feliciano 668.

[146] Some of the steps designed to provide an improved public order are considered in McDougal, "Perspectives for an International Law of Human Dignity," 53 *Proc. A.S.I.L.* 107 (1959).

attacked. Rules of ideal doctrinal content would, of course, prohibit any ancillary destruction of or injury to civilians in attacks on lawful military objectives. The difficulty with such a doctrinal formulation is that experience indicates it has little or no prospect of being enforced in a future general war. It is clear that in the relevant past belligerent practices, states have tolerated substantial ancillary destruction of civilian values. The fact is, even taking into account the development of efficient bombsights, radar instruments, night and bad weather guidance techniques, and similar devices, that as many as a third of the bombs dropped by aircraft usually fall outside of "a large factory" target.[147] The central factual point is that the bombardment of military objectives, as a matter of uniform past experience and probable future expectation involves some incidental destruction of civilian life.

The draft Hague Rules of Aerial Warfare (1923) attempted to prohibit what is now termed "strategic bombardment." The relevant provision states:

> The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of the operations of land forces is prohibited.[148]

This reflects an attempt to limit aerial bombardment to tactical situations where the use of the bombardment is closely related to "the operations of land forces."

It is well known that during the Second World War massive "strategic bombardment" employing large numbers of aircraft carrying traditional explosives was used.[149] This method of bombardment was practiced by the major belligerents even though the selected military targets such as factories or military installations were in heavily populated areas where it was clear that many civilians would be and were killed. In the same way, the two uses thus far of nuclear weapons during war, the attacks on Hiroshima and on Nagasaki, involved great destruction of civilian lives although military objectives were at the center of the targets.[150]

The International Committee of the Red Cross Draft Rules (1956) provide constructive suggestions designed to minimize the ancillary destruction of civilians. One modest provision, for example, states:

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[147] Possony, *Strategic Air Power: The Pattern of Dynamic Security* 55 (1949).

[148] Art. 24, paragraph 3.

[149] See, e.g., Harris, *Bomber Offensive* (1947).

[150] The military objectives are stated by Henry L. Stimson, Secretary of War during World War II, in "The Decision to Use the Atomic Bomb," 194 *Harper's Magazine* 97 (Feb. 1947).

Criticism of the action in using the nuclear weapons appears in Sack, "ABC-Atomic, Biological, Chemical Warfare in International Law," 10 *Lawyers Guild Rev.* 161 (1950).

> The person responsible for ordering or launching an attack shall, first of all:
>
> (a) make sure that the objective, or objectives, to be attacked are military objectives within the meaning of the present rule and are duly identified.
>
> When the military advantage to be gained leaves the choice open between several objectives, he is required to select the one, an attack on which involves least danger for the civilian population . . .[151]

Since it does not interfere with military efficiency, this provision should be implemented to minimize harm to civilians.

United States v. Ohlendorf [152] presents a judicial perspective concerning the ancillary destruction of civilians in aerial bombardment. The facts of the case concerned the infamous *Einsatzgruppen* which were the special task forces employed by the Nazis to murder the "inferior" civilian persons behind the military lines in Eastern Europe and in the Soviet Union. The defendants claimed, *inter alia,* that there was no meaningful distinction between the systematic killing of civilians who were members of one or more of the proscribed groups as the defendants had done and killing civilians with atomic bombs as the United States had done in Japan.[153] In response to this argument the judgment stated:

> A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them.[154]

The Charter of the International Military Tribunal at Nuremberg characterized the "wanton destruction of cities, towns, or villages, or devastation not justified by military necessity" as a war crime.[155] None of the major war criminals, however, was charged with indiscriminate aerial

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[151] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, art. 8(a) (1956).

[152] "The Einsatzgruppen Case," 4 *Trials of War Crims.* 1.

[153] *Id.* at 466, 467. The testimony of Ohlendorf on this general subject appears in *id.* at 355–57.

[154] 4 *Trials of War Crims.* 1, 467.

[155] Art. 6(b). Text in 1 *I.M.T.* 10, 11.

bombing. In addition, the United Nations War Crimes Commission in preparing lists of persons who, *prima facie,* appeared to have committed a war crime, rejected cases alleging illegal aerial bombardment if the places bombarded contained military objectives.[156]

Dr. Spaight has attempted to make a fundamental legal discrimination between strategic bombardment which involves target-area bombing by large numbers of aircraft using traditional weapons and strategic bombardment using atomic weapons. He states:

> [International law] should hold to the view that, while target-area bombing comes close to the borderline of permissibility, atom bombing definitely oversteps it. To change the metaphor, one might say that target-area bombing remains anchored—under strain—to the rule of the military objective, which must now be regarded as international law; atom bombing breaks adrift.[157]

This argument appears to be based on the assumption that where nuclear weapons are employed there is no possibility whatsoever of limiting the ancillary destruction connected with the attack upon the military target. The opposite assumption is made concerning target-area bombing. Both assumptions seem to be open to considerable doubt because of the contemporary range in the size and explosive power of various nuclear weapons and the past conduct of target-area bombing. It does not seem possible to state with certainty that under no circumstances could a nuclear weapon, or several of them, be used in a manner which effectively limits ancillary destruction. Although as used by the Allied Powers during the Second World War, target-area bombing with traditional weapons placed very few effective limitations upon ancillary destruction, such bombing could also be used so as to limit such destruction more effectively.

The significant differences for present purposes between traditional explosives employed in very large quantities and one or more nuclear weapons concern the initial and residual effects which are associated with the nuclear weapons.[158] The "dirty" nuclear weapon is one which places a large amount of radiation in the environment.[159] Such radiation, and its consequent deadly or injurious effects, will be manifested in the immediate area of the explosion in particular and throughout the world environment in general over a considerable period of time.[160] On the other hand, a "clean" nuclear bomb is designed, like traditional bombs, to be deadly in its blast and heat effects but to minimize the associated radiation effects.[161]

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[156] Digest of Laws and Cases, 15 *Reps. U.N. Comm.* 110, n. 2.

[157] Spaight 276.

[158] U.S. Dept. of Defense, *The Effects of Nuclear Weapons* 369–413 (initial effects), 414–501 (residual effects) (rev. ed. 1962).

[159] *Id.* at 435–36.

[160] See *id.* at 473–88.

[161] The technological limitations upon reducing the radiation effects of nuclear weapons are described in *id.* at 435–36.

The radiation effects of the "dirty" bomb can impose continuing destruction upon the civilian population after the bombing has stopped. It seems clear, consequently, that this type of effect from the use of nuclear weapons may impose unreasonably high and disproportionate levels of destruction upon the civilian population. These factual differences justify a different juridical appraisal of such nuclear weapons. It should be maintained that where the radiation effects are likely to cause such high and disproportionate levels of destruction of the civilian population, the nuclear weapon should be regarded as unlawful in a situation where a number of traditional weapons with the same blast and heat effects would be deemed lawful. Among the sanctions to uphold this differential juridical treatment is the common self-interest of all mankind, including rational decision-makers, in preserving the earth and its environment as habitable for humanity.

The comments concerning the military inefficiency of biological or chemical weapons which are uncontrollable by their belligerent users are equally applicable to nuclear weapons which are similarly uncontrollable. The International Committee of the Red Cross Draft Rules (1956) make this recommendation concerning uncontrollable weapons:

> Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects—resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents—could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.[162]

In such an extreme situation, considerations of humanity and those of military efficiency should be combined to protect common humanity from mass destruction. The most obvious way to avoid destruction of civilian values by nuclear weapons is not to use such weapons. The constructive contemporary use of nuclear weapons is in their role as inducements to avoid general war. They are now being used as the key element in a mutual deterrence system which establishes a primitive minimum public order based on the threat of mutual nuclear disaster.[163]

C. CLAIMS CONCERNING WEAPONS OF ATTACK IN LIMITED WAR

In the appraisal of other aspects of limited war, a central distinction has been made between limited wars involving major powers as the par-

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[162] Art. 14, paragraph 1.

[163] The nuclear deterrence role of fleet ballistic missile submarines is considered in Kuenne, *The Polaris Missile Strike: A General Economic Systems Analysis* 65 and *passim* (1966).

ticipants and similar wars where minor powers comprise the participants. Such an organization appears less useful in considering the lawfulness of particular weapons in limited war situations. Most states have armaments which include, even though in very modest degree in some instances, traditional naval weapons.[164] In addition, there is an existing trend toward the proliferation of nuclear weapons which will apparently continue unless conventional agreements are reached to prevent it effectively.[165] The present organization, consequently, will consider the same weapons categories used in the general war analysis. At the outset, it should be stated that the limitation of weapons is indispensable if limited wars are not to be replaced by or "escalated" into general wars.[166]

Weapons of mass destruction which are uncontrollable in the hands of their belligerent users have been referred to in the context of general war. Even in general war situations, such weapons cannot be justified as lawful by the most expanded conceptions of military necessity since they do not achieve military objectives without disproportionate ancillary destruction.[167] It is obvious that they also lack military efficiency and lawfulness in limited war. A narrow conception of the tactical controllability of weapons is also necessary in limited war situations and the weapons used must be consistent with the limited political objectives which are postulated.[168]

The customary law test involving a determination of the reasonable proportionality between the military efficiency of the weapon and the ancillary destruction of values caused by its use is also employed in determining the lawfulness of weapons in limited war.[169] The point which must be stressed, however, is that the same juridical principle used in weapons appraisal in general war is now being applied in the very different context of limited war. If it is assumed that exactly the same weapon were used in each type of war, a certain degree of ancillary destruction of values which would be acceptable in general war might well be quite unacceptable and, consequently, unlawful in limited war.

A recognized naval authority has written concerning the combat capabili-

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[164] Le Masson (ed.), *Les Flottes de Combat 1966* lists eighty states which have navies (or functionally equivalent organizations) with associated vessels and weapons.

[165] The facts are well known. See The American Assembly, *A World of Nuclear Powers?* (Buchan ed. 1966).

[166] The textual statement is obvious. The point is stressed in Osgood 248–50 and *passim.*

[167] Prof. O'Brien advances a careful and balanced conception of military necessity in "Legitimate Military Necessity in Nuclear War," 2 *World Polity* 35 (1960). He stresses the relevance of the central concept of proportionality in appraising the facts. *Id.* at 69–82. Of course, some facts, such as the genetic effects of radiation, are not understood adequately. See *id.* at 72–73.

[168] See the analysis of tactical nuclear weapons in limited war in Osgood 251–59.

[169] See the test as formulated by Prof. McDougal and Dr. Feliciano in the text accompanying *supra* note 128.

ties of the U.S. Navy in the war in Vietnam:

> The United States Navy is . . . a gentle giant. It must be a source of wonder to many a nation, especially to any aggressively inclined, why the United States, with such a colossal naval strength at its command, capable of landing any size of military force and mounting any size of air strike, has not bulldozed her way to the objective in Vietnam. The U.S. Navy is doubtless capable not only of containing any possible combination of Vietnamese forces arrayed against it but of countering any force that any co-belligerents might have available in that sphere. Yet, the U.S.N. attack craft, surface, submarine or air, the amphibious ships, support vessels, transports and auxiliaries have shown the restraint necessary to channel down the operations to limited and conventional war.[170]

In his 1967 State of the Union Message the President of the United States stressed other factors than weapons capability and military power. His statement raised a fundamental question concerning the conduct of limited war by the United States:

> Whether we can fight a war of limited objectives over a period of time, and keep alive the hope of independence and stability for people other than ourselves; whether we can continue to act with restraint when the temptation to "get it over with" is inviting but dangerous; whether we can accept the necessity of choosing "a great evil in order to ward off a greater"; whether we can do these without arousing the hatreds and the passions that are ordinarily loosed in time of war—on all these questions so much turns.[171]

1. Traditional Naval Weapons

The weapons now under consideration are the same traditional ones which have been considered in connection with general war. Such weapons of considerable destructive power have been employed in limited wars. During the Korean War, for example, the North Korean forces employed modern sea mines, including acoustic and magnetic types, with considerable effectiveness.[172] The Soviet Union provided technical assistance in these operations.[173] It is necessary to recognize that because a weapon may be accurately characterized as "traditional" does not, without more consideration, provide reasonable assurance of the lawfulness of its use in all

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[170] Blackman (ed.), *Jane's Fighting Ships 1965–66* iv, v.

[171] "The State of the Union" (delivered Jan. 10, 1967), 56 *Dept. of State Bull.* 158, 163 (Jan. 30, 1967).

President John Adams' central role in limiting the limited naval war with France is described in Bailey, *A Diplomatic History of the Amercan People* 94–97 (6th ed. 1958).

[172] Cagle & Manson 142–46.

[173] *Ibid.*

the divergent fact situations of limited war. If the traditional torpedo with a warhead of TNT explosives were used against merchant ships not participating in the war or hostilities, for example, it would be a violation of the Submarine Protocol. In addition, such use might make the continuing limitation of the war most difficult if not impossible.

It should be obvious that the availability of traditional weapons of all kinds, including specialized naval ones, is indispensable for limited war purposes.[174] In the same way, there must be a carefully thought out and continuingly updated naval doctrine concerning weapons uses in limited war.[175] If these important matters are not adequately recognized the results could be disastrous. A major power which neglects traditional weapons and tactical nuclear ones in favor of overemphasis upon large nuclear and thermonuclear ones could be confronted with a situation where it has no better alternative than a choice between general war involving the use of weapons of mass destruction on the one hand or surrender on the other.

2. Traditional Naval Bombardment

The historic examples of traditional naval bombardment of land targets which were mentioned in connection with general war situations involved only modest legal limitation upon the efficiency of the bombardment because of the "military objective" test employed in the applicable conventional law.[176] Military interest, nevertheless, imposed meaningful limitations upon needless destruction of values. The basic military principle of economy of force required the careful control of naval gunfire so as to maximize military injury to the enemy. It is well known that naval gunfire, along with aircraft bombing attacks, was used as the spearhead of the great United States amphibious operations in the Pacific War.[177] In this use of naval gunfire it was not a matter of promoting the principle of humanity alone to direct the gunfire at specific military objectives, such as gun installations and aircraft runways, but it was also a matter of simple

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[174] Seim, "Are We Ready to Wage Limited War?" 87 *Nav. Inst. Proc.* No. 3, p. 27 (1961).

The interest of the Soviet Union in traditional weapons is indicated in Marshal of the Soviet Union Sokolovskii (ed.), *Soviet Military Strategy* 51 and *passim* (Rand Corp. transl. 1963).

[175] Cagle, "A Philosophy for Naval Atomic War," 83 *Nav. Inst. Proc.* 249 (1957) is a thoughtful and fundamental contribution. See also the careful consideration of the limited war role of the aircraft carrier in Gormley, "Limited War and the Striking Fleets," 89 *Nav. Inst. Proc.* No. 2, p. 53 (1963).

The related necessity of legal doctrines for limited war is thoughtfully considered in Baldwin, "A New Look at the Law of War: Limited War and Field Manual 27–10," 4 *Military L. Rev.* 1 (Army Pam. No. 27–100–4; 1959).

[176] See the text accompanying *supra* notes 61–63.

[177] See Potter & Nimitz 745-48 and *passim.*

self-preservation. Unless the Japanese military targets on land were effectively destroyed, they had the capacity to sink or severely damage the battleships [178] and other warships comprising the attack force.

The conjoining of the principles of humanity and military necessity to protect human values should be even more important in a limited war naval bombardment situation. The United States amphibious landing at Inchon in the early part of the Korean War was preceded by a heavy naval bombardment.[179] The specific character of this bombardment has been authoritatively described as follows:

> Vice Admiral Struble's orders to the bombardment forces clearly specified that there should be no promiscuous firing at the city itself or at civilian installations. To achieve this, the entire objective area had been divided into 60 sub-areas. Known military targets had been previously assigned, and those which offered the greatest potential hazard to our landing troops were circled in red. It had been agreed that any ship could fire into a red-circle area with or without a "spot." In the uncircled areas, however, firing was permitted only if definite targets were found and an air spot was available. This differentiation between types of areas was adopted to reduce destruction of nonmilitary targets to a minimum, to save the city of Inchon for occupation forces, and to avoid injury to civilian personnel. . . . [Struble ordered:] Bombing and gunfire will be confined to targets whose destruction will contribute to the conduct of operations—accurate gunfire and pinpoint bombing against specific targets, rather than area destruction, is contemplated.[180]

3. Biological and Chemical Weapons

The juridical appraisal concerning the use of biological and chemical weapons which are uncontrollable by the belligerent user in general war [181] is even more applicable, a fortiori, in limited war situations. If biological or chemical weapons are to be used lawfully in limited war they must be weapons of very limited destructive power which are employed under the

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[178] The Navy now maintains the four *Iowa* class battleships (including the *Missouri* of Japanese surrender ceremony fame) mounting nine 16-inch guns each in the Reserve Fleets. The New York Times, April 9, 1967, p. 1, cols. 1, 2 reports that consideration is being given to recommissioning one or more of these ships for shore bombardment purposes in the war in Vietnam because of the efficiency of their gunfire. [Editor's note: The decision to reactivate the battleship *New Jersey* for employment in the Pacific Fleet in augmentation of the naval gunfire support force in Southeast Asia was announced on August 1, 1967. Department of Defense News Release No. 708–67 of August 1, 1967.]

[179] Cagle & Manson 97. It involved the use of short-range rockets as well as gunfire.

[180] Cagle & Manson 97.

[181] See the text accompanying *supra* note 69.

most rigid technological and tactical controls. It is unfortunate that the broad language in the Geneva Gas Protocol referring to "poison gases" and then to "all analogous liquids, materials or devices" [182] is susceptible through mechanical interpretation to the inclusion of nonlethal biological or chemical weapons which produce temporary disablement of enemy personnel without permanent damage to the human organism. Such mechanical interpretation [183] is, of course, quite inconsistent with the humanitarian purpose of the Gas Protocol to prevent the use of highly injurious and destructive gases.

There are many situations in which the use of tear gas, or similar chemical agents, imposes much less damage or injury upon enemy personnel than alternative weapons. The use of tear gas in preference to flamethrowers against guerrilla troops located in entrenched positions has been referred to in connection with a general war situation.[184] The humanitarian considerations in favor of the use of tear gas would appear to be at least equally applicable in a limited war situation. Another example involves the use of weapons to control riotous prisoners of war. This was a practical situation which arose with North Korean prisoners of war in United States prisoner of war camps.[185] Riots among the prisoners were apparently initiated for the purpose of involving effective military forces which might otherwise have been used at the front. Rifles and machine guns were used at the outset to reestablish discipline in the camps. The use of tear gas was finally authorized for humanitarian reasons as well as for efficiency.[186] General Mark Clark, then the Commander of the United Nations Forces in Korea, apparently experienced some difficulty in obtaining authorization for the use of this gas which is harmless in residual effects.[187] The reluctance of the Department of the Army to authorize the use of tear gas in this situation apparently reflects the general revulsion shared by military personnel with civilians against any weapon which can be included under the label "gas." It is most unfortunate in terms of the impact upon human values that word symbols [188] present difficulties in using less harmful and less destructive weapons. If limited weapons are to be used in limited wars, the responsible decision makers must look beyond the labels to the actual effects of particular weapons.

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[182] See the Gas Protocol in the text accompanying *supra* notes 82–83.

[183] The intellectual inadequacy of mechanical or "literal" interpretation has been referred to in the text of Ch. IV accompanying notes 110–11.

[184] See the text accompanying *supra* note 92.

[185] Rothschild, *Tomorrow's Weapon: Chemical and Biological* 62–63 (1964).

[186] *Id.* at 63.

[187] *Ibid.*

[188] Word symbols, of course, are not identical with thoughts. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Holmes, J. in Towne v. Eisner, 245 U.S. 418, 425 (1918).

Psychological conditioning and mental predispositions are, of course, important factors in obtaining popular acceptance or rejection of weapons. Popular views and prevailing opinions upon this subject are also factors which have some bearing upon the determination of lawfulness. Mr. Tompkins has written concerning weapons acceptability:

> The more direct the violence is in a weapon, the more acceptable it seems. People seem to object to non-violent or even non-lethal, weapons more strongly than they do to the the most violent ones. While there is an element of conditioning in this—we accept what we are used to —weapons seem to be accepted the closer they approximate the primitive violence of cutting, crushing, and stabbing. Ordinary shells, bullets, and bombs are really only modern ways of reaching the same bloody result that the caveman got with his stone ax or obsidian-tipped spear.[189]

If this analysis is correct, it presents a bleak prospect in terms of developing and using the necessary limited weapons for limited war unless there is a reorientation of both military and civilian thinking in terms of facts.

4. Nuclear Weapons

It does not require detailed analysis to demonstrate that the use of large nuclear weapons and of any thermonuclear weapons presents the gravest problems concerning the restriction of military means employed in limited war. Professor Osgood has questioned whether or not the use of tactical nuclear weapons is consistent with the limitation of war.[190] He emphasizes that if such tactical weapons are used, national strategy must control their use rather than the weapons use determining national strategy.[191]

General Taylor has also questioned the dangers involved in using even "small" nuclear weapons:

> [I]t also seems likely that there will be a desire to limit, if not to prevent, the use of atomic weapons in local conflicts for fear of their unpredictable consequences in broadening the war. These tendencies to restrict atomic weapons may also find support from the proprietor of the battle zone, presumably a friend to whom we are bringing military aid to resist aggression. There is such destructiveness in atomic weapons, even in the small ones, that serious objection to their use in friendly territory may be anticipated from the inhabitants.[192]

It has been determined previously that nuclear weapons cannot be convincingly appraised as unlawful per se. It has been suggested that,

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[189] Tompkins, *The Weapons of World War III: The Long Road Back from the Bomb* (1966).

[190] Osgood 230.

[191] *Id.* at 230–31.

[192] Taylor, *The Uncertain Trumpet* 186–87 (1959).

in general war situations, there may be occasions when the tactical uses of nuclear weapons will probably be appraised as lawful.[193] It is less possible, but certainly not impossible, that the same appraisal of the lawfulness of particular tactical uses of nuclear weapons should be made in limited war situations as well. Such appraisals of probable lawfulness could only be made with assurance in situations where the traditional criteria of reasonable proportionality between the military efficiency of the weapon and the ancillary destruction of values could be demonstrated convincingly.

A naval authority has formulated some of the central considerations involved in limited atomic warfare:

> Atomic warfare can be kept limited only if the world—friend and foe alike—knows the types and small sizes of weapons which could be used and understands the vast difference between *precision atomic warfare* and *mass destruction warfare*. Unless the difference between precision atomic warfare and massive retaliation is made clear, and our intention to use *precision weapons* delivered by *precision means* made known, the United States is irretrievably headed toward nuclear impotence, or drifting into what has been termed "atomic isolationism" and being powerless to respond to "nibbling aggression." [194]

In further development of this approach, the same writer has referred to three specific military objectives in the Korean War in which naval aircraft used traditional weapons in persistent attacks without achieving militarily efficient results. These targets were the Yalu River bridges, the key elements of the rail and road systems which were used to supply the North Korean armies, and the principal hydroelectric complexes in North Korea.[195] In his view, the precision delivery of tactical nuclear weapons against these targets would have accomplished the military objectives without disproportionate ancillary damage.[196] Because of this, the examples employed appear to meet the accepted juridical criteria for the lawful use of weapons.

In appraisal of nuclear weapons in general war it was concluded that the avoidance of civilian destruction is achieved most effectively by the nonuse of these weapons.[197] This conclusion is obviously applicable in limited war situations also. Since there has been considerable experience

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[193] See the text accompanying *supra* notes 132–33.

[194] Cagle, *op. cit. supra* note 175 at 254.

[195] *Id.* at 257–58.

[196] *Ibid.*

The explosive yields of tactical naval weapons should be very small. Weapon design must reduce the fall-out peril to a minimum. The delivery method must always endeavor to place the weapon at the precise point of aim, and the acceptable margin of error should be limited to *tens* of feet.

Id. at 257.

[197] See the text accompanying *supra* note 163.

with limited wars since the end of the Second World War, the future projection which is grounded in past experience is that such wars are much more probable than a general war.[198] In considering a future appraisal concerning the lawfulness of nuclear weapons use in limited war it must be emphasized that the smaller the blast and ensuing radiation effects, and the more clear the minimization, or avoidance, of ancillary civilian destruction, the more likely an accurate appraisal of lawfulness becomes. In the meantime, efforts to achieve a convention which effectively bans nuclear weapons should be intensified so that the appraisals of lawfulness referred to may be only temporary.

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[198] See the statement of such probability quoted in the text of Ch. I accompanying note 115.

APPENDIX A

THE LONDON NAVAL TREATY OF 1930[1]

ARTICLE 22

The following are accepted as established rules of International Law:

(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

The High Contracting Parties invite all other Powers to express their assent to the above rules.

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[1] *U.S. Statutes At Large,* Vol. XLVI, Part 2, p. 2881–2882 (Wash.: U.S. Govt. Print. Off., 1931).

APPENDIX B

DOCUMENT DÖNITZ-100 [1]

TESTIMONY OF FLEET ADMIRAL NIMITZ, U.S. NAVY, 11 MAY 1946, REGARDING NAVAL WARFARE IN THE PACIFIC FROM 7 DECEMBER 1941, INCLUDING THE PRINCIPLES GOVERNING THE RESCUE OF SURVIVORS OF SUNK ENEMY SHIPS (EXHIBIT DÖNITZ-100)

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11 May 1946

INTERROGATION OF FLEET ADMIRAL CHESTER W. NIMITZ, U.S. NAVY

At the request of the International Military Tribunal the following interrogatories were on this date, 11 May 1946, put to Fleet Admiral Chester W. Nimitz, U.S. Navy by Lieutenant Commander Joseph L. Broderick, U.S. Naval Reserve, of the International Law Section, Office of the Judge Advocate General, Navy Department, Washington, D.C., who recorded verbatim the testimony of the witness.

Admiral Nimitz was duly sworn by Lieutenant Commander Broderick and interrogated as follows:

Q. What is your name, rank and present station?

A. Chester W. Nimitz, Fleet Admiral, United States Navy, Chief of Naval Operations of the United States Navy.

1. **Q.** What positions in the U.S. Navy did you hold from December 1941 until May 1945?

A. Commander-in-Chief, U.S. Pacific Fleet.

2. **Q.** Did the U.S.A. in her sea warfare against Japan announce certain waters to be areas of operation, blockade, danger, restriction, warning or the like?

A. Yes. For the purpose of command of operations against Japan the Pacific Ocean areas were declared a theater of operations.

3. **Q.** If yes, was it customary in such areas for submarines to attack merchantmen without warning with the exception of her own and those of her Allies?

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[1] 40 I.M.T. 109–111.

A. Yes, with the exception of hospital ships and other vessels under "safe conduct" voyages for humanitarian purposes.

4. **Q.** Were you under orders to do so?
   A. The Chief of Naval Operations on 7 December 1941 ordered unrestricted submarine warfare against Japan.
5. **Q.** Was it customary for submarines to attack Japanese merchantmen without warning—outside of announced operation or similar areas since the outbreak of the war?
   A. The reply to this interrogatory involves matters outside the limits of my command during the war; therefore I make no reply thereto.
6. **Q.** Were you under orders to do so?
   A. The reply to this interrogatory involves matters outside the limits of my command during the war, therefore I make no reply thereto.

—Page 2—

7. **Q.** If the practise of attacking without warning did not exist since the outbreak of the war, did it exist from a later date on? From what date on?
   A. The practice existed from 7 December 1941 in the declared zone of operations.
8. **Q.** Did this practice correspond to issued orders?
   A. Yes.
9. **Q.** Did it become known to the U.S. Naval authorities that Japanese merchantmen were under orders to report any sighted U.S. submarine to the Japanese Armed Forces by radio? If yes, when did it become known?
   A. During the course of the war it became known to the U.S. Naval authorities that Japanese merchantmen in fact reported by radio to Japanese armed forces any information regarding sighting of U.S. submarines.
10. **Q.** Did the U.S. submarines thereupon receive the order to attack without warning Japanese merchantmen, if this order did not exist already before? If yes, when?
    A. The order existed from 7 December 1941.
11. **Q.** Did it become known to the U.S. Naval authorities that the Japanese Merchantmen were under orders to attack any U.S. submarine in any way suitable according to the situation, for instance by ramming, gun fire or by depth charges. If yes, when did it become known?
    A. Japanese merchantmen were usually armed and always attacked by any available means when feasible.

12. **Q.** Did the U.S. submarines thereupon receive the order of attacking without warning Japanese merchantmen, if this order did not already exist before? If yes, when?

A. The order existed from 7 December 1941.

13. **Q.** Were, by order or on general principles, the U.S. submarines prohibited from carrying out rescue measures toward passengers and crews of ships sunk without warning in those cases where by doing so the safety of the own boat was endangered?

—Page 3—

A. On general principles the U.S. submarines did not rescue enemy survivors if undue additional hazard to the submarine resulted or the submarine would thereby be prevented from accomplishing its further mission. U.S. submarines were limited in rescue measures by small passenger-carrying facilities combined with the known desperate and suicidal character of the enemy. Therefore it was unsafe to pick up many survivors. Frequently survivors were given rubber boats and/or provisions. Almost invariably survivors did not come aboard the submarine voluntarily and it was necessary to take them prisoner by force.

14. **Q.** If such an order or principle did not exist, did the U.S. submarines actually carry out rescue measures in the above mentioned cases?

A. In numerous cases enemy survivors were rescued by U.S. submarines.

15. **Q.** In answering the above question, does the expression "merchantmen" mean any other kind of ships than those which were not warships?

A. No. By "merchantmen" I mean all types of ships which were not combatant ships. Used in this sense it includes fishing boats, etc.

16. **Q.** If yes, what kind of ships?

A. The last answer covers this question.

17. **Q.** Has any order of the U.S. Naval authorities mentioned in the above questionnaire concerning the tactics of U.S. submarines toward Japanese merchantmen been based on the grounds of reprisal? If yes, what orders?

A. The unrestricted submarine and air warfare ordered on 7 December 1941 resulted from the recognition of Japanese tactics revealed on that date. No further orders to U.S. submarines concerning tactics toward Japanese merchantmen throughout the war were based on reprisal, although specific instances of Japanese submarines' committing atrocities toward U.S. mer-

chant marine survivors became known and would have justified such a course.

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18. **Q.** Has this order or have these orders of the Japanese Government been announced as reprisals?

A. The question is not clear. Therefore I make no reply thereto.

19. **Q.** On the basis of what Japanese tactics was the reprisal considered justified?

A. The unrestricted submarine and air warfare ordered by the Chief of Naval Operations on 7 December 1941 was justified by the Japanese attacks on that date on U.S. bases, and on both armed and unarmed ships and nationals, without warning or declaration of war.

The above record of my testmony has been examined by me on this date and is in all respects accurate and true.

11 May 1946

Chester W. Nimitz
CHESTER W. NIMITZ
Fleet Admiral, U.S. Navy

The witness, Chester W. Nimitz, Fleet Admiral, U.S. Navy, was duly sworn by me prior to giving the above testimony and I do certify that the above is a true record of the testimony given by him.

11 May 1946

Joseph L. Broderick
JOSEPH L. BRODERICK
Lieutenant Commander, U.S.
Naval Reserve

APPENDIX C

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA OF AUGUST 12, 1949 [1]

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Xth Hague Convention of October 18, 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, have agreed as follows:

Chapter I. General Provisions

ARTICLE 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

ARTICLE 2. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

ARTICLE 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed

[1] TIAS 3363, 6 UST 3217.

hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

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

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

ARTICLE 4. In case of hostilities between land and naval forces of Parties to the conflict, the provisions of the present Convention shall apply only to forces on board ship.

Forces put ashore shall immediately become subject to the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

ARTICLE 5. Neutral Powers shall apply by analogy the provisions of the present Convention to the wounded, sick and shipwrecked, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict received or interned in their territory, as well as to dead persons found.

ARTICLE 6. In addition to the agreements expressly provided for in Articles 10, 18, 31, 38, 39, 40, 43 and 53, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of wounded, sick and shipwrecked persons, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.

Wounded, sick and shipwrecked persons, as well as medical personnel and chaplains, shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

ARTICLE 7. Wounded, sick and shipwrecked persons, as well as members of the medical personnel and chaplains, may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

ARTICLE 8. The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

ARTICLE 9. The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded, sick and shipwrecked persons, medical personnel and chaplains, and for their relief.

ARTICLE 10. The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When wounded, sick and shipwrecked, or medical personnel and chaplains do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power, or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever, in the present Convention, mention is made of a Protecting Power, such mention also applies to substitute organizations in the sense of the present Article.

ARTICLE 11. In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, in particular of the authorities responsible for the wounded, sick and shipwrecked, medical personnel and chaplains, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict, a person belonging to a neutral Power or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

Chapter II. Wounded, Sick and Shipwrecked

ARTICLE 12. Members of the armed forces and other persons mentioned in the following Article, who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances, it being understood that the term "shipwreck" means shipwreck from any cause and includes forced landings at sea by or from aircraft.

Such persons shall be treated humanely and cared for by the Parties to the conflict in whose power they may be, without any adverse distinction

founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they sh not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Only urgent medical reasons will authorize priority in the order of treatment to be administered.

Women shall be treated with all consideration due to their sex.

ARTICLE 13. The present Convention shall apply to the wounded, sick and shipwrecked at sea belonging to the following categories:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

  (a) that of being commanded by a person responsible for his subordinates;

  (b) that of having a fixed distinctive sign recognizable at a distance;

  (c) that of carrying arms openly;

  (d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

ARTICLE 14. All warships of a belligerent Party shall have the right to demand that the wounded, sick or shipwrecked on board military hospital ships, and hospital ships belonging to relief societies or to private individuals, as well as merchant vessels, yachts and other craft shall be surrendered, whatever their nationality, provided that the wounded and sick are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment.

ARTICLE 15. If wounded, sick or shipwrecked persons are taken on board a neutral warship or a neutral military aircraft, it shall be ensured, where so required by international law, that they can take no further part in operations of war.

ARTICLE 16. Subject to the provisions of Article 12, the wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them. The captor may decide, according to circumstances, whether it is expedient to hold them, or to convey them to a port in the captor's own country, to a neutral port or even to a port in enemy territory. In the last case, prisoners of war thus returned to their home country may not serve for the duration of the war.

ARTICLE 17. Wounded, sick or shipwrecked persons who are landed in neutral ports with the consent of the local authorities, shall, failing arrangements to the contrary between the neutral and the belligerent Powers, be so guarded by the neutral Power, where so required by international law, that the said persons cannot again take part in operations of war.

The costs of hospital accommodation and internment shall be borne by the Power on whom the wounded, sick or shipwrecked persons depend.

ARTICLE 18. After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a beseiged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area.

ARTICLE 19. The Parties to the conflict shall record as soon as possible, in respect of each shipwrecked, wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification. These records should if possible include:

(a) designation of the Power on which he depends;
(b) army, regimental, personal or serial number;
(c) surname;
(d) first name or names;

(e) date of birth;
(f) any other particulars shown on his identity card or disc;
(g) date and place of capture or death;
(h) particulars concerning wounds or illness, or cause of death.

As soon as possible the above-mentioned information shall be forwarded to the information bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of the double identity disc, or the identity disc itself if it is a single disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

ARTICLE 20. Parties to the conflict shall ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. Where a double identity disc is used, one half of the disc should remain on the body.

If dead persons are landed, the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, shall be applicable.

ARTICLE 21. The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.

Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance.

They may, in no case, be captured on account of any such transport; but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.

Chapter III. Hospital Ships

ARTICLE 22. Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the

wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.

The characteristics which must appear in the notification shall include registered gross tonnage, the length from stem to stern and the number of masts and funnels.

ARTICLE 23. Establishments ashore entitled to the protection of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, shall be protected from bombardment or attack from the sea.

ARTICLE 24. Hospital ships utilized by National Red Cross Societies, by officially recognized relief societies or by private persons shall have the same protection as military hospital ships and shall be exempt from capture, if the Party to the conflict on which they depend has given them an official commission and in so far as the provisions of Article 22 concerning notification have been complied with.

These ships must be provided with certificates from the responsible authorities, stating that the vessels have been under their control while fitting out and on departure.

ARTICLE 25. Hospital ships utilized by National Red Cross Societies, officially recognized relief societies, or private persons of neutral countries shall have the same protection as military hospital ships and shall be exempt from capture, on condition that they have placed themselves under the control of one of the Parties to the conflict, with the previous consent of their own governments and with the authorization of the Party to the conflict concerned, in so far as the provisions of Article 22 concerning notification have been complied with.

ARTICLE 26. The protection mentioned in Articles 22, 24 and 25 shall apply to hospital ships of any tonnage and to their lifeboats, wherever they are operating. Nevertheless, to ensure the maximum comfort and security, the Parties to the conflict shall endeavour to utilize, for the transport of wounded, sick and shipwrecked over long distances and on the high seas, only hospital ships of over 2,000 tons gross.

ARTICLE 27. Under the same conditions as those provided for in Articles 22 and 24, small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations, shall also be respected and protected, so far as operational requirements permit.

The same shall apply so far as possible to fixed coastal installations used exclusively by these craft for their humanitarian missions.

ARTICLE 28. Should fighting occur on board a warship, the sick-bays shall be respected and spared as far as possible. Sick-bays and their equipment shall remain subject to the laws of warfare, but may not be diverted

from their purpose so long as they are required for the wounded and sick. Nevertheless, the commander into whose power they have fallen may, after ensuring the proper care of the wounded and sick who are accommodated therein, apply them to other purposes in case of urgent military necessity.

ARTICLE 29. Any hospital ship in a port which falls into the hands of the enemy shall be authorized to leave the said port.

ARTICLE 30. The vessels described in Articles 22, 24, 25 and 27 shall afford relief and assistance to the wounded, sick and shipwrecked without distinction of nationality.

The High Contracting Parties undertake not to use these vessels for any military purposes.

Such vessels shall in no wise hamper the movements of the combatants.

During and after an engagement, they will act at their own risk.

ARTICLE 31. The Parties to the conflict shall have the right to control and search the vessels mentioned in Articles 22, 24, 25 and 27. They can refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communications, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires.

They may put a commissioner temporarily on board whose sole task shall be to see that orders given in virtue of the provisions of the preceding paragraph are carried out.

As far as possible, the Parties to the conflict shall enter in the log of the hospital ship, in a language he can understand, the orders they have given the captain of the vessel.

Parties to the conflict may, either unilaterally or by particular agreements, put on board their ships neutral observers who shall verify the strict observation of the provisions contained in the present Convention.

ARTICLE 32. Vessels described in Articles 22, 24, 25 and 27 are not classed as warships as regards their stay in a neutral port.

ARTICLE 33. Merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities.

ARTICLE 34. The protection to which hosiptal ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after the warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded.

In particular, hospital ships may not possess or use a secret code for their wireless or other means of communication.

ARTICLE 35. The following conditions shall not be considered as

depriving hospital ships or sick-bays of vessels of the protection due to them:

(1) The fact that the crews of ships or sick-bays are armed for the maintenance of order, for their own defence or that of the sick and wounded.

(2) The presence on board of appartus exclusively intended to facilitate navigation or communication.

(3) The discovery on board hospital ships or in sick-bays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service.

(4) The fact that the humanitarian activities of hospital ships and sick-bays of vessels or of the crews extend to the care of wounded, sick or shipwrecked civilians.

(5) The transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.

Chapter IV. Personnel

ARTICLE 36. The religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board.

ARTICLE 37. The religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13 shall, if they fall into the hands of the enemy, be respected and protected; they may continue to carry out their duties as long as this is necessary for the care of the wounded and sick. They shall afterwards be sent back as soon as the Commander-in-Chief, under whose authority they are, considers it practicable. They may take with them, on leaving the ship, their personal property.

If, however, it prove necessary to retain some of this personnel owing to the medical or spiritual needs of prisoners of war, everything possible shall be done for their earliest possible landing.

Retained personnel shall be subject, on landing, to the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

Chapter V. Medical Transports

ARTICLE 38. Ships chartered for that purpose shall be authorized to transport equipment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease, provided that the particulars regarding their voyage have been notified to

the adverse Power and approved by the latter. The adverse Power shall preserve the right to board the carrier ships, but not to capture them or seize the equipment carried.

By agreement amongst the Parties to the conflict, neutral observers may be placed on board such ships to verify the equipment carried. For this purpose, free access to the equipment shall be given.

ARTICLE 39. Medical aircraft, that is to say, aircraft exclusively employed for the removal of the wounded, sick and shipwrecked, and for the transport of medical personnel and equipment, may not be the object of attack, but shall be respected by the Parties to the conflict, while flying at heights, at times and on routes specifically agreed upon between the Parties to the conflict concerned.

They shall be clearly marked with the distinctive emblem prescribed in Article 41, together with their national colours, on their lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification which may be agreed upon between the Parties to the conflict upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to alight on land or water. In the event of having thus to alight, the aircraft with its occupants may continue its flight after examination, if any.

In the event of alighting involuntarily on land or water in enemy or enemy-occupied territory, the wounded, sick and shipwrecked, as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Articles 36 and 37.

ARTICLE 40. Subject to the provisions of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land thereon in case of necessity, or use it as a port of call. They shall give neutral Powers prior notice of their passage over the said territory, and obey every summons to alight, on land or water. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.

The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.

Unless otherwise agreed between the neutral Powers and the Parties to the conflict, the wounded, sick or shipwrecked who are disembarked with the consent of the local authorities on neutral territory by medical aircraft shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of

war. The cost of their accommodation and internment shall be borne by the Power on which they depend.

Chapter VI. The Distinctive Emblem

ARTICLE 41. Under the direction of the competent military authority, the emblem of the red cross on a white ground shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.

Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, these emblems are also recognized by the terms of the present Convention.

ARTICLE 42. The personnel designated in Articles 36 and 37 shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel, in addition to wearing the identity disc mentioned in Article 19, shall also carry a special identity card bearing the distinctive emblem. This card shall be water-resistant and of such size that it can be carried in the pocket. It shall be worded in the national language, shall mention at least the surname and first names, the date of birth, the rank and the service number of the bearer, and shall state in what capacity he is entitled to the protection of the present Convention. The card shall bear the photograph of the owner and also either his signature or his fingerprints or both. It shall be embossed with the stamp of the military authority.

The identity card shall be uniform throughout the same armed forces and, as far as possible, of a similar type in the armed forces of the High Contracting Parties. The Parties to the conflict may be guided by the model which is annexed, by way of example, to the present Convention. They shall inform each other, at the outbreak of hostilities, of the model they are using. Identity cards should be made out, if possible, at least in duplicate, one copy being kept by the home country.

In no circumstances may the said personnel be deprived of their insignia or identity cards nor of the right to wear the armlet. In case of loss they shall be entitled to receive duplicates of the cards and to have the insignia replaced.

ARTICLE 43. The ships designated in Articles 22, 24, 25 and 27 shall be distinctively marked as follows:

(a) All exterior surfaces shall be white.

(b) One or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air.

All hospital ships shall make themselves known by hoisting their national flag and further, if they belong to a neutral state, the flag of the Party to the conflict whose direction they have accepted. A white flag with a red cross shall be flown at the mainmast as high as possible.

Lifeboats of hospital ships, coastal lifeboats and all small craft used by the Medical Service shall be painted white with dark red crosses prominently displayed and shall, in general, comply with the identification system prescribed above for hospital ships.

The above-mentioned ships and craft, which may wish to ensure by night and in times of reduced visibility the protection to which they are entitled, must, subject to the assent of the Party to the conflict under whose power they are, take the necessary measures to render their painting and distinctive emblems sufficiently apparent.

Hospital ships which, in accordance with Article 31, are provisionally detained by the enemy, must haul down the flag of the Party to the conflict in whose service they are or whose direction they have accepted.

Coastal lifeboats, if they continue to operate with the consent of the Occupying Power from a base which is occupied, may be allowed, when away from their base, to continue to fly their own national colours along with a flag carrying a red cross on a white ground, subject to prior notification to all the Parties to the conflict concerned.

All the provisions in this Article relating to the red cross shall apply equally to the other emblems mentioned in Article 41.

Parties to the conflict shall at all times endeavour to conclude mutual agreements in order too use the most modern methods available to facilitate the identification of hospital ships.

ARTICLE 44. The distinguishing signs referred to in Article 43 can only be used, whether in time of peace or war, for indicating or protecting the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned.

ARTICLE 45. The High Contracting Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs provided for under Article 43.

Chapter VII. Execution of the Convention

ARTICLE 46. Each Party to the conflict, acting through its Commanders-in-Chief, shall ensure the detailed execution of the preceding Articles and provide for unforeseen cases, in conformity with the general principles of the present Convention.

ARTICLE 47. Reprisals against the wounded, sick and shipwrecked

persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.

ARTICLE 48. The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

ARTICLE 49. The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

Chapter VIII. Repression of Abuses and Infractions

ARTICLE 50. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

ARTICLE 51. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

ARTICLE 52. No High Contracting Party shall be allowed to absolve

itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

ARTICLE 53. At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire, who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

Final Provisions

ARTICLE 54. The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

ARTICLE 55. The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the Xth Hague Convention of October 18, 1907, for the adaptation to Maritime Warfare of the principles of the Geneva Convention of 1906, or to the Geneva Conventions of 1864, 1906 or 1929 for the Relief of the Wounded and Sick in Armies in the Field.

ARTICLE 56. The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 57. The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

ARTICLE 58. The present Convention replaces the Xth Hague Convention of October 18, 1907, for the adaptation to Maritime Warfare of the principles of the Geneva Convention of 1906, in relations between the High Contracting Parties.

ARTICLE 59. From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

ARTICLE 60. Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 61. The situation provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

ARTICLE 62. Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

ARTICLE 63. The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

IN WITNESS WHEREOF the undersigned, having deposited their respective full powers, have signed the present Convention.

DONE at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

[Annex, containing form of Identity Card for members of Medical and Religious Personnel Attached to the Armed Forces at Sea, is omitted.]

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