

INTERNATIONAL LAW STUDIES

1993

TARGETING ENEMY MERCHANT SHIPPING

Edited by

Richard J. Grunawalt

Volume 65

NAVAL WAR COLLEGE

NEWPORT, RHODE ISLAND

Printed in the United States of America



This volume is printed on acid-free paper
by William S. Hein & Co., Inc.

Library of Congress Cataloging-in-Publication Data

Targeting enemy merchant shipping / Richard J. Grunawalt.

p. cm. — (International law studies; v. 65)

Includes index.

1. War, Maritime (International law)—Congresses. 2. Naval law—Congresses. 3. Naval tactics—Congresses. 4. United States. Navy—Congresses. I. Grunawalt, Richard J. II. Series.

JX1295.U4 vol. 65

[JX5203]

341 s—dc20

[341.6'3]

93-13402

CIP

TABLE OF CONTENTS

	Page
FOREWORD	
PREFACE	
Chapter One	
Targeting Enemy Merchant Shipping: An Overview of Law and Practice	2
<i>L. F. E. Goldie</i>	
Chapter Two	
Submarine Warfare: With Emphasis on the 1936 London Protocol	28
<i>Howard S. Levie</i>	
Comments	72
<i>A. V. Lowe</i>	
Comments	78
<i>Dieter Fleck</i>	
Chapter Three	
The Naval Practices of Belligerents in World War II: Legal Criteria and Development	87
<i>Sally V. Mallison and W. Thomas Mallison</i>	
Comments	104
<i>M. W. Janis</i>	
Comments	110
<i>W. J. Fenrick</i>	
Chapter Four	
State Practice Following World War II: 1945 - 1990	121
<i>George K. Walker</i>	
Comments	223
<i>L. C. Green</i>	

Targeting Enemy Merchant Shipping

	Page
Chapter Five	
Targeting Realities: Platforms, Weapons Systems, and Capabilities	231
<i>James Service</i>	
Comments	242
<i>J. H. Doyle Jr</i>	
Chapter Six	
Strategic Imperatives: Economic Warfare at Sea	250
<i>Hugh F. Lynch</i>	
Comments	264
<i>Harry Almond</i>	
Chapter Seven	
U. S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice	338
<i>H. B. Robertson Jr</i>	
Comments	356
<i>Frits Kalshoven</i>	
Comments	364
<i>J. Ashley Roach</i>	
Index	367

FOREWORD

The International Law Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. Work on this, the sixty-fifth volume of that series, began in the midst of a decade of turmoil in the Persian Gulf. During that time, the targeting of merchant shipping by both Iran and Iraq raised anew questions about the rules regarding targeting of merchant shipping and current viability of those rules in the international community.

This volume consists of papers written for and presented at a recent Naval War College-sponsored Symposium on the Law of Naval Warfare: Targeting Enemy Merchant Shipping. The papers collected in this volume are the work of seventeen of the world’s most highly respected authorities in the field. The principal papers analyze different aspects of the targeting issue, while the commentaries provide critical analyses of those complex and topically important assessments and conclusions. The result is a thorough and well-balanced discussion of targeting issues regarding enemy merchant shipping. While the opinions expressed in this volume are those of the individual authors and not necessarily those of the United States Navy nor the Naval War College, they collectively provide a valuable contribution to the study and development of the law of naval warfare. On behalf of the Secretary of the Navy, the Chief of Naval Operations and Commandant of the Marine Corps, I extend to the editor, Professor R. J. Grunawalt, and the contributing authors of this informative and provocative work our gratitude and thanks.

Joseph C. Strasser
Rear Admiral, U.S. Navy
President, Naval War College

PREFACE

In February 1990, the Naval War College, with the generous support of the Naval War College Foundation, hosted a symposium on the Law of Naval Warfare. The 3-day symposium addressed the legality of targeting enemy merchant shipping during armed conflict and the subsidiary issue of whether the 1936 London Protocol continues to have efficacy as an international commitment for those States party to it. The symposium brought together legal scholars, government officials and operational commanders from the United States, the United Kingdom, Canada, the Netherlands and Germany in a scholarly but free-wheeling examination of this contentious problem. The product of that examination, in the form of the principal papers and supporting written commentaries delivered during the symposium, has been preserved and is presented here as Volume 65 in the 'Blue Book' series.

The first day of the symposium, with Professor John Norton Moore serving as moderator, provided an overview of law and practice pertaining to targeting enemy merchant vessels followed by an in-depth analysis of the origins and purposes of the 1936 London Protocol. The actual practice of belligerents during World War II, and the Nuremberg response thereto, completed the first day's work. The second day of the symposium, moderated by Professor Michael Reisman, began with a review of state practice since the end of World War II, followed by a review of targeting realities in the modern context from the special vantage point of the operational commander, and by an analysis of the strategic imperatives of economic warfare at sea into the 21st Century. The third and final day of the symposium, under the direction of moderator Dr. Robert Wood, examined current U.S. policy on targeting enemy merchant shipping from the perspective of conventional law and state practice.

The central focus throughout the symposium was the following prescription of the 1936 London Protocol:

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 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 belligerents of World War II initially sought to conduct commerce raiding in a manner consistent with the Protocol. As the war progressed and merchant vessels were regularly armed and convoyed, participated in intelligence

collection, and were otherwise incorporated directly or indirectly into the enemy's war effort, they were widely regarded as legitimate military targets subject to destruction on sight. By war's end, little, if any, attempt was made by the belligerents of either side to comply with the Protocol. However, the 1936 London Protocol remains "on the books," not having been rescinded nor formally repudiated. It is in this context that the ongoing debate is framed. Is the Protocol still viable? Are enemy merchant platforms "civilian objects" and therefore immune from attack? Or do they constitute an integral part of the enemy's lines of communication, supply and support, subject to destruction without warning as lawful objects of attack?

Professor L.F.E. Goldie's opening presentation proved to be representative of the extraordinary scholarship that was to characterize the substantive work of the symposium. As the principal paper of Chapter I, Professor Goldie's analysis provides an 'overview' of law and practice respecting the targeting of enemy merchant shipping. Noting that total economic warfare at sea, fought with modern weapons platforms such as the nuclear-powered attack submarine and supersonic strike aircraft, renders long-cherished principles of humanitarian armed conflict effectively, if not legally, obsolete, Professor Goldie argues that in more limited conflict there remains a place for the concept of distinction in targeting and for "fellowship of the sea" during naval warfare as exemplified by Lord Nelson at Trafalger.

Session Two of the symposium, and Chapter II of this volume, address the law of submarine warfare with emphasis on the influence of the London Protocol of 1936 on the targeting of merchant shipping by submarines during World War II. Professor Howard S. Levie, the author of the principal paper of Chapter II, provides a concise analysis of the evolution of the submarine into a highly effective instrument of modern warfare, and of the attempts of the international community to define its proper role under the law. Professor Levie traces this development through World War I, describes the failed attempts by Great Britain following that conflict to outlaw the submarine as a commerce raider, and analyzes the antecedents to, and substance of, the 1936 London Protocol. He then examines the practices of the belligerents during World War II, the findings of the International Military Tribunal at Nuremberg, and contemporary views of the maritime powers, particularly the United States, as expressed in modern military manuals. Professor Levie's conclusions as to the continued efficacy of the mandate of the London Protocol, that enemy merchant shipping may not be destroyed unless the safety of passengers, crew and ship's papers are first assured, set the framework for the learned - and spirited - debate of the symposium participants.

Formal comments on Professor Levie's paper were delivered during the Second Session by Professors A.V. Lowe and Dieter Fleck. Professor Lowe's assessment of the development of the 1936 London Protocol provides a British

perspective of that process. His insightful observation that arms limitation agreements, such as the London Protocol, have peacetime implications for procurement, the development of strategy and tactics, and training that may overshadow their impact on the rules of the game, gives pause for thought in the contemporary context. The jettisoning by belligerents of both sides during World War II of the requirements of the London Protocol in the face of the reality of total warfare at sea, demonstrates Professor Lowe's further observation that no arms limitation agreement should be expected to survive the historic context in which it was negotiated.

Professor Fleck's commentary provides a German perspective of the nature and continuing efficacy of the London Protocol. Professor Fleck argues that the Protocol was not intended to apply in circumstances where compliance would place an attacking warship, surface or submarine, in immediate peril. Consequently, state practice during World War II did not, in his view, constitute a wholesale departure from its prescriptions. Professor Fleck argues, therefore, that the protection of civilians and civilian objects articulated in the London Protocol continues to accord with contemporary rules of humanitarian warfare at sea.

Chapter III comprises the principal paper and commentaries presented during the Third Session of the symposium. In the principal paper, the authors, Professor W.T. and Sally V. Mallison, examine the practices of the belligerents at sea during World War II and analyze the legal criteria applicable at the onset of that conflict, as well as the development of those criteria as the war progressed. The Mallisons trace the origins of the London Protocol of 1936 and, in doing so, contend that a contextual interpretation of its provisions makes it clear that the Protocol's protections were not intended to extend to merchant vessels participating in the enemy's warfighting or war sustaining effort. Given the 'normatively ambiguous' nature of the prescriptions of the London Protocol, the Mallisons argue that the practice of the belligerents of World War II cannot be said to have departed from its mandates as significantly as has generally been suggested.

Professor Mark Janis, while applauding the 'mission' of the Mallisons' analysis, argues in his commentary that their "restrictive interpretation of merchant shipping" is in error. Professor Janis contends that if it is true, as the Mallisons suggest, that in modern warfare virtually all enemy merchant shipping "participates" in the enemy's war-effort, the Protocol is robbed of its substance, a conclusion he is not willing to accept. Professor Janis states that he is of the view that the Protocol is in the nature of "soft" international law that was widely disregarded during World War II because it could not be effectively applied.

Commander W.J. Fenrick's commentary concludes that the analysis of the London Protocol provided in the Mallisons' paper is 'quite persuasive.' Commander Fenrick, a serving Canadian officer, argues that if "the law of naval warfare is to have an impact on the conduct of warfare, there should be a crude

congruence between law and practice so that it is marginal, extreme conduct which is condemned, not activities which are routine operations of war.”

The Fourth Session of the symposium addressed state practice regarding targeting enemy merchant shipping since World War II. Professor George Walker's principal paper provides a comprehensive analysis of the practice of belligerents during the Korean conflict, the Chinese civil war, the Arab-Israeli conflicts, the India-Pakistan wars, the Vietnam War, the Falklands/Malvinas War, and the Iran-Iraq Tanker War. In addition, Professor Walker examines the evolution of treaty law during the period as well as the development of military manuals among the nations possessing significant naval capability. For U.S. readers, his commentary on U.S. Naval Warfare Publication (NWP) 9, *The Commander's Handbook on the Law of Naval Operations*, is particularly useful. Professor Walker concludes his presentation with an illuminating discussion of the on-going sponsorship by the International Institute of Humanitarian Law of a series of conferences at which international participants are examining naval warfare issues including those pertaining to the targeting of enemy merchant shipping.

Professor L.C. Green's commentary on Professor Walker's principal paper completes Chapter IV of this volume. Professor Green, *inter alia*, cautions that applying rules of law developed for “one dimension of activity” - *e.g.*, land warfare - to another - *e.g.*, naval warfare - ought to be undertaken with great circumspection. Accordingly, drawing analogues for targeting enemy merchant shipping from rules designed for specific application on land - *e.g.*, Protocol I Additional to the Geneva Conventions of 1949 - or at sea during time of peace - *e.g.*, the 1982 United Nations Convention on the Law of the Sea -, Professor Green argues, are best avoided unless they are so general as to have obvious application irrespective of the area or the circumstances in question.

Chapter V provides an analysis of the military realities of naval targeting in the modern era from the perspective of the operational commander. VADM James Service, USN (Ret.) provides the principal paper entitled “Targeting Realities: Platforms, Weapons Systems and Capabilities.” Noting that targeting enemy merchant shipping will remain a major objective of warfare at sea for the foreseeable future, VADM Service argues that the London Protocol of 1936, if literally interpreted, “would unacceptably put at risk all of my forces, decrease the probability of success for my assigned mission and unnecessarily prolong the conflict.” VADM J.M. Doyle, Jr., USN (Ret.) contributed to Session Five of the symposium with a commentary on and expansion of VADM Service's assessment of the impact of technological advancements on the targeting equation. VADM Doyle stresses the importance of target discrimination in modern warfare at sea, particularly with the advent and proliferation of over-the-horizon weapon systems. Noting that in limited warfare national rules of engagement will likely constrain the operational commander more than will the

law of armed conflict, VADM Doyle argues that the law itself must be sufficiently flexible to permit targeting of enemy merchant shipping if and when the need arises. To that end, "reassessment or fresh interpretation of the London Protocol of 1936" may be required.

Session Six of the symposium examined the strategic imperatives of economic warfare at sea. Professor Hugh Lynch provides the principal paper for Chapter VI of this volume in which he explores that theme in the context of a global conventional war between superpowers and in the more likely scenario of limited conflict between nations other than superpowers. Addressing his subject from the perspective of a military strategist and "practitioner of the operational art at sea," Professor Lynch maintains that the foremost challenge to international law respecting economic warfare in the maritime environment is "keeping abreast of technological change."

Professor Harry Almond provides a comprehensive commentary on Professor Lynch's paper. Professor Almond postulates that economic warfare, as a concept, must be functional if it is to be useful. He argues that "whether perceived as a strategy by policy . . . makers . . . or by . . . naval forces acting in the operational dimension of hostilities, economic warfare is judged under legal standards of reasonableness and effectiveness." Professor Almond agrees that technological change drives change in tactics, which in turn determines how economic warfare is actually conducted in the crucible of armed conflict at sea. These precedents will, over time, lead to continuing change and refinement in the law. Nonetheless, he reminds us that economic warfare at sea is but a subset of economic warfare in general. Strategies adopted to strangle an opponent's capability to sustain his warfighting effort will dictate not only the intensity but the duration of the conflict. Economic warfare at sea will continue to evolve as that calculus changes to accommodate emerging technology and adjustments of community norms or "tolerances." Professor Almond concludes that the precepts of law regulating economic war in the maritime dimension will necessarily, and properly, remain "emerging" law.

The Seventh and concluding session of the symposium focused on current United States policy respecting the targeting of enemy merchant shipping. Professor H.B. Robertson's principal paper for this topic assessed the success of that policy in terms of its utility as an acceptable bridge between conventional law, as articulated in the London Protocol of 1936 and state practice during, and subsequent to, World War II. Professor Robertson's paper, together with commentaries of Professor Fritz Kalshoven and Captain Ashley Roach thereon, comprise Chapter VII of this volume.

Professor Robertson's analysis of U.S. policy in this arena is premised on his scholarly review of *The Commander's Handbook on the Law of Naval Operations*. Noting that the *Handbook* seeks to "walk a fine line between the conventional law as set forth in the 1936 Protocol and the actual practice of states that occurred

in World War II and subsequent conflicts,” Professor Robertson concludes that the U.S. policy of acceptance of the continued viability of the Protocol, while at the same time holding it to be inapplicable in most circumstances, is justified.

Professor Frits Kalshoven, representing a Dutch view on the targeting of enemy merchant shipping, applauds the 1987 publication of the *Handbook* as a “welcome event.” He takes exception, however, to the statement therein that an enemy merchant ship which contributes to the enemy’s war effort constitutes a legitimate military objective. Fearing that criterion is too “permissive,” he would limit use of the concept of contribution to the war effort as a separate ground for attack to circumstances where it is shown that the enemy state exercises complete and effective control over a platform being used to transport “items essential to the war effort.” While generally accepting the U.S. view that the security of the attacking force and mission accomplishment are valid considerations in determining whether an enemy merchant platform may be attacked without first providing for the safety of passengers and crew, Professor Kalshoven warns that such concerns must be balanced with humanitarian values else they degenerate into a “license to kill.”

Captain Ashley Roach, in his commentary on Professor Robertson’s paper, maintains that civilian objects, which by definition are immune from intentional attack, lose that immunity and become legitimate military objectives when “by their nature, location, purpose or use they effectively contribute to the enemy’s war-fighting or war-sustaining capability and when their total or partial destruction . . . would constitute a definite military advantage to an attacker.” He then argues that the circumstances listed in the *Handbook* as to when enemy merchant shipping may be attacked without warning are consistent with those criteria. Accordingly, he finds U.S. policy on this issue, as expressed in the *Handbook*, to be a “reasonable and realistic balance.” With respect to the question of the London Protocol’s construed viability, Captain Roach argues that it “has not lapsed into desuetude, but must be understood to be not applicable across the board as some would have it.”

The spirited debate over the current state of the Law of Naval Warfare respecting the targetability of enemy merchant shipping generated in the course of the symposium, as reflected in the principal papers and commentaries reproduced in this volume, provide the serious reader, whether international lawyer, governmental official or operational commander, with a solid intellectual framework upon which to address this issue.

I would like to add my voice to that of the President of the Naval War College in thanking the authors for their contributions to this volume and to the advancement of the study of the Law of Naval Warfare. I would also like to recognize the contribution of all of the participants of the symposium - legal scholars, military strategists, operational commanders and policy makers - for

their role in ensuring the success of the symposium from whence the papers reproduced here were derived.

Richard J. Grunawalt
Director, Oceans Law and Policy Department
Center for Naval Warfare Studies
Naval War College

Chapter I

Targeting Enemy Merchant Shipping: An Overview of Law and Practice

A paper by
L.F.E. Goldie ★

Targeting Enemy Merchant Shipping: An Overview of Law & Practice

I. Introduction

The title of this paper is, perhaps, very ambitious, but its object is to review the impact of two inventions, centuries in gestation, which were brought to birth through the inventive genius of Americans—Orville and Wilbur Wright and their aircraft and John Phillip Holland and his submersible torpedo boat. (A necessary adjunct to the latter was the earlier invention of the “Whitehead torpedo.”) There seems to be an almost fatal irony in noting that Holland developed his boat, the principles of which remained controlling in building such submersibles until the end of World War II, as a member of the Irish Fenian Brotherhood. His object: the humiliation of the British Navy through maritime, clandestine guerrilla attacks. His goal was almost achieved in World War I by boats built upon his principles but navigated, not by the Fenian Brotherhood, but in open and declared warfare by Britain’s foremost naval rival, the Imperial German Navy.

In World War II a more refined German version, still designed on Holland’s basic principles, posed such a great threat that Winston Churchill claimed:

The only thing that ever really frightened me during the war was the U-Boat peril . . . I was even more anxious about this battle than I had been about the glorious air fight called the Battle of Britain.¹

In World War II both the United States and the United Kingdom employed submarines to challenge their enemies’ surface supremacy in areas where they were not able at the time to resort to the power of their surface units.

To the end of World War II, however, the vessels utilized in submarine warfare were still submersible torpedo boats rather than true submarines. This situation was not to last as, even before the end of World War II, the German Navy was experimenting with the hydrogen peroxide fueled “Walther boat.” This vessel was of a revolutionary design, which provided fresh air for the crew by means of the Dutch-designed “snorkel” and dispensed altogether with the need for an oxygen breathing engine of the older “Holland”-style boats. The Holland boats were obliged to motor on the surface in order to gain the speed necessary to take up tactical fighting positions as well as to charge their batteries

which stored the energy that drove the electric motors essential for submerged navigation. By contrast, the Walther boat could travel submerged indefinitely, and did not require the power plant duality of the traditional Holland boats. Fortunately for the Allies, this style vessel was not operational during World War II. Presently, with the advent of nuclear powered boats, the age of the true submarine has come into being. Such a warship can cruise submerged continuously; it is capable of travelling at very high speeds under water and does not need to surface to fight or to launch its missiles.

In World War II, the air services also presented their challenge to surface naval power and proved, after the Battle of Midway at the latest, to be surface warfare's master. Debate now rages as to whether the air or the submarine services will ultimately prove to hold the final keys to admiralty. Because of their physical limitations, neither a maritime warplane nor a raiding submarine, can comply with the values Nelson expressed in his prayer before the Battle of Trafalgar: ". . . may humanity after victory be the predominant feature in the British fleet."² Should a contest for mastery of the oceans come about under contemporary conditions, it would be awesome in its magnitude, and in its dire power would test men's hardihood and fortitude, their planning and their fighting skills. The imminent and horrifying means of destruction may also challenge their humanity. These animadversions, while taking our imaginations beyond the limit of this paper, help to set a larger frame and one, moreover, within which the present topic must need be fitted. In addition, these criticisms do point to a widening possibility that fighting men will become increasingly compelled to accept what Admiral Doenitz characterized as a "code of hardness" which forswore "every principle of the sea's fellowship—mutual help in the face of nature, instant assistance to the shipwrecked, magnanimity in victory and fair play at all times."³

Linked, as part of a more-embracing value system with the ethics of the "seas' fellowship," is the time honored legal notion, in both maritime and land warfare, of the principle of distinction. Traditionally, war on land distinguished between civilians and military personnel and between private and public property. At sea, the merchant ships of a belligerent were always subject to lawful capture; neutral trading vessels, unless carrying contraband, were, however, treated as immune. The extension of the concept of contraband in World War I and the system of economic warfare as waged by the United Kingdom and her Allies in both World Wars on the one side, and, on the other, the indiscriminate raiding strategy of submarine warfare by Germany, effectively ended that traditional protection of belligerent or neutral merchant ships, and with it, the principle of distinction in maritime warfare.

II. "The Seas' Fellowship"

Historians relating the Battle of Trafalgar tell of the storm that struck the damaged ships of the victors and vanquished alike. They also record the valiant

efforts of the victors to save the prize crews, at great risk to themselves and their prisoners after they had been ordered to abandon their captured ships.⁴ The “fellowship of the sea” was also reflected in the capture of enemy private and merchant ships,⁵ which, if they submitted to visit and search by a warship, would not be attacked. Furthermore, crews and passengers were, by their capture, placed under the protection of their captors or, at least, had so far as conditions made it possible, the expectation that their safety would be assured.⁶

These values were observed, in the main, in both World Wars by the German surface commerce raiders. An example of the “seas fellowship” was set by Count von Luckner in his *Seeadler* in World War I. There were, with some unfortunate exceptions, similar examples in World War II: the famous *Altmark* incident arose from a British naval rescue of 300 British merchant navy officers and seamen who had been taken prisoner by the German pocket battleship *Graf Spee* while the latter ship was engaging in commerce raiding in the South Atlantic. The incident became notorious by reason of the fact that the Norwegian authorities, aware that the *Altmark* was a naval auxiliary ship, still permitted her to navigate through approximately 400 miles of Norwegian territorial waters while refusing a British request to examine her to ascertain whether she was carrying British seamen who had been taken prisoner. Upon Norway’s refusal, the British destroyer *Cossack* entered her territorial sea and rescued the British captives.⁷ The relevance of the *Altmark* incident to this paper is that it illustrates that German naval authorities acknowledged the authority of, and complied with, the traditional humanitarian obligations of protecting enemy lives, apart from the necessary⁸ infliction of battle casualties (including collateral injuries and deaths) in sea warfare. In general, one may say that in both World Wars, German surface raiders did adhere to the traditional values held among seamen. While the *Trial of Helmuth von Ruchteschell*⁹ shows that one German commander of an armed surface raider failed to live up to those norms of behavior, it also distinguishes aberrant conduct on the part of one officer and his crew from the traditional values observed by most sea warriors.

The surface raiders of the two World Wars were also able to follow the traditional values of seamen because their ships permitted them to do so. They had adequate space for accommodating captured crew members, could rendezvous with auxiliary vessels for transshipment and eventual incarceration, and they carried armament which enabled them to engage in fighting. (For example, the disguised German armed raider *Kormoran* sank, by recourse to a perhaps obsolete ruse of war, the Australian cruiser *Sydney* in November 1941).¹⁰ So long as naval warfare remained two-dimensional, its conduct was largely, if not entirely, consistent with the traditional values. This was so despite the development of turbine-driven warships with “ship-killing” armaments. In writing of the aftermath of the Battle of Heligoland Bight on August 28, 1914, Keegan pointed out that:

“There was time for Keyes [the British Commander] to come alongside one of the foundering victims, *Mainz*, and for an echo of Trafalgar to sound across the waters separating them.”¹¹

III. Three Dimensional Warfare at Sea

The new, twentieth century development of three dimensional naval warfare has resulted from the increasing use of aircraft and submarines. To the end of World War II, the fragile hulls of the submarines exposed them to almost inevitable destruction by ramming, should they offer to fight on the surface. Their light surface fighting armaments meant they would be outgunned by armed merchant ships, and their cramped quarters dictated that they could carry very few, if any, prisoners. Hence their very design and structure militated against their observing the traditional norms of the sea.

While it might be argued that rigid airships and zeppelins might develop a capability for observing the traditional humanitarian values of the sea, the future did not lie with them but with heavier-than-air craft. Like submarines, these latter aircraft did not have the structural ability to take and secure prisoners and rescue wounded seamen.

These still-developing vessels and aircraft, operating in the depths of the seas and in the air, illustrate how war in three dimensions now challenges the present body of law, predicated as it is on two dimensional contests. It is necessary, therefore, to examine the new strategies and tactics in light of the present law, so far as that can be made relevant, and to determine if still applicable principles can be extrapolated from the past.

IV. A Retrospective

A. The Anti-Submarine Diplomatic Campaign, 1922-36.

The German use of indiscriminate submarine warfare against Allied and neutral shipping in World I had threatened the survival of the United Kingdom as well as the effectiveness of the intervention of the United States. Therefore, the victorious Entente and Associated Powers, led by Great Britain, engaged in the inter-war period in a diplomatic campaign to outlaw the use of submarines as commerce raiders. The Allies “had been severely shaken by the ‘First Battle of the Atlantic,’ appalled by its cost and severely stressed by the effort needed to fight it.”¹² Accordingly, by Article 191 of the Treaty of Versailles, Germany was prohibited from engaging in “[t]he construction or acquisition of any submarine, even for commercial purposes . . .”.¹³

Shortly thereafter, at the Washington Naval Conference of 1921, Great Britain failed to obtain agreement on limiting the total tonnage of the parties’ submarine fleets and of the tonnage of the individual boats of which those fleets

were comprised.¹⁴ While Article 3 of the Treaty¹⁵ resulting from that Conference sought to establish the principle that an officer under the orders of a responsible state who engages in such activities “shall be liable to trial and punishment as if for an act of piracy,” this provision did not enter into force, and the attempt to stigmatize such an officer as a pirate (rather than merely a war criminal) was subsequently abandoned. On the other hand, principles such as those reflected in Article 1 of the Washington Treaty which provided that submarines were not exempt from the rules applicable to surface warships, were written into Part IV (Article 22) of the subsequent London Naval Treaty of 1930.¹⁶ This latter treaty, too, had some problems with acceptance (it was not ratified by France and Italy). France, in particular, argued for a distinction between the submarine as a legitimate weapon and its inhuman use. She argued that a belligerent using the weapon in a reprehensible manner should be condemned, rather than the weapon itself.

Prior to the London Naval Conference of 1935, which was called to frame a treaty to replace that of 1930, Great Britain sought the ratification of Part IV (Article 22) of the 1930 Treaty. That provision was as follows:

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 a surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crews 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 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.¹⁷

France and Italy deposited their instruments of ratification of Part IV on November 6, 1936. Subsequently, because of a problem arising from the non-renewal of the London Naval Treaty¹⁸ a number of states¹⁹ adhered to the London Protocol of 1936.²⁰ In addition to the original signatories, Afghanistan, Albania, Belgium, Bulgaria, Finland, Germany, Greece, Guatemala, Haiti, Nepal, Panama, Peru, Saudi Arabia, Sweden and the Soviet Union adhered to this Protocol.

The upshot of all the diplomatic activity was that the parties could be deemed to have recognized that the belligerent rights of submarines attacking merchant

vessels, despite their obvious limitations and vulnerabilities, should be no greater than those traditionally exercised by surface warships. Their obligations called for respect for the safety of non-combatants, prohibited the unnecessary destruction of private property, and, further, characterized violations of these rules as constituting gross breaches of the rules of international law. On the other hand, the proponents of the stigmatization of submarine personnel engaging in the indiscriminate sinking, without warning, of merchant ships as pirates *jure gentium* abandoned their arguments in that regard. It should also be noted that aircraft, although subject to physical limitations analogous to submarines, were not mentioned. To this writer such a lacuna reflects the former Allied Powers' (and especially Great Britain's) phobia against the use of submarines as commerce raiders. This stemmed from the traumatic experience of Britain in World War I when the submarine proved to be the only weapon which threatened her with disaster. The fact that disaster was narrowly evaded did little to mitigate the trauma and the insecurity resulting therefrom.

B. The Challenge in the Mediterranean, 1937.

(1) The Problem

In the Spanish Civil War, both sides (including Franco's German and Italian "sympathizers") sought to employ naval power on the high seas against merchant shipping supplying their opponents. The insurgent Franco forces had not been recognized as belligerents. Hence, the conflict was not an international war in which the contestants enjoyed belligerent rights. Non-participating states therefore took the position that any action by either the government's or the insurgents' war vessels in interfering with foreign shipping on the high seas was illegal. Accordingly, foreign powers were entitled to use force to protect their merchant ships from restraints imposed by the combatants' warships.

During 1937 newspapers carried reports of the sinking without warning of a number of merchant ships of various flags by bombing from aircraft or by torpedoes from unidentified submerged submarines. These depredations took place in the Mediterranean area and were widely believed to be connected with the Spanish civil war.²¹ As Professor Finch in an article written at approximately that time stated:

A number of merchant ships of various nationalities have been bombed by aeroplanes or attacked by submarines of doubtful identity. All the attacks were said to have been without warning and regardless of the fate of the passengers and crews, but fortunately there appears to have been but slight loss of life. Whatever the identity of the attackers, they were evidently acting in the interest of the Spanish insurgent forces. The attacks were obviously of great strategic importance in cutting the flow of supplies from Soviet Russia to the Spanish Government. . . . England also became aroused over the danger to her "life line" through the Mediterranean Sea and demanded protective measures.²²

These attacks revived demands for the outlawing of this kind of warfare. The British Government, in particular, wished to have agreement that officers engaging in such hostilities, even when acting under the orders of their governments, should be deemed to be pirates. Other states were satisfied with the view that the conduct of such operations constituted grave breaches of the rules of war and that officers engaging in such tactics, should be tried and punished for their acts.²³

(2) *The Nyon Arrangements*

As a result of the submarine and aircraft attacks in the Mediterranean, several European states called for an international conference to deal with the problem. The Conference convened on September 9, 1937, at Nyon, France, and within five days signed an agreement, known as the Nyon Arrangement.²⁴

In its preamble, the Nyon Arrangement recited that submarine attacks on merchant vessels "not belonging to either of the conflicting Spanish parties" had occurred and, citing Part IV of the Treaty of London,²⁵ it added thereto by asserting the hitherto unsuccessful British formula that such attacks "should justly be treated as acts of piracy." The arrangement obligated the participating states to instruct their naval forces to counter-attack and destroy any submarine which had attacked a merchant vessel "contrary to the rules of international law referred to" in Part IV of the London Treaty of 1930.²⁶ This instruction was extended, in the next article, "to any submarine encountered in the vicinity of a position where a ship not belonging to either of the conflicting Spanish parties has recently been attacked in violation of the rules referred to in the preceding paragraph."²⁷ In addition, the Nyon Arrangement created an International Naval Patrol to supplement the efforts of individual Mediterranean states.²⁸ Later, as a result of further submarine attacks on merchant shipping, the limiting requirement in provision III was dispensed with and the governments concerned (United Kingdom, France and Italy) announced that they would sink "any submarine found submerged" in the zones of the Mediterranean placed under the signatories' respective control.²⁹

(3) *The Geneva Agreement Supplementary to the Nyon Arrangement of September 17, 1937*

Despite the diplomatic emphasis on submarines as commerce raiders, submarines did not provide the only means of attacking merchant ships on the high seas in the Spanish Civil War. Shore based aircraft also attacked shipping in the Mediterranean. Accordingly, after the conclusion of the Nyon Arrangement, ten of the states represented at the Conference convened at Geneva and adopted an "Agreement Supplementary to the Nyon Agreement"³⁰ for the purpose of protecting merchant ships against surface and air attack.

The September 17 Geneva agreement was made an "integral part"³¹ of the Nyon Arrangement. But there are important differences between the provisions relating to submarines and those covering aircraft and surface vessels. While the

Nyon Arrangement provided that submarines seen, or believed to have been guilty of, torpedoing merchant ships without warning should be attacked and “if possible destroyed,” with regard to aircraft, the protecting ships were called upon to “open fire” only against planes actually seen to have attacked merchant ships.³² Should patrolling ships actually see surface warships attacking non-Spanish merchant ships, those patrol ships should only “intervene to resist” further attack.³³ As Padelford points out:

Patrol vessels were given no mandate by the Supplementary Agreement to counter-attack aircraft or surface vessels with a view to their complete destruction. No provision was made for the capture of any offending craft or their personnel.³⁴

Padelford’s contrast between the different situations permitting action by the patrol vessels, and the sanctions that they might lawfully apply to the three distinct means of commerce destruction, highlights the concern about submarines and the British drive to treat their captains and crews as pirates. This special hostility to submarines, appeared to blind the parties to the potential of aircraft for wreaking havoc on the oceans without also having the capability of assuring the safety of their victims.

The Nyon and Geneva Agreements reflect, in this writer’s view, the high watermark of the British inter-War campaign to have an international agreement that stigmatized indiscriminate submarine warfare as “piracy.” This apogee was soon left behind in the evolution of submarine weapons, strategies and tactics that evolved to answer the belligerents’ needs in World War II.

V. World War II and the Nuremberg International Military Tribunal³⁵

To whatever extent decisions of international tribunals, or of domestic tribunals applying international law, have credibility, the decisional law regarding the German indiscriminate submarine campaign after World War II has thrown an ambiguous light on the issue of the acceptance, in practice, of the 1936 London Protocol.

A. An Issue of Discrimination?

First, it should be noted that the United Nations War Crimes Commission did not address the question of blockade by resort to aerial attacks on shipping. Aircraft, as has already been indicated, have limitations similar to submarines regarding their capability to visit, search and seize ships, and ensure the safety of their crews. Possibly this omission could be explained by the fact that the United Nations forces themselves engaged in this activity to a greater extent than did the Axis Powers. Knowing it to be illegal, the United Nations prosecutors may not have wished to have the conduct of their own military planners stigmatized

as war crimes. Or, alternatively, they may have planned their cases that way because they felt that long distance blockades had become lawful through general practice and acceptance and, further, because such blockades could lawfully be enforced by aircraft, limited though they were in ensuring the safety of target ships' passengers, papers, and crews.

B. Judging Submarine Warfare at Nuremberg

The records of the war crimes tribunals regarding prosecutions for indiscriminate sinking of merchant ships by submarines are instructive. The inter-War diplomatic campaigns to stigmatize unrestricted submarine warfare as piracy were not resumed. That particular cause seemed as extinct now as the dinosaurs. Although Admirals Doenitz and Raeder were charged before the International Military Tribunal at Nuremberg with waging unrestricted submarine warfare contrary to the London Naval Treaty of 1930 and the 1936 Naval Protocol (to which Hitler's Germany had acceded), and although charges were brought that on or about September 3, 1939,³⁶ the German U-boat arm began unrestricted submarine warfare, the Tribunal was not prepared to find Doenitz guilty for his conduct of that form of submarine warfare against British armed merchant ships. Perhaps this reluctance arose after the Tribunal received evidence of unrestricted submarine warfare in a maritime prohibited zone which the United Kingdom had established in the Skagerrak on May 8, 1940, and Admiral Nimitz's answers to interrogatories which established that the United States Navy had engaged in unrestricted submarine warfare against the Japanese in the Pacific Ocean from the surprise attack on Pearl Harbor until the Japanese surrender in Tokyo Bay. The Tribunal announced that the sentencing of Doenitz was not assessed on the ground of his "breaches of the international law of submarine warfare."³⁷

On the other hand, it should be noted that some brutal submarine attacks on civilian shipping in both World Wars were punished as war crimes. But these always involved conduct that was more reprehensible than merely the act of sinking the victim ship without warning and without giving its crew an opportunity to seek relative safety. The war crimes cases arising from both World Wars that stand out illustrate the minority situations in which the accused resorted to intensified inhumanity. These included:

1. *The Llandoverly Castle* (World War I)³⁸. In this case the submerged U-boat 82 sank a hospital ship which was distinctly marked as such. The hospital ship was not carrying any military personnel other than sick and wounded soldiers and members of the Canadian Medical Corps. After torpedoing the hospital ship the submarine's commander, Patzig, ordered the U-boat to surface and, after questioning some of the survivors, fired on them in lifeboats, massacring many of them. After the War, Patzig was not found, but two of his officers were arrested, tried and convicted of their war crimes. Their pleas of following

superior orders were rejected since “killing defenseless people in life-boats could be nothing else than a breach of the law”.³⁹

2. *The Peleus* (World War II). A submarine commander ordered the massacre by machine-gun fire of the survivors who were clinging to pieces of wreckage from the sunken merchant ship.⁴⁰

3. *Trial of Karl-Heinz Moehle* (World War II): As in *The Peleus*, the accused had ordered the massacre of survivors of sunken ships and was convicted for that aggravated offense.⁴¹

4. *Trial of Helmuth von Ruchteschell* (World War II)⁴²: The accused was the commander of an armed German surface raider. He was charged with committing, *inter alia*, the following offenses against Allied merchant ships: (a) continuing to fire after the target ship had signalled her surrender; (b) failure to make provision for the safety of survivors (despite having the facilities for taking prisoners on board his ship); and (c) firing at survivors in life rafts.⁴³

In all the above cases the officers charged were guilty of conduct that involved gratuitous and deliberate acts of brutality which went beyond just the sinking of the victims' ships without warning and, without more, leaving their crews to whatever fate the sea might have in store for them. Although some of the accused were called upon to answer before the IMT, their offenses are inherently distinguishable from those for which Admirals Doenitz and Raeder went unpunished in that they involved gratuitous cruelty not even justifiable in terms of collateral damage.

VI. A “Dip into the Future”⁴⁴

In his book, *The Price of Admiralty*, John Keegan provides masterly descriptions of the Battle of Midway⁴⁵ and the Battle of the Atlantic of World War II.⁴⁶ After a carefully reasoned comparison of air power and the effectiveness of the true submarine, namely the nuclear powered boat (which he designates as “the ultimate capital ship”⁴⁷) he determined, in his luminous chapter entitled “Conclusion: An Empty Ocean,”⁴⁸ that:

In a future war the oceans might appear empty again, swept clear both of merchant traffic and of the navies which have sought so long to protect it against predators. Yet the oceans' emptiness will be illusory, for in their deeps new navies of submarine warships, great and small, will be exacting from each other the price of admiralty.⁴⁹

Insightful as these closing sentences are, one may have a sense that they are predicated on a notion of the use of force at sea which has escalated into total, indeed totalitarian, war.⁵⁰ It assumes a desperate diversion of national resources involving the total effort of a wealthy, highly developed country into complex submarine fighting and logistical systems. Imagine, for example, the magnitude

and the cost of supplying, in times of war, such countries as Britain or Japan by a submarine merchant service whose convoys, would have to be protected by further investments in armed submarine escorts of many sizes deploying a diversity of weapons systems. A similar investment might well be necessary to provide logistical support for United States combat forces serving in battle, for example, in Europe, Australia and Oceania, South America or on some part of the Asian mainland.

This other glimpse of the future is surely predicated upon a world embroiled in a type of total war whose ruthlessness would render the maritime contests in World War II relatively temperate by comparison. Service in the depths of the ocean, whether mercantile or combat, would leave no place at all for "the sea's fellowship." Every vessel could become an inescapable coffin for all who sailed in her.⁵¹

Short of such a desperate sacrifice of human and economic resources, limited three dimensional wars may well be fought on the surface of the seas, in the deeps and in the air—with ancillary activities in outer space. Perhaps one may argue that, because of the challenges of such a total war as John Keegan envisions, whatever resort to force may occur may well be self-limiting or limited by a refusal to commit additional resources, or finally limited from outside by international groups or alliances acting in the enlightened self-interest of the generality of mankind.

Be that as it may, in the quite recent past, several wars involving fighting at sea, namely the India-Pakistan War (1971), the Falklands (Malvinas) Conflict (1982) and the Persian Gulf Tanker War (1982-88) illustrate that limitations do occur. In the India-Pakistan conflict there was very little interest from the point of view of maritime warfare law except for the short-lived blockade (or rather proclamation of a blockade) of Pakistani ports which O'Connell viewed as "so aberrant in its purposes and enforcement as to offer scant lessons."⁵² As O'Connell points out, there was "no investment of Pakistan ports, nor even visitation on the high seas, but neutral ships were attacked *en route* to Pakistan."⁵³

A. The Falklands (Malvinas) Conflict, 1982

In two of the conflicts mentioned above, namely the Falkland Islands Conflict (1982)⁵⁴ and the Persian Gulf Tanker War (1982-1988),⁵⁵ the contests were limited as to space, and to some extent, weapons. But the limitations worked out in very different ways. In the 1982 Falkland Islands (Malvinas) Conflict a number of exclusion zones were proclaimed (seven in all). These seemed, in general, to be guided by a felt need on the part of both parties to the war to establish an arena, or a ring, inside of which, apart from the need of the British fleet to protect itself as it approached the battle zone, the struggle was largely contained. The British declarations and the first two Argentinean zones reflected the desire of both sides to limit the conflict to the Islands and to the seas around

them. The British resort to maritime exclusion zones was to further their strategy of retaking and defending the Islands. Their strategy was, in part, executed by raiding combat tactics conducted within the various exclusion zones. On the other hand, the Argentinean invocation of such zones (except her third, her May 11, 1982, proclamation of a "South Atlantic War Zone")⁵⁶ was for the purpose of reinforcing her persisting holding tactics once her raiding strategy had netted her control over the disputed islands. This appeared to be a corollary to the claim that each of the parties asserted that it was merely exercising its right of self-defense, and was limiting its use of force to expelling its adversary from the islands it claimed, or to prevent that adversary from permanently establishing a possessory authority over them.

The British first announced a Maritime Exclusion Zone (MEZ), on April 9, 1982, to take effect on April 12, 1982. The prohibited zone was the area enclosed by a two-hundred-nautical-mile radius drawn from a point approximately at the center of the Falkland Islands. Under this promulgation only Argentine warships and naval auxiliaries found within this zone were liable to be attacked.⁵⁷ On the following day Argentina responded by establishing a two hundred mile zone off its coast and around the "Malvinas" (Falkland) Islands. Since the approaching British fleet was still some distance from the Islands, the declaration of the British Maritime Exclusion Zone had the effect, as a ruse of war, of reinforcing an unfounded Argentine belief that the Royal Naval nuclear submarine HMS *Superb* was on station in the area of Puerto Belgrano and the Falklands. The fact that HMS *Superb* was at Holy Loch, Scotland, at the time may give rise to the question whether the British "blockade" complied with the Declaration of Paris.⁵⁸ On this point Professor Levie has commented:

The British declaration was not really a blockade, as merchant ships and neutral vessels were not barred from the exclusion zone; it only applied to enemy naval vessels. It was, therefore, nothing more than a gratuitous warning to Argentine naval vessels.⁵⁹

On April 23, 1982, the United Kingdom Government informed the Argentine Government that:

. . . any approach on the part of Argentine warships, including submarines, naval auxiliaries or military aircraft which could amount to a threat to interfere with the mission of the British forces in the South Atlantic, will encounter the appropriate response. All Argentine aircraft including civil aircraft engaging in surveillance of these British forces will be regarded as hostile and are liable to be dealt with accordingly.⁶⁰

In essence, this declaration created a moving "Defensive Bubble" around the British forces deploying to the South Atlantic.

On April 28, 1982 the British Government announced its Total Exclusion Zone (TEZ), to take effect on April 30, 1982.⁶¹ While occupying the same area as the MEZ of April 12, this zone also encompassed “any aircraft, whether military or civil, which is operating in support of the illegal occupation [of the Falkland Islands by Argentine forces].”⁶² It continued with the further warning that:

Any ship and any aircraft, whether military or civil, which is found within this zone without due authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile . . .⁶³

When on May 2 the British submarine *Conqueror* torpedoed and sank the Argentine cruiser *General Belgrano* some 30 miles outside the April 12 and 28 zone, the British Government experienced criticism for apparently violating its own self-imposed geographical limits to the conflict, it justified the attack on basis of the April 23 (“Defensive Bubble”) declaration rather than the MEZ and TEZ declarations. As stated by Minister of Defense Nott in Parliament:

That zone [i.e., the TEZ proclaimed on April 28, 1982] was not relevant in this case. The *General Belgrano* was attacked under the terms of our warning to the Argentines some ten days previously that any Argentine naval vessel or military aircraft which could amount to a threat to interfere with the mission of British forces in the South Atlantic would encounter the appropriate response.⁶⁴

Finally, it should be noted that in all her announcements of the delimitations of her specific zones, Great Britain still continued to insist that it was without prejudice to her general right of self-defense under Article 51 of the United Nations Charter. Criticism of the *Belgrano* attack may be further seen as paradoxical since at the time of the sinking, the Argentine forces were occupying the Islands and the British forces were forcibly attempting to terminate that possession.

The United Kingdom’s Ministry of Defense announced on May 7, 1982, that because hostile forces “can cover undetected, particularly at night and in bad weather,”⁶⁵ the distances involved in resupplying the Argentine forces on the Falkland Islands, or taking other hostile action, any “Argentine warship or aircraft found more than twelve miles from the Argentine coast” will be treated as hostile.⁶⁶ The Soviet Union, without protesting against the creation of an exclusion zone in principle, advised the British Government that it considered the latest statement of policy unlawful “because it ‘arbitrarily proclaim[ed] vast expanses of the high seas closed to ships and craft of other countries.’”⁶⁷ On this Professor Levie has commented:

Of course, a blockade always denies the use of part of the high seas to other countries. While the Soviet Union might have questioned the extent of the blockaded area as excessive, if the blockade was effective (and there seems little doubt that it was), it was a valid blockade under the 1856 Declaration of Paris, to which Russia was one of the original parties.⁶⁸

An analogous criticism of this Soviet protest is that there was an adequate ratio of force to space and time for the purpose of carrying out the enforcement of the British maritime exclusion zones. Furthermore, the proclamation appeared to have been enforced by persistent holding, rather than raiding, tactics—a further consideration in its favor. Finally, in the sense that this proclamation, like its predecessors, was seeking to limit the area of hostilities, it exhibited a wise resort to economy of force as well as a desire not to unleash the horrors of war in an indiscriminate manner.

After the Argentine forces on the Falkland Islands had surrendered, Great Britain lifted the Total Exclusion Zone on July 22, 1982, but, at the same time, asked the Argentine Government (via the Swiss Government) not to allow its military aircraft or warships within a zone measuring 150 sea miles radius around the Falkland Islands. Similarly Argentina was warned not to allow her civil aircraft and shipping within that zone without the prior agreement of the British Government.

In response to the British MEZ on April 8, 1982, Argentina proclaimed a similar Maritime Zone, and, on April 29, 1982, it strengthened its MEZ. Finally it proclaimed, on May 11, 1982, a “South Atlantic War Zone.” This last declaration has been the occasion of well-known United States domestic litigation. In *Amerada Hess Shipping Corp. v. Argentine Republic*⁶⁹ the plaintiff corporation sued Argentina for the loss of its very large oil tanker *Hercules* as a result of three successive air strikes by Argentine aircraft using bombs and air-to-surface missiles. At the time of the attack the *Hercules* was about 600 miles off the Argentine coast and nearly 500 miles from the Falkland Islands.⁷⁰ The United States Second Circuit Court of Appeals noted that she was:

[I]n international waters, well outside the “exclusion zones” declared by the warring parties.⁷¹

While this statement would have been true if it had referred to the British zones and those declared by Argentina on April 8 and April 29, 1982, it was of doubtful accuracy with regard to Argentina’s “South Atlantic War Zone” which that country declared on May 11, 1982. It is a valid inference, therefore, that the court may have been prepared to recognize Argentina’s first two declarations as creating valid exclusion zones, but it was not prepared to extend that recognition to the vaguely defined “South Atlantic War Zone.”⁷² Indeed, this last zone, regardless of the bombing of the *Hercules*, fails the tests of

reasonableness, proportionality, clarity of definition and self-defense. It clearly failed to provide for an adequate ratio of power to space and time, and amounted to little more than an excuse for conducting indiscriminate attacks on neutral shipping, rather than formulating an effective logistical persisting, holding strategy, which could be integrated in a sea-keeping assertion of naval power utilized for rational ends. This last proclamation, and the unhappy event following from it, did nothing to assist Argentina in her attempt to establish possession of the islands she claimed. By extending the scope of the contest to include an unoffending neutral merchant ship that clearly could not have been carrying war supplies to the British forces, and by expanding the area of her war zone, Argentina could have risked the possibility (improbable as it was under the concrete circumstances of the situation) of escalation, both as to parties and area.

B. The Persian Gulf "Tanker War" 1982-1988—A Contrast

The Iraq-Iran war began with the border clashes in June-August 1980, leading to full scale land fighting on September 21, 1980.⁷³ The Persian Gulf Tanker War may be said to have begun with the Iraqi declaration on August 12, 1982 of a prohibited war zone at the northern end of the Persian Gulf (north of 29° 03' North).⁷⁴ In contrast with the Falklands (Malvinas) Conflict, which took place in an unfrequented and secluded part of the world, the Persian (or Arabian) Gulf War was fought in one of the world's busiest waterways. The original Iraqi prohibited war zone essentially contained the northern end of the Gulf. In reality, however, this zone was not so much one of exclusion, supported by a persisting logistical strategy, as the proclamation of an intention to engage in random air raids having the object of inhibiting Iranian shipping in the Gulf. Subsequently, the zone's perimeters were enlarged to include the key Iranian oil installations on Kharg Island. In February 1984, the zone was expanded to include the area within a 50-mile radius around Kharg.

Until early in 1984 the Iraqis concentrated their attacks on ships navigating in the northern zone and sailing to and from Bandar Khomeini and Bandar Manshar. But after early 1984 they concentrated their air strikes on ships sailing to and from Kharg. The Iraqi logistical strategy was clear. Like Napoleon's Berlin and Milan decrees against Great Britain (which were directed against British trade and that country's ability to wage war and subsidize her allies from her income from that trade), the object of the raids was to deny Iran income she needed from oil exports in order to purchase war material abroad and, generally, defray her costs of waging the war.

Iran had a similar logistical end in view, namely that of suppressing her enemy's trade with third countries which had enabled Iraq and other Gulf countries that were subsidizing Iraq's war effort to earn the money needed to defray Iraq's cost of waging the war. Unlike Napoleon's policy, which sought

an unlimited geographical scope (and was limited only by his lack of sea power)⁷⁵ this prevention of trade was executed by seeking to interdict all and any navigation to and from Iraqi ports in the Gulf. But Iraq was able to export her oil, and so defray the costs of her belligerency, by pipelines across her western and southern neighbors.

In addition to the foregoing, Iran also established prohibited zones off the shores of Iraq's supporters in the war. For example, this was done to Kuwait and the United Arab Emirates in the hope of reducing their oil revenues and hence their contributions to Iraq's war effort. Responses to Iranian attacks launched in support of this policy included the United States policy of reflagging of Kuwait's tankers, establishing convoys with United States, British, French and Italian escorts, and bringing the issue of the unlawful interference with neutral flag shipping to the Security Council of the United Nations. All these steps did not prevent continued Iranian raids on neutral flag tankers. Nor, indeed, did the Saudi Arabian proclamation of a 12-mile safety corridor which, since it was within the territorial seas of the seven states of the Gulf Cooperation Council, was entitled to belligerent respect and was intended to provide security for neutral shipping—especially the very large tankers carrying oil from Kuwait and from other supporters of Iraq. Be that as it may, the parties' motives for resorting to proclaiming their prohibited or war zones were not for the purpose of setting geographical limits to the fighting. Rather, their zones were used offensively, and the only limits imposed on the geographical extent of the fighting were the physical limitations of the parties' weapons and platforms. Neither party set any limits as to the states whose flags they were likely to attack.

C. A Brief Reprise and Review

The thesis of the present paper includes an argument that the starkness of modern three dimensional maritime contention may, except in the most desperate circumstances where escalation may prove especially difficult to control, impose limits to the contest. While the contestants themselves may see their self-interest in limiting fighting both geographically and as to parties, neutrals will have an even stronger motive to "keep the ring." One device that has been used in order to set geographical limits to a contest is the use, by the contestants themselves, of war or exclusion zones. This, it is suggested, is a novel employment of an old and familiar, if controversial, device. The Falklands, (Malvinas) Conflict provides a recent example. By contrast, the Persian Gulf Tanker War does not give any evidence of a similar exercise of self-restraint, by either party. The restraints that did exist, such as they were, were imposed by the economic limitations of the parties, and by the relatively limited range of weapons and means and methods of fighting at their disposal.

VII. "Starvation Blockade"

The long distance blockades against Germany and her allies in both World Wars have been stigmatized by a number of writers as "starvation blockades" by reason of the inclusion of fuels, forage and foodstuffs in the categories of conditional contraband and the shift of many consumer goods from conditional to absolute contraband such that the distinction between the two forms became eroded.⁷⁶ Indeed, as a result of that erosion and as the list of contraband goods has so dramatically been extended, the principle of distinction has ceased to have utility. As Professor Tucker tells us:

[O]ccasionally the argument has been pressed that a belligerent in endeavoring to seize all goods destined to an enemy state, including goods intended for consumption by the civilian population, thereby violates the principle requiring a distinction to be drawn between the treatment of combatants and non-combatants.⁷⁷

Professor Tucker does not agree with this charge. His response distinguishes between direct attacks against civilians and situations where civilians, in cases of blockade, may collaterally suffer from the effects of war along with the combatants.⁷⁸ Of course, the case of neutrals is quite distinct. Added to the uncertainty of the law in principle is the difficulty comprised in the indeterminacy of the criterion of "ultimate enemy destination." This problem was finessed by the British by means of their "rationing" of neutrals and their "navicert" systems,⁷⁹ and by "blacklisting" merchants who traded with Germany and the European Axis Powers generally in World War II.⁸⁰ The net effect of this form of economic warfare was, in World War I, to leave a relatively meager supply of foodstuffs and raw materials for the internal consumption of the populations of the states that neighbored Germany. Without such restrictions, those neighbors could have served as transit points to meet all of Germany's needs. This neutral commerce, moreover, would quite clearly have been conducted at very favorable prices. It was such reasons as these that induced the Entente Powers to refuse to ratify the Declaration of London of 1909,⁸¹ despite their original inclination to favor it. They found, on analysis, that Germany and Austria could receive foodstuffs by transshipment through the neutral state of the Netherlands via the Rhine River, since the Netherlands Government took the position that her declaration of neutrality and her participation in the Convention of Mannheim regulating the navigation of the Rhine prevented her from stopping such trade.⁸² The advantages to the neutral states of the navicert system and the policy of "rationing" was the avoidance of losses through delays at the belligerents' contraband control centers.

The Central Powers In World War I and the Axis Powers in World War II also sought to bring England to her knees by the logistical strategy of unrestricted submarine warfare. This strategy was unsuccessful because to be effective it

required a holding strategy — a capability of holding the “chokepoints” in which the interdiction of ships and cargoes would be completely successful.

The two World Wars were total or “totalitarian” wars. They came to involve almost all the Powers and all, or almost all, of their populations and resources so that each of them strained every resource to ensure victory. As the contest increased in intensity, resort was made to additional and more ruthless means and methods of fighting as the conflict escalated. Hence the starvation blockades by both sides were justified by each as reprisals for wrongdoing by their adversary. But an analysis that placed reliance on reprisals, *per se*, as the rationale for the escalation in the “hardness” displayed by each side, overlooks the stark realities of those wars. For each side, the war was, in a very real sense, “to the death,” and because more and more of each nation’s resources were sucked into the fight, the escalation became a function of each side’s desperation. Reprisals were merely a justification for both sides’ next step into the abyss of totalitarian war. They were simply legal masks for improving the image of the party resorting to them and for denigrating his opponent. But these escalations were almost independent of moral and legal considerations, despite the commitment of one side to the restoration of international legality and morality as a “war aim.”

Article 54, paragraph 1, of Protocol I, provides: “[s]tarvation of civilians as a method of warfare is prohibited.”⁸³ In his comments on this article Dr. Elmar Rauch states that the “arguments put forth by Prime Minister Churchill in the British Parliament would be no longer tenable.”⁸⁴ This writer doubts whether Dr. Rauch’s position is tenable, given the modalities and conditional phrases and implications in the remaining four paragraphs of article 54. To pursue such an analysis is, however, beyond the scope of this paper. Rather the thought here offered is that, in the event of totalitarian war involving the greater part of this planet, modes of fighting will escalate so that the “hardness” advocated by Admiral Doenitz will prevail. The justification of such an escalation may well be, for both sides, appeals to reprisals as responses to their adversaries’ alleged previous illegal conduct. In such a situation, John Keegan’s version of a silent, and lethal underwater contest could become a reality. The sightlessness of such a form of battle would leave civilian populations ashore at the mercy of whatever supplies the underwater barge-trains of cargo carriers could bring past an enemy’s interdiction forces.

In fighting on a more limited scale, however, or where enforcement measures may be resorted to under Chapter VII of the United Nations Charter, it would appear unlikely that anything approaching the type of starvation blockade that both sides resorted to in World Wars I and II, and was envisaged in paragraph I of Protocol I’s Article 54, would eventuate.

With regard to resort to submarine warfare in such conflicts, Professor Mallison, for example, has observed that “although submarines are *de jure* entitled to combatant status, they are not extensively employed in limited war.”⁸⁵ On

the other hand the British bluff, with regard to the nuclear submarine *Superb*⁸⁶ and that country's effective use of H.M.S. *Conqueror*,⁸⁷ in the Falklands (Malvinas) Conflict should not be overlooked. But, it should be pointed out, that country did not use her submarine service for raiding logistical activities, let alone "indiscriminate sinking on sight" policies.

VIII. Conclusion

The foregoing brief and impressionistic review has, perhaps too pessimistically, seen in the means and methods that are available today an increasing stress on the "killing" of ships, aircraft and underwater vessels, rather than on "man killing"—leaving the weapons and platforms damaged but not totally destroyed.⁸⁸ With the increase of "ship killing" capabilities, the possibilities, as well as the opportunities, of rescue tend to become diminished to a vanishing point. Thus Doenitz's "code of hardness" has become technologically inevitable. But the enormous investment in fighting wars with the technological monsters that increasingly eliminate the human equation may leave situations where states resorting to the use of force may prudentially hold back from escalating their contest until it reaches such a level of inhumanity.

In limited contests the traditional norms of rescue, respect for hospital, medical and cartel ships, coastal fishing and marketing boats and vessels guaranteed safe conduct, can and may well survive. But it should be pointed out that limited contests at sea can be of two kinds: where the parties voluntarily limit their goals; and where the means, methods and resources of the combatants are limited. In the former situation, as, for example, in the case of the Falklands (Malvinas) Conflict, the rules of war were punctiliously observed. Professor Levie stressed this point when he characterized that contest as a "gentlemen's war."⁸⁹ In such wars, "starvation blockades" do not provide useful weapons and, as in the Falklands (Malvinas) Conflict, tend not to be resorted to. Yet, in wars where the contestants are limited only by their resources, they most probably would only be governed by feasibility, the probability of success, and fear of reciprocity. Indeed, while minor contests may give rise to "gentlemanly" fighting,⁹⁰ or, alternatively, escalate into violent and bloody confrontations, it is highly probable that in totalitarian wars waged at the cutting edge of human beings' technological capabilities, Keegan's comment that ". . . the suspicion grows that battle has already abolished itself,"⁹¹ may well turn out to be true.

Notes

*Professor of Law (Emeritus), Director, International Legal Studies Program, Syracuse University College of Law. Former Charles H. Stockton Professor of International Law, U.S. Naval War College, Newport, R.I. This paper is written as part of a larger research project which this writer is undertaking on "The International Humanitarian Law Applicable to Armed Conflict at Sea." This project has received generous support from the United States Institute for Peace and The Ford Foundation.

Editor's Note: Unfortunately Professor Goldie died before this paper was published. Final editing for publication was completed by the staff of the Naval War College.

1. 2 Winston S. Churchill, *The Second World War: Their Finest Hour* 598 (1949).
2. Alfred Thayer Mahan, *The Life of Nelson: The Embodiment of the Sea Power of Great Britain* 729 (2nd ed., 1899).
3. John Keegan, *The Price of Admiralty: The Evolution of Naval Warfare* 265 (1988) [hereinafter Keegan, Admiralty].
4. Keegan, Admiralty, *supra* note 3, at 91-92; David Howarth, *Trafalgar: The Nelson Touch* 228-232 (1968).
5. Cartel ships, hospital ships and vessels engaged in coastal trading and fishing were exempted so long as they took no part in the hostilities. See Julius Stone, *Legal Controls of International Conflict* 585-87 (1954), [hereinafter Stone, Legal Controls], and the many authorities there cited. See also Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* 592-96 (1961), [hereinafter McDougal and Feliciano]. Note should be taken of the latter authors' appraisal of the erosion of the exemptions of coastal fishing and trading boats in light of modern warfare, *id.* at 594-95. Also to be noted are those authors' doubts of the continued utility in Hague Convention XI of ships engaged in "religious scientific or philanthropic missions," *id.* at pp. 595-596. See also 1913 Oxford Manual of Naval War, arts. 17-18, 31-48, 55-63, and 86 [hereinafter 1913 Oxford Manual], *reprinted in* *The Law of Armed Conflict* 857-75 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Schindler and Toman].
6. See, e.g., 1913 Oxford Manual, *supra* note 5, arts. 55-63, 70-73 and 84. See also, generally, the authorities cited in *supra* note 5.
7. See Claude H.M. Waldock, *The Release of the Altmark's Prisoners*, 24 Brit. Y. B. Int'l L. 216; Stone, *Legal Controls*, *supra* note 5, at 394-95 and the authorities cited therein; and Brunson MacChesney, 51 Naval War College International Law Studies, *International Law Situations and Documents* 1956, at 5-48 (1957).
8. The qualifier "necessary" here needs explanation. Thus, for example, O'Connell points out that "many acts would be illegal even if required for the submission of the enemy with the greatest economy of time, life and physical resources." He cites with approval the *PELEUS* case, 1 Law Reports of Trials of War Criminals v. 1-21 (1947) [hereinafter War Crimes Reports], as a case where "[a] British Military Court rejected such a plea [i.e., necessity] in the case of the killing of the survivors of a sunken merchant vessel by the captain of a German U-boat." 2 Daniel P. O'Connell, *The International Law of the Sea* 1106 (Ivan A. Shearer ed., 1984) [hereinafter 2 O'Connell, Law of the Sea].
9. 9 War Crimes Reports, *supra* note 8, at 82-90.
10. 1 Stephen W. Roskill, *The War at Sea: 1939-1945*, at 548 (1954); Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 International Law Studies 140 at n. 37 (1957). For a commentary on the legality of this incident in terms of *ruses de guerre*, see Joachim Von Gosseln, *The Sinking of the Sydney*, 79 U.S. Naval Inst. Proc. 251 (March 1953).
11. Keegan, Admiralty, *supra* note 3, at 113. See also Keegan's further quotation, *supra*, note 3, at 113-14.
12. *Id.* at 220. See also, for a history of the British diplomatic campaign to outlaw submarines, and the counterarguments to it that were presented by Britain's former allies in World War I, especially France and Italy, W. Thomas Mallison, Jr. *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars*, 58 U.S. Naval War College International Law Studies 1966, at 34-50 [hereinafter Mallison].
13. Treaty of Peace Between the Principal Allied and Associated Powers, of the One Part, and Germany, of the Other Part, signed at Versailles, June 28, 1919, 25 Consol. T.S. 188 at 276.
14. Thereafter, under the London Naval Treaty of 1936, submarines were limited in size to 2,000 tons or less and, as to their armament (apart from torpedoes), they were limited to guns of 5.1 inches; see Mallison, *supra* note 12, at 47.
15. Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, *reprinted in* 16 Am. J. Int'l Law 57-60 (Supp.) (1922).

Targeting Enemy Merchant Shipping 22

16. Treaty For the Limitation and Reduction of Naval Armaments (Part IV, Article 22, Relating to Submarine Warfare), *reprinted in* 25 Am. J. Int'l Law 78 (Supp.) (1931).

17. *Id.*

18. The Treaty provided, in article 23, that "Part IV shall remain in force without limit of time," but the Treaty's lapse created perceived political insecurities with regard to the continued honoring of Part IV by states whose maritime interests might be better served by unrestricted submarine warfare than by the international legal protections accorded by Part IV to large and vulnerable merchant marines.

19. The United States, Great Britain and the British Dominions, France, Italy and Japan confirmed their adhesion to Part IV and expressed the hope that the rules it contained should be accepted by as great a number of adherents as possible.

20. Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, *reprinted in* 31 Am. J. Int'l Law 137 (Supp.) (1937).

21. See the reports cited in George A. Finch, *Editorial Comment: Piracy in the Mediterranean*, 31 Am. J. Int'l Law 659-65 (1937) [hereinafter Finch]. See also 2 Green Haywood Hackworth, *Digest of International Law* 692 (1941).

22. Finch, *supra* note 21, at 659.

23. This British characterization of such officers as pirates indicates a revival of World War I attitudes that were reflected, for example, in the case of the *Baralong*, British Parliamentary Papers, Misc No. 1 (1916) [Cd 8144], *reprinted in* 10 Am. J. Int'l Law 79-86 (Supp.) (1916). Catching the officers and crew of a German U-boat in the act of sinking a British merchant ship, the captain of the *Baralong* ordered their summary execution on the spot. The German Government demanded that the British Government prosecute the latter's commander and her ship's company for murder and punish them according to the law of war. The British Government, without admitting that the facts justified the executions as retaliation against the ruthlessness of Germany's U-boat policy of unrestricted sinking of merchant ships, took no further action against the *Baralong's* company.

24. "The Nyon Arrangement," (also known as the "The Nyon Agreement"), *reprinted in* 31 Am. J. Int'l Law 179 (Supp.) (1937) [hereinafter The Nyon Arrangement].

25. *Supra* note 16, and accompanying text.

26. The Nyon Arrangement, *supra* note 24, provisions I-II. See also Norman J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* 42 (1939) [hereinafter cited as Padelford].

27. The Nyon Arrangement, *supra* note 24, provision III.

28. The Nyon Arrangement, *supra* note 24, provision IV.

29. Padelford, *supra* note 26, at 49.

30. Agreement Supplementary to the Nyon Agreement, done at Geneva, Sept. 17, 1937, *reprinted in* 31 Am. J. Int'l Law 183 (Supp.) (1937). The preambular language of this Agreement indicates the parties' intention. It read as follows:

Whereas under the arrangement signed at Nyon on 14 September 1937, whereby certain collective measures were agreed upon relating to piratical acts by submarines in the Mediterranean, the participating Powers reserved the possibility of taking further collective measures; and

Whereas it is now considered expedient that such measures should be taken against similar acts by surface vessels and aircraft . . .

31. *Id.* provision I.

32. *Id.* provision III.

33. *Id.*

34. Padelford, *supra* note 26, at p. 35.

35. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, *reprinted in* Am. J. Int'l Law 257, 258 (Supp.) (1937).

36. These charges did not go uncontested. See, e.g., Argument of Kranzbueller (Counsel for defendant Doenitz) of July 15, 1946 in Trial of the Major War Criminals Before the International Military Tribunal 315 [hereinafter Trial of the Major War Criminals], referring to "the great struggle which took place between the U-boats, on the one hand, and the armed merchant vessels . . . on the other hand, as equal military opponents." The date of September 3, 1939, was chosen as not only being that of the first day of World War II, but, more significantly perhaps, that of the sinking of the British passenger liner *Athenia*. The U-boat commander (Lemp of U-30) claimed that he mistook the ship for a trooper. She was, in fact, loaded with civilians, including 316 Americans returning home. At the time of the sinking, indeed, the German Navy had promulgated orders against sinking without warning and half the U-boats on patrol at that time were withdrawn and U-30's log was "doctored to disguise the incident." Keegan, *Admiralty*, *supra* note 3, at 226.

37. 22 Trial of the Major War Criminals, *supra* note 36, at 559.

23 Goldie

38. This was one of the notorious “Leipzig War Crimes Trials” held in Germany in 1921. See 16 Am. J. Int’l Law 708 (1922).

39. *Id.* at 722. This case should be contrasted with the *Dover Castle*, *id.* at 704. The *Dover Castle* was also one of the Leipzig War Crimes cases. The vessel was a British hospital ship. She was clearly marked as such and was carrying no military personnel, munitions, or stores, other than sick and wounded soldiers, members of the medical corps, and necessary supplies connected with that service. The accused commander of the submarine, Karl Neumann, was acquitted because the *Dover Castle* was sunk in “obedience to a service order of his highest superiors.” *id.* at 708. It should be noted that this latter case was distinguished from the *Llandonery Castle* also on the ground that the commander did not, as did Patzig, the commander of U-boat 82, order the massacre of the survivors in lifeboats, or those on, or in the water and clinging to rafts and wreckage. See also 2 Lassa Oppenheim, *International Law – A Treatise*, 569 (H. Lauterpacht ed., 7th ed. 1952). On the German Government’s and High Command’s policy, and orders, of sinking hospital ships on sight, see *id.* at 504–506 n. 2. See also the British refusal to recognize the immunity of German seaplane ambulances in the English Channel rescuing German airmen. *Id.* at 506–507.

40. The defenses of the “Laconia Order” (superior order commanding the killing of survivors of torpedoed ships) and of necessity were rejected. See War Crimes Reports, *supra* note 8, at 1–21.

41. 9 War Crimes Reports, *supra* note 8, at 75–82. This case also involved the “Laconia Order.”

42. 9 War Crimes Reports, *supra* note 8, at 82–90.

43. See Tucker, *supra* note 10, at 72 n. 56. Tucker writes regarding the accused, Helmuth von Ruchteschell:

According to S. W. Roskill, with the one exception noted above [i.e., Helmuth von Ruchteschell], the captains of German armed merchant raiders “generally behaved with reasonable humanity towards the crews of intercepted ships, tried to avoid causing unnecessary loss of life and treated their prisoners tolerably.” (footnote omitted)

44. From Tennyson’s “Locksley Hall” line 119:

For I dipped into the future, far as human eye
could see
Saw the vision of the world, and all the wonder
that would be;
Saw the heavens fill with commerce, argosies of
magic sails,
...
Heard the heavens fill with shouting, and there
raised a ghastly dew
From the nations’ airy navies grappling in the
central blue.

Alfred Lord Tennyson, *Locksley Hall*, *The Works of Alfred Lord Tennyson*, 98, 101 (Complete ed. 1894).

See also Keegan, *Admiralty*, *supra* note 3, at 157.

45. Keegan, *Admiralty*, *supra* note 3, at 157–211.

46. *Id.* at 213–265.

47. *Id.* at 274.

48. *Id.* at 266–75.

49. *Id.* at 275.

50. The term “totalitarian war” is taken from Herbert A. Smith, *The Crisis in the Law of Nations* 75 (1947), where he wrote:

We must accept the fact that under modern conditions all wars, great and small alike, have become totalitarian, in the sense that every belligerent state will in the future find it necessary to mobilize its entire population and all its material resources for its war effort. If that is so, the distinctions so carefully drawn by the earlier law, in themselves entirely reasonable in their own day, have now become obsolete and the law must reconcile itself to this fact .

While the concept of “totalitarian war” is, indeed, very useful, this writer dissents from Professor Smith’s sweeping pessimism. A number of “small” wars have occurred in the recent past in which the belligerents have not found it necessary to mobilize their entire populations and all their material resources for their war

efforts. Two examples that spring to mind are the Falklands (Malvinas) Conflict of 1982 and the Indo-Pakistan Conflict of 1971.

51. In envisioning the land battles of the future, John Keegan writes:

Impersonality, coercion, deliberate cruelty, all deployed on a rising scale, make the fitness of modern man to sustain the stress of battle increasingly doubtful.

John Keegan, *The Face of Battle* 325 (1976) [hereinafter Keegan, *The Face of Battle*].

52. 2 O'Connell, *Law of the Sea*, *supra* note 8, at 1154.

53. *Id.* at 1154-55. See also Daniel P. O'Connell, *The Influence of Law on Seapower* 129-130, 160 (1975).

54. Clearly the conflict between Argentina and the United Kingdom was a limited war, as to the participants, the area and the weapons employed. For a quite detailed discussion of the seven exclusion zones proclaimed by both sides, for their characterization as "unusual" and for the comment that "[t]he rationale for these is difficult to determine," see W. J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 *Can. Y.B. Int'l L.* 91, 109 (1987) [hereinafter Fenrick]. This writer believes that, at least in part, the proclamation of these zones (except for the ill-advised last one to be proclaimed by Argentina, which was implicated in the unnecessary bombing of the tanker "Hercules"), — see *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *rev'd sub. nom. Argentina Republic v. Amerada Hess Shipping Corp.*, 488 U.S.428 (1989) — helped to restrict the conflict to the disputed territory and localize the fighting. This writer agrees completely with Professor Howard Levie's comment in his contribution *The Falklands Crisis and the Laws of War*, which is contained in *The Falklands War: Lessons for Strategy, Diplomacy and International Law* 64, 76 (A. Coll & A. Arend eds., 1985) [hereinafter Levie], where he listed the reasons why, in his opinion, the laws of war were able to exert their restraining influence:

First, this was a limited war, fought for limited ends and with limited means. . . . The adversaries restricted their operations to the disputed territory, and refrained from military actions against the enemy's homeland; had it . . . been conducted otherwise, the war would have been much more violent and destructive. . . .

55. The date 1982, shown in the text as that of the commencement of the Persian Gulf Tanker War, is predicated on the Iraqi attack on Kharg Island on April 29, 1982, and the Iraqi announcement of a Maritime Exclusion Zone in the Gulf on August 12, 1982. Unlike The Falklands (Malvinas) Conflict, the Iran-Iraq war, although limited as to participants and area of conflict, did not evidence restraints as to means and methods of warfare, nor in the treatment of prisoners.

56. See *infra* notes 70-72 and accompanying text.

57. *United Kingdom Materials on International Law - 1982*, 53 *Brit. Y.B. Int'l L.*, 337, 539 (G. Marston ed., 1983) [hereinafter Marston].

58. See Art. 4, *Declaration Respecting Maritime Law, done at Paris, April 16, 1856*, reprinted in Schindler and Toman, *supra* note 5 at 787-88. Art. 4 of the Declaration provides:

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.

59. Levie, *supra* note 54, at 65.

60. Marston, *supra* note 57, at 540-41 who quoted from a letter of April 24, 1982 from the Permanent Representative of the United Kingdom to the President of the United Nations Security Council (S/14997).

61. *Id.* at 542. See also, Fenrick, *supra* note 54, at 113.

62. Marston, *supra* note 57, at 542.

63. *Id.* For enforcement of this zone see letter dated May 1, 1982, addressed to the President of the Security Council from the Permanent Representative of the United Kingdom to the United Nations, see *id.* at 546.

64. *Id.* at 549. See also Levie, *supra* note 54, at 66. A further example of the British enforcement of the "Defensive Bubble" was the sinking of the Argentine fishing vessel *Narwal*. She was shadowing the British forces and was "a spy ship with an Argentine Navy Lieutenant Commander on board sending back information about the [British] fleet's movements." Christopher Dobson, *The Falklands Conflict* 104 (1982), 104. See also Levie, *supra* note 54, at 67.

65. Marston, *supra* note 57, at 549.

66. *Id.*

67. Quoted in Levie, *supra* note 54, at 66.

68. *Id.*

25 Goldie

69. 830 F.2d 421 (2d Cir. 1987), *rev'd sub. nom. Argentina Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989). This reversal was on the ground that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602 *et. seq.* provides the sole basis of jurisdiction in such cases and, that under that Act, Argentina was immune from suit in the United States.

70. 830 F.2d 421, 423.

71. *Id.*

72. It should be noted that the United States sought to protect the neutrality of the *Hercules* and the Government emphasized her neutral status to the Argentine Government. The Court stated that:

On May 25, 1982, *Hercules* embarked from the Virgin Islands, without cargo but fully fueled, headed for Alaska. On June 3, in an effort to protect United States interest ships, the United States Maritime Administration telexed to both the United Kingdom and Argentina a list of United States flag vessels and United States interest Liberian tankers (like *Hercules*) that would be traversing the South Atlantic, to ensure that these neutral vessels would not be attacked. The list included *Hercules*.

See also the Second Circuit's comment that "it is beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law." *Id.* at 424.

73. See 27 Keesing's Contemporary Archives 31006 (Aug. 7, 1981) [hereinafter Keesing's].

74. It should be pointed out that damaging attacks by both sides on their opponent's oil installations began as early as September and October 1980. See Keesing's *supra* note 73, at 31015-31016 and 28 Keesing's *supra* note 73, at 31517 (June 4, 1982). For an outline of the events concerning the exclusion zones in the Persian Gulf Tanker War, see Fenrick, *supra* note 54, at 116-22; and Ross Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, 37 Int'l & Comp. L. Q. 629 (1988).

75. See, for an insightful discussion of the implications of Napoleon's Berlin Decree of November 21, 1806, 1 Alfred Thayer Mahan, *Sea Power in its Relation to the War of 1812*, at 141-150, 169-173 (1905), (Note especially the treatment of the U.S. merchant ship *Horizon* by the French authorities and Mahan's comment that "[t]he geographical sweep intended to be given to the [Berlin] edict was manifested by the action of state after state, whither arms had extended Napoleon's influence.")

76. Thus, Stone, in *Legal Controls*, points out, with approval, that in the *Jurko-Topic*, 1 Ll. P.C. 89, 91 (1941), the British Crown was arguing that "in relation to a totalitarian enemy, the line between absolute and conditional contraband was in any case undistinguishable." Stone, *Legal Controls*, *supra* note 5, at 482. See also *id.* note 27 for citations to numerous authorities supporting this position. See also *The Commander's Handbook on the Law of Naval Warfare (NWP9) (Rev.A) (FMFM 1-10) 1989 para. 7.4.1* which states, *inter alia*, that:

The practice of belligerents in World War II has cast doubt on the relevance, if not the validity, of the traditional distinction between absolute and conditional contraband . . . As a result, belligerents considered goods as absolute contraband which in earlier conflicts were considered to be conditional contraband.

See also Tucker, *supra* note 10, at 269 n. 10, where he points out that "by 1915 Germany had declared that almost every port in the British Isles was either a 'fortified place' or a base for serving the armed forces." He further points out that this action abandoned "the distinction between absolute and conditional contraband . . ." *Id.*

77. Tucker, *supra* note 10, at p. 278.

78. Professor Tucker points out that the principle of distinction could apply where a "reasonably clear distinction can even be drawn between the combatant and the civilian enemy population." *Id.* at 278 n. 37. A major argument of Professor Tucker's book is that the impact of total (or totalitarian) war has effectively obliterated the possibility of making this distinction in the factual, evidentiary, sense as well as in the legal sense.

79. On "navicerts" and the "rationing" of neutrals, see, e.g., G. G. Fitzmaurice, *Some Aspects of Modern Contraband Control and the Law of Prize*, 82 Brit. Y.B. Int'l L. 73, 89 (1945); Neill H. Alford, Jr., *Modern Economic Warfare (Law and the Naval Participant)*, 56 International Law Studies 363-415 (1967); Stone, *Legal Controls*, *supra* note 5, at 505-07; McDougal & Feliciano, *supra* note 5, at 509-19; 2 O'Connell, *Law of the Sea*, *supra* note 8, at 1147-48. Professor O'Connell's definition at 1148 should be noted:

A navicert is in the nature of a commercial passport, assuring cargoes free passage through contraband control, and so avoiding interferences with neutral ships, or at least avoiding delay in investigation of neutral cargoes. A guarantee had to be deposited that goods so covered would not directly or indirectly reach enemy territory.

80. On "blacklisting" see McDougal & Feliciano, *supra* note 5, at 518-19. See also *id.* for the practice of "preemption" and other, less lawful, forms of economic warfare.

81. Declaration Concerning the Laws of Naval Warfare, done at London, Feb. 26, 1909, reprinted in Schindler and Toman, *supra* note 5, 843-56.

82. For a thorough analysis of this issue, see Louis Guichard, *The Naval Blockade: 1914 - 1918*, at 16-18 (C. R. Turner trans. ed., 1930).

83. Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of the Victims of International Armed Conflicts (Protocol I), signed Dec. 12, 1977, entered into force Dec. 7, 1978, reprinted in Schindler and Toman, *supra* note 5, at 621-88.

84. Elmar Rauch, *The Protocol Additional to the Geneva Convention for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare* 93 (1984) [hereinafter Rauch].

The "argument" referred to was Churchill's statement in the House of Commons on Aug. 20, 1940. He stated:

There have been many proposals founded in the highest motives that food should be allowed to pass the blockade for the relief of these populations [i.e., the populations of the occupied territories]. I regret that we must refuse these requests. Many of these valuable foods are essential to the manufacture of vital war materials. Fats are used to make explosives. Potatoes make the alcohol for motor spirit. The plastic materials now so largely used in the construction of aircraft are made of milk. If the Germans use these commodities to help them bomb our women and children rather than to feed the populations who produce them, we may be sure imported foods would go the same way, directly or indirectly, or be employed to relieve the enemy of the responsibilities he has so wantonly assumed.

Quoted in Rauch, *id.* at 89-90.

85. Mallison, *supra* note 12, at 53.

86. See *supra* note 58 and accompanying text.

87. With regard to the legal issues involved in the sinking of the Argentinean heavy cruiser *General Belgrano* by H.M.S. *Conqueror*, see *supra* notes 63-64.

88. These categories of the effects of weapons and tactics as man-killing" and "ship-killing" are based on Keegan, Admiralty, *supra* note 3, at 89, 211, 260-65. In effect, in the process, weapons ships (and those that sail in them) are destroyed. "Man killing" on the other hand, indicates the possibility of the survival of a ship despite numerous human casualties sustained on board. In the latter situation it is more probable that survivors can and will be rescued.

89. Levie, *supra* note 54, at 76.

90. For the meaning, and the future vitality, of "low intensity conflict" see L. F. E. Goldie, *Low Intensity Conflict at Sea*, 14 *Syracuse J. Int'l L. & Com.* 597 (1989). See also the valuable comments made thereon, *id.* at 639-56.

91. Keegan, *The Face of Battle*, *supra* note 51, at 336.

Chapter II

Submarine Warfare: With Emphasis on the 1936 London Protocol

A paper by
Howard S. Levie *

Comments by
A. V. Lowe
D. Fleck

Submarine Warfare: With Emphasis on the 1936 London Protocol

Part I Early History of the Submarine

Although the idea of a submersible boat dates back at least to the early seventeenth century, and a number of efforts to perfect such a vessel had occurred over the subsequent years, it was not until the latter part of the eighteenth century that realistic attempts began to be made in this respect. During the American Revolution David Bushnell devised a one-man submersible known as the *American Turtle*. Its several attacks against British warships were, for one reason or another, all unsuccessful.¹ Then in 1797 Robert Fulton, who had been demonstrating his version of the submersible to the French Navy, submitted a proposal to the French Directory for the construction and the use by his “Nautulus Company” of a submarine against the ships of the British Navy. Paragraph Six of that proposal stated:²

And whereas fire Ships or other unusual means of destroying Navies are Considered Contrary to the Laws of war, and persons taken in such enterprises are liable to Suffer death, it will be an object of Safety if the Directory give the Nautulus Company Commissions Specifying that all persons taken in the *Nautulus or Submarine Expedition* Shall be treated as Prisoners of War, And in Case of Violence being offered the Government will Retaliate on the British Prisoners in a four fold degree.

It can thus be seen that even in its earliest form, and even when it was to be directed solely against warships, the submarine was a controversial weapon. Fulton was unable to sell his idea to the French Government. Subsequently, he was equally unsuccessful in selling it to the British.³

From the very beginning of the idea of a vessel that would travel under the water instead of on the water, it was accepted that if it could be successfully developed it would be an asset to small nations, nations which could not afford large standing navies. It was assumed that, because of its anticipated short range, it would be used primarily for coastal defense. It is, therefore, not surprising to find that during the American Civil War the Confederacy developed and built this type of vessel to be used against the blockading warships of the Union Navy.⁴ It was called a *David* and altogether the Confederate Navy probably constructed more than a dozen of them. It was not truly a submersible, because, being

propelled by a steam engine, it had to have a constant source of air. Accordingly, it moved with its deck awash and an open hatch — not exactly a recommended method for safe navigation, and one which resulted in a number of sinkings during its trials, with the loss of most of the members of the crews. However, on October 5, 1863, one of these boats attacked and damaged the *U. S. S. New Ironsides*.⁵ The Confederates also built a true submersible, called the *Hunley*, propelled by eight members of the crew turning a crankshaft which ran down the center for most of the length of the vessel and which was connected to a propeller. Its claim to fame is that on February 17, 1864 it sank the *U.S.S. Housatonic* — and itself! It may be said that the *David* and the *Hunley* ushered in the era of the submarine in warfare — even though at this point the Confederate Navy appeared to lose interest in submersibles.⁶

In the quarter century which followed, numerous other inventions were being developed, and tested, in various countries, particularly in France, a country which had early exhibited great interest in such a weapon, even though it had rejected Fulton's proposal. The first really successful submersible, the forerunner of the submarine of today, was built by John P. Holland, an Irish-American who, after he had constructed several models, succeeded in selling the latest version of the Holland to the United States Navy in 1900, the first that it had acquired.⁷ At that same period both the United States Navy and the Royal Navy placed orders with Holland for the construction and delivery of additional submarines; while a number of continental nations were placing similar orders with Holland and other inventors. Even Admiral von Tirpitz, head of the German Navy, was eventually convinced that the submarine was no longer solely a weapon of coastal defense.⁸

The 1899 Hague Peace Conference

When, on December 30, 1898, the Ministry of Foreign Affairs of Imperial Russia issued its proposed agenda for the 1899 Hague Peace Conference, one item thereof stated:⁹

4. Prohibition of the use in naval battles of submarine or diving torpedo-boats or of other engines of destruction of the same nature;

When the matter was discussed in the Second Subcommittee of the First Commission of the Conference on May 31, 1899, the German representative indicated that "if all the other governments agreed not to adopt vessels of this kind, Germany would join in this understanding"; and the Italian and Japanese delegates concurred in that statement; the United States delegate indicated that his Government "wishes to preserve full liberty . . . to use submarine torpedo boats or not"; the delegate of Austria-Hungary gave his personal opinion that

“this new invention . . . may be used for the defense of ports and roadsteads and render very important services”; the French delegate stated 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 British delegate thought that “his country would consent to the prohibition in question if all the great Powers were agreed on this point. It would concern itself little as to what decision the smaller countries reached”; the Dutch delegate and the delegate of Sweden and Norway believed that “the submarine torpedo [boat] is a weapon of the weak, and does not think its use can be prohibited.”¹⁰

In his report the Rapporteur of the Subcommission said¹¹

After an exchange of personal views on the question of submarine torpedo boats which enabled several delegates . . . to formulate very clear and precise ideas regarding the future of this weapon, it is shown that, according to the declarations made by a majority of the delegates, a prohibition of the boats in question must be considered as very unlikely, at least for the time being.

His prognostication was confirmed when a vote on the proposal to ban the submarine was taken in the First Commission and resulted in five votes (Belgium, Bulgaria, Greece, Persia, and Siam) for the prohibition with reservations; five votes (Germany, Great Britain, Italy, Japan, and Rumania) for the prohibition on condition of unanimity; and nine votes (Austria-Hungary, Denmark, France, Netherlands, Portugal, Spain, Sweden and Norway, Turkey, and the United States) in the negative. Russia, Serbia, and Switzerland abstained.¹² That ended all efforts to ban the submarine at the 1899 Hague Peace Conference. It should be borne in mind that at this point in time most naval experts still considered that the submarine was a weapon to be used for coastal defense, particularly by the smaller and weaker nations which did not have strong navies.¹³ Little or no consideration was given to the fact that the submarine might be valuable as a commerce destroyer and on the high seas. Moreover, having failed to ban the submarine, inexplicably, no attempt was made to obtain even minimum restrictions on its operations.¹⁴

The 1907 Hague Peace Conference

During the period between the Hague Peace Conferences of 1899 and 1907, the major international event in the military area was the Russo-Japanese War (1904–1905). No submarines participated in this conflict but, as one author has pointed out, even a few Russian short-range submarines could have done enough damage to the Japanese to have caused the latter to lift the blockade of Port Arthur and even a few of the longer-ranged ones could have effectively impeded the landing of Japanese troops in Korea.¹⁵ At that time, however,

neither Japan nor Russia had any submarines in their navies. That situation would soon change.¹⁶

The Russian agenda for the 1907 Second Hague Peace Conference called for the “framing of a convention relative to the laws and customs of maritime warfare,” but contained no specific mention of the submarine.¹⁷ When the Fourth Commission of that Conference met for the first time on June 24, 1907, its President, de Martens of Russia, said: “We must now do for naval warfare what the Second Commission of the last Peace Conference did for land warfare.”¹⁸ While the Conference did draft a number of conventions with respect to war at sea, some good and some not so good, the possibility of drafting rules with respect to the use of submarines was not even a subject of discussion. Although there is a tendency on the part of writers to refer to the inability of both of those Hague Peace Conferences to reach agreement on restrictions on the use of submarines,¹⁹ the present author could find only one passing reference to the subject in the proceedings of the 1907 Conference. During the lengthy discussion of the United States proposal to exempt all private property from capture or seizure at sea the Belgian delegate said:²⁰

A torpedo-boat or a submarine can annihilate in a few moments a magnificent vessel representing an enormous outlay and a thousand lives. In 1899 Russia proposed that the employment of such engines of destruction be given up, just as the poisoning of arms and of springs had been prohibited, and most of the Powers seemed ready to adhere to the proposal provided it were accepted unanimously. But unfortunately I do not now see any indication among us of such an idea.

No further mention of submarines could be found. It will, however, be appropriate to point out that Article 3 of the 1907 Hague Convention No. VI provided that if an enemy merchant ship were to be destroyed “provision must be made for the safety of the persons on board as well as the security of the ship’s papers.”²¹

1909 Declaration of London

Article I of this Declaration stated that “the rules contained in the following Chapters correspond in substance with the generally recognized principles of international law.”²² As the Declaration was intended to be all-inclusive insofar as restrictions on maritime trade during the course of a war were concerned and as it contained no special rules with respect to submarines, it must be assumed that there were at that time still no such rules.²³ That being the case, submarines would be bound by the general rules applicable to all warships. Customary international law prescribed that, while a warship could be attacked without warning, a merchant vessel was a noncombatant which could only be attacked after warning and which could only be sunk under exceptional circumstances

and then only after the safety of the passengers and crew had been assured.²⁴ Although the then Lieutenant Rickover wrote in 1935 that “[i]n its official correspondence with the United States the German government appears not to have questioned the American contention that the rules of international law governing surface men-of-war applied also to the submarine,”²⁵ during World War I Germany actually did take issue with this conclusion. She contended that she had chosen to use “a new weapon, the use of which had not yet been regulated by international law and, in doing so, could not and did not violate any existing rules but only took into account the peculiarity of this new weapon, the submarine boat.”²⁶ Contrariwise, Lauterpacht took the position that “[t]he novelty of a weapon does not itself carry with it a legitimate claim to a change in the existing rules of war.”²⁷ Strange to relate, in a message of July 18, 1916 to the British Ambassador in Washington the British Foreign Office said: “The first point to be established is that international law ought not to transfer without modification to submarines, rules and regulations which work fairly well as regards surface vessels.”²⁸

It was during the immediate pre-World War I period that Great Britain made a decision which was to have far-reaching consequences with respect to the use of the submarine as a commerce destroyer and the disregarding of the requirements of warning and of assuring the safety of the passengers and crew. On March 26, 1913 Winston Churchill, then First Lord of the Admiralty, announced in Parliament the intention of the British Government to arm its merchantmen, at the same time asserting that the armaments would be strictly defensive and would not change the status of these vessels as noncombatant merchant ships, to be distinguished from converted armed merchant cruisers.²⁹ As we shall see, this decision had serious consequences in both World Wars, one being the so-called “unrestricted submarine warfare” and the subsequent controversy as to whether the provisions of the 1936 London Submarine Protocol are still binding law.

Part II World War I (1914-1918)

In World War I the inadequacy of the law of naval warfare with respect to the protection of merchant vessels proved to be a matter of prime importance for both belligerents and neutrals. It may well be said that while the American Civil War was the beginning of the era of the submarine, it only received full recognition as a dangerous — and controversial — naval weapon system during World War I.

On August 6, 1914, just a few days after the outbreak of World War I, Secretary of State Bryan sent a circular message to the belligerents asking each if it would be “willing to agree that the laws of naval warfare as laid down by

the Declaration of London of 1909 shall be applicable during the present conflict in Europe."³⁰ Most of the belligerents, including Germany, indicated that they would comply with the rules set forth in that Declaration, subject to reciprocity. However, Great Britain's decision to adopt these rules was made "subject to certain modifications and additions which they adjudge indispensable to the efficient conduct of their naval operations."³¹ As a result of the British position, the United States withdrew its suggestion.³² Primary among these British "modifications and additions" was a vast increase in the list of contraband items.³³ Historically, an enemy merchant ship was a noncombatant which could be stopped, visited, and searched in order to examine her papers and to determine whether she was carrying contraband, and captured if found to be carrying contraband, but which could not be attacked, nor destroyed, except under specific and limited circumstances — and then only after the safety of the persons aboard had been assured. The lifeboats were not considered to be a place of safety unless the weather was moderate and land was within a reasonable distance, or another vessel was available which could take the crew and passengers of the doomed vessel aboard. For some months after the outbreak of World War I German submarines were used almost exclusively in the capacity of warship against warship.³⁴ The few merchantmen which were sunk by German submarines during this period had suffered their fate in strict accordance with the customary law of naval warfare applicable to the sinking of merchant vessels by surface warships — they had been stopped by a warning shot, visited and searched, found to have contraband aboard, and the safety of passengers and crews had been assured before they were sunk.³⁵ That procedure was not to continue.

On November 3, 1914 the British gave notice that "the whole of the North Sea must be considered a military area."³⁶ The British sea blockade of Germany was so effective that the German Navy urged the need to counter it by a declaration of a war zone around the British Isles within which all ships would be sunk. The Foreign Office opposed such a procedure because of its anticipated effect on neutrals and the German Chancellor, Bethmann Hollweg, at first agreed with the Foreign Office. However, early in 1915 the German Government determined that it had no alternative but to use the submarine to stop the flow of food and essential munitions to the British Isles³⁷ and on February 4, 1915 the German Admiralty issued a Proclamation declaring the waters around Great Britain and Ireland, including the entire English Channel, to be a "war zone" in which, after February 18, 1915, all enemy merchant ships would be destroyed without assuring the safety of the passengers and crews — in other words, they would be sunk without warning.³⁸ The Proclamation added that, because, on January 31, 1915, the British Admiralty had ordered British merchant vessels to fly neutral flags, even neutral merchant vessels would be at risk in the announced zone. A lengthy "Memorial", issued at the same time,

justified the German action as retaliation for British disregard of the provisions of the 1909 Declaration of London and of the 1856 Declaration of Paris³⁹ and the British declaration of the North Sea between Scotland and Norway as being “comprised within the seat of war” combined with neutral acceptance of these British violations.⁴⁰ It was thus that first arose a problem which continues to plague the Governments and navies of the world and students of the law of maritime warfare to this day — the question of the legality of war zones, under any of the various names which have been given to such areas of the high seas by belligerents.⁴¹

The German Proclamation caused considerable consternation in the United States. Robert Lansing, then Counselor of the Department of State, prepared a reply to the German proclamation which he himself referred to as “sharp.” It described the German intention as “a wanton act unparalleled in naval warfare.”⁴² However, after he had read the accompanying “Memorial” he relented considerably. Nevertheless, the United States protest may still be described as “strong.”⁴³ The United States also protested to Great Britain the use of the American flag by British merchant ships.⁴⁴ As neither of these protests accomplished its purpose, the United States proposed that each side should, among other things, agree:⁴⁵

That neither will use submarines to attack merchant vessels of any nationality except to enforce the right of visit and search.

That each will require their respective merchant vessels not to use neutral flags for the purpose of disguise or *ruse de guerre*.

Germany accepted this proposal with conditions. Great Britain rejected it on the ground that the German Proclamation of February 4, 1915 was, “in effect, a claim to torpedo at sight”; and that submarines did not, and could not, comply with the well-established rules of maritime warfare, such as bringing merchant ships before prize courts, sinking them only when extraordinary circumstances existed, distinguishing between neutral and enemy ships, assuring the safety of crews, etc.⁴⁶ Of course, the British position disregarded the fact that by accepting the proposed agreement Germany would have, in effect, consented to give up any claimed right to “torpedo at sight” with all of its corollaries.

This began a campaign of submarines as commerce destroyers, a campaign that extended from February 1915 to September 1915, during which period strong protests were made to the German Government by the Government of the United States over attacks upon and the sinking of American merchant vessels and of other merchant vessels on which American citizens were traveling. The matter reached a peak with the sinking of the *Lusitania* on May 7, 1915 as a result of which over 100 American citizens were lost. The U.S. protest included the following statement:⁴⁷

The Government of the United States, therefore, desires to call the attention of the Imperial German Government with the utmost earnestness to the fact that the objection to their present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice, and humanity which all modern opinion regards as imperative. It is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo. It is practically impossible for them to make a prize of her; and, if they cannot put a prize crew on board of her, they cannot sink her without leaving her crew and all on board of her to the mercy of the sea in her small boats.

After another strong protest by the United States when the *Arabic* was sunk on August 19, 1915, with American citizens aboard, German submarines were ordered not to attack passenger ships without a warning and an opportunity for the passengers and crew to be taken to a place of safety.⁴⁸ As this required the submarine to come to the surface, an extremely dangerous procedure in a confined area, all German submarines were soon recalled from the English Channel. One anonymous author believes that this seven-month period (February – September 1915) “saw the submarine come of age as the first modern weapon to make war a universal scourge, rather than a professional duel between rival armies and fleets.”⁴⁹

Thus, within the first year of World War I the use of the submarine had generated issues with respect to the arming of merchantmen, the use of false colors, the establishment of “war zones”, the sinking of merchantmen without warning, and the failure to assure the safety of the passengers and crews. All of those issues continue to exist; only the latter two were addressed by the 1936 London Submarine Protocol.⁵⁰ The problem of the status of merchantmen under convoy did not arise until much later in the war.

Disputes with respect to submarine warfare continued to arise and finally, on April 18, 1916, the United States warned Germany that if the latter intended to continue “to prosecute relentless and indiscriminate warfare against vessels of commerce without regard to what the United States must consider the sacred and indisputable rules of international law and the universally recognized dictates of humanity,” it would have no choice but to sever diplomatic relations.⁵¹ The German reply, dated May 4, 1916, notified the United States Government that the following instructions had been issued to German naval forces:⁵²

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 [a] naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance.

The following months were comparatively free of incidents but, understandably, the success of the U-boats was considerably reduced. Ultimately, the German Government decided that its only possibility of winning the war, which had reached a stalemate on land, was to embark on a program of unrestricted submarine warfare and an announcement of such a policy was suddenly made on January 31, 1917, to take effect the following day.⁵³ On February 3, 1917, the United States severed diplomatic relations with Germany;⁵⁴ on March 12, 1917, the United States announced its intention to arm its merchantmen;⁵⁵ on April 2, 1917, in a speech to Congress requesting a declaration of war against Germany, President Wilson stated: "The intimation [of the German Government] is conveyed that the armed guards which we have placed on our merchant ships will be treated as beyond the pale of the law and subject to be dealt with as pirates would be";⁵⁶ and on April 6, 1917, the United States declared war on Germany.

Because of the magnitude of the problem created by the arming of merchantmen during World War I, it is, perhaps, advisable to deal with it at some length at this point. It is a problem which was and is important to neutrals as well as belligerents inasmuch as Article 12 of the 1907 Hague Convention No. XIII,⁵⁷ provides that, in general, a warship may only remain in neutral waters for twenty-four hours. If armed merchantmen are warships, then this rule applies to them and if they remain in neutral waters beyond the twenty-four-hour period, they are, under Article 24 of the same Convention, subject to internment. If they were held to fall within the ambit of those provisions, their utility as cargo carriers would be completely nullified as none could accomplish unloading and reloading within that time frame. Germany demanded that the United States (and other neutrals) apply the provisions of this Convention to British armed merchantmen. The United States declined to do so.⁵⁸ It appears that The Netherlands was the only country that so interpreted and applied the cited provisions of the Hague Convention.⁵⁹ One author has taken the position that "neutrals are not justified in treating an armed merchant vessel as an innocent peaceful carrier. By so doing they risk their neutrality."⁶⁰ A major work argues that neutral states "employed the convenient but elusive and tenuous distinction between 'offensive' and 'defensive' armament" because of their desire to avoid the need to apply the provisions of the 1907 Hague Convention No. XIII to armed belligerent merchantmen.⁶¹

The provisions of the 1907 Hague Convention No. VII⁶² require, among other things, that merchant vessels converted into warships must be placed under the direct authority of the State and must have a commander who is "in the Service of the State and duly commissioned by the competent authorities" and a crew which is subject to military discipline. When the British ordered the arming of all of their merchant vessels, many of the captains and other officers of these vessels held commissions in the Royal Navy Reserves and many of the vessels

were subsequently furnished with Royal Navy gun crews. Nevertheless, the British Government contended that these vessels were armed solely for defensive purposes and that, therefore these facts did not make them armed auxiliary cruisers. The British were probably correct in contending that the status of the officers and men did not bring the vessel within the provisions of this Hague Convention. The vessels were not State vessels and the crews, other than the gunners, were not subject to military discipline. However, whether the fact that they were armed removed them from the category of vessels entitled to the protections of customary international law is an altogether different question.

It is often believed that the original decision of the British Government to arm its merchant ships was reached as a measure of protection against submarines. This is not so. In March 1913, when Churchill made his announcement in the House of Commons,⁶³ the British were not concerned with submarines, they were concerned with converted merchant auxiliary cruisers. Thus he said:⁶⁴

There is now good reason to believe that a considerable number of foreign merchant steamers may be rapidly converted into armed ships by the mounting of guns. . . . Our food-carrying liners and vessels carrying raw material following these trade routes would in certain contingencies meet foreign vessels armed and equipped in the manner described. If the British ships had no armament, they would be at the mercy of any foreign liner carrying one effective gun and a few rounds of ammunition. . . . Hostile cruisers, wherever they are found, will be covered and met by British ships of war, but the proper reply to an armed merchantman is another merchantman armed in its own defence.

Again, a year later, on March 17, 1914, he said:⁶⁵

The House will expect me to say a few words on the arming of merchant ships. Much misconception has arisen on this subject. . . . Forty ships have been armed with two 4.7 guns apiece, and by the end of 1914-1915 seventy ships will have been so armed. They are armed solely for defensive purposes. The guns are mounted in the stern and can only fire on a pursuer. Vessels so armed have nothing in common with merchant vessels taken over by the Admiralty and converted into commissioned auxiliary cruisers, nor are these vessels privateers or commerce destroyers in any sense. They are exclusively ships which carry food to this country. They are not allowed to fight any ship of war. . . . They are, however, thoroughly capable of self-defence against an enemy's armed merchantmen.

During the years that it was a neutral in World War I, the position of the United States with respect to armed merchantmen was so ambivalent as to leave much to be desired. However, as it was one of the main players with respect to the problem, it will be of interest to analyze the permutations and combinations which were encountered in the negotiations on this subject and the decisions which were made and unmade.

Within a few days after the beginning of the war the British Charge d'Affaires in Washington called the attention of the Secretary of State to the fact that "a certain number" of British merchant vessels were armed "solely for the purpose of defence."⁶⁶ Two weeks later, the British Ambassador advised the Secretary of State that he had been directed to give the United States:

the fullest assurances that British merchant vessels will never be used for purposes of attack, that they are merely peaceful traders armed only for purposes of defence, that they will never fire unless first fired upon, and that they will never under any circumstances attack any vessel.⁶⁷

Despite these assurances, it does not appear that the armed merchantmen used their guns solely for defense, nor that the British Government expected them to do so. Thus, confidential instructions to masters of armed merchant vessels stated:⁶⁸

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-defence, notwithstanding the submarines [sic] may not have committed a definite hostile act, such as firing a gun or torpedo.

Any submarine approaching a merchant vessel may be treated as hostile.⁶⁹

Moreover, when they became available, merchant ships were supplied with depth charges, definitely an offensive weapon.⁷⁰

In justification of the practice of arming merchant ships, and in support of their contention that this did not remove them from a noncombatant status, the British frequently referred to the long history of armed merchant ships, pointing out that this had been ordered by Royal Proclamation as early as the seventeenth century and that this right had been recognized by Prize Courts during the Napoleonic Wars.⁷¹ They omitted to mention that this procedure had been directed against pirates and privateers and that there were no longer pirates on the well-traveled trade routes which the British ships were traversing and that privateering had been prohibited by the 1856 Declaration of Paris.⁷²

Lauterpacht, while a strong supporter of the right of a belligerent to arm its merchant ships for defensive purposes, added the following caveat:⁷³

At the same time it is clear that the arming of merchant vessels raises problems of substantial difficulty. In the first place, it is not easy to draw a line of distinction between offensive and defensive acts. Secondly, the encouragement of even defensive hostilities on the part of private vessels is fraught with danger inasmuch as it threatens to undermine the abolition of privateering by the Declaration of Paris of 1856 [and the distinction?] between commissioned and non-commissioned vessels. Thirdly, the fact that a merchantman is armed and that she is entitled to resist actual or anticipated attack makes it impossible for enemy submarines to

exercise their right of visit and capture in accordance with International Law without running the risk of destruction by the superior armament of the merchant-vessel or being rammed by her.

On September 19, 1914 the Department of State issued a memorandum, prepared by Robert Lansing, entitled "The Status of Armed Merchant Vessels," which provided that, while a merchant vessel might carry armament and ammunition for defensive purposes without becoming a warship, the presence of such items aboard would create a presumption that they were for offensive purposes, a presumption that could be overcome by showing that the vessel carried its armament for defensive purposes only. The memorandum then proceeded to list a number of "indications" that the armament would not be used offensively, including such items as the size and number of the guns, their location on the vessel, the status of the officers and crew, etc.⁷⁴ With one amendment which provided that the presence of any gun on a merchantman, no matter what its size, would create the presumption of offensive use,⁷⁵ this memorandum laid down the policy followed by the United States during 1914 and 1915.

On January 7, 1916 Lansing, now the Secretary of State, sent a memorandum to President Wilson in which he pointed out the potential danger to submarines of even a small caliber gun on an armed merchantman; that if submarines were to be required to give warning to merchant vessels, the latter should not be armed; and that armed merchantmen should, therefore, be treated as not possessing the immunities of private commercial vessels.⁷⁶ President Wilson concurred with these conclusions and, on January 18, 1916, Lansing circulated an informal letter to the belligerents in which he set forth the general rules of international law and humanity understood to be applicable to noncombatant merchant vessels during a war. He called attention to the manner in which the submarine had changed maritime operations and the dangers it faced when compelled to stop and search an armed merchant vessel on the high seas. He then said:⁷⁷

Moreover, pirates and sea rovers have been swept from the main trade channels of the seas, and privateering has been abolished. Consequently, the placing of guns on merchantmen at the present day of submarine warfare can be explained only on the ground of a purpose to render a merchantman superior in force to submarines and to prevent warning and visit and search by them. An armament, therefore, on a merchant vessel would seem to have the character of an offensive armament.

....

It would, therefore, appear to be a reasonable and reciprocally just arrangement if it could be agreed by the opposing belligerents that submarines 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 vessels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited

and prevented from carrying any armament whatsoever.

....

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.

If the paragraph last quoted was intended to put pressure on Great Britain to agree to the basic suggestion, as it undoubtedly was, it did not accomplish its purpose. While the British Government's adamant opposition to the proposal of the United States had probably previously been conveyed orally, it was not until March 23, 1916 that the British Ambassador delivered to the Secretary of State a memorandum from the British Government setting forth in some detail, not always relevant, the reasons why that Government believed the proposal to be pro-German, why it could not rely on a "non-guaranteed German promise", and why it could not, therefore, accept the proposal made some two months earlier. It also presented its reasons why it did not consider that the action mentioned in the last paragraph of the American note would be in accordance with international law.⁷⁸ The Germans also rejected the proposal, asserting that it was pro-British.⁷⁹

The British won both battles: they continued to arm their merchantmen; and these armed merchantmen continued to be treated by the United States as ordinary merchant vessels "armed for defense only." On March 25, 1916, just two days after the date of the British memorandum, the Department of State issued a new "Memorandum on the Status of Armed Merchant Vessels" which was even more lenient on the subject than the 1914 memorandum had been. Two pertinent paragraphs provided:⁸⁰

The *status* of an armed merchant vessel as a warship in neutral waters may be determined, in the absence of documentary proof or conclusive evidence of previous aggressive conduct, by presumption derived from all the circumstances of the case.

....

Merchantmen of belligerent nationality, armed only for the purposes of protection against the enemy, are entitled to enter and leave neutral ports without hindrance in the course of legitimate trade.

In passing, it is worthy of note with respect to this problem that when, in 1928, the members of the then Pan American Union drafted a convention on the subject of maritime neutrality, Article 12(3) provided that the rules relating to warships would apply to armed merchantmen. The United States ratified the Convention with a reservation to that provision.⁸¹

In conclusion, it might be said that “defensively armed merchant vessels” were properly so-called in that, unlike auxiliary merchant cruisers, they did not go searching for enemy vessels; they were not properly so-called in that they usually opened fire immediately upon sighting a U-boat, before it had taken any offensive action other than to make its appearance. It should be obvious that the present author agrees with the following statement:⁸²

The criteria [for determining whether a merchant vessel is participating in the hostilities] should certainly include, *inter alia*, any armed merchant vessel and no consideration should be given to the purported distinction between “defensive” and “offensive” armament.

As we shall see, this same problem arose during the course of World War II.⁸³

Part III The Intra-War Period (1919-1939) The Versailles Treaty

In the course of drafting a suggested basic document for the proposed League of Nations, to be submitted to the Peace Conference which met at the end of World War I, President Woodrow Wilson sought comments from David H. Miller, the Legal Adviser of the American Delegation to the Conference. In his comments on Wilson’s Second Draft, Miller suggested the inclusion of the following provision:⁸⁴

The Contracting Parties agree never to make use of armed submarines in naval operations, and further agree that they will hereafter build no submarines armed or capable of being armed and further agree that all submarines now in existence or under construction shall be dismantled and rendered incapable of being armed or shall be destroyed.

Wilson did not adopt this suggestion and while Article 191 of the *Treaty of Versailles*⁸⁵ which ended World War I as between Germany and the Allies, specifically prohibited “[t]he construction or acquisition of any submarine, even for commercial purposes” by Germany, the Covenant of the League of Nations contained no provision on the subject. As events proved, this provision of the Treaty, like many of the other provisions thereof, was of little value.⁸⁶

The 1921-1922 Washington Conference

In 1921 a Conference on the Limitation of Armament met in Washington. The conferees represented the five major victorious Powers in World War I: France, Great Britain (and the Commonwealth countries), Italy, Japan, and the United

States. When the discussion with respect to submarines began, the British Delegation took the position that “what was required was not merely restrictions on submarines, but their total and final abolition.”⁸⁷ The French delegation was, as it had been in the past, particularly opposed to the banning of the submarine as an accepted naval weapons system, its delegate saying:⁸⁸

The French Government believes that every method of warfare may or may not be employed in conformity with the laws of war, and that the inhuman and barbarous use made of the submarine by a belligerent in the late war is a reason for condemning that belligerent, but not for condemning the submarine.

It quickly became obvious that the British proposal would not receive the necessary support. As one commentator on the 1922 Diplomatic Conference stated: “The British seem to hold that the submarine is an offensive weapon, while the others consider that it is a defensive weapon.”⁸⁹ Elihu Root, one of the delegates of the United States and a former Secretary of State, then submitted several proposed resolutions to the Conference. These resolutions may be considered to have been the genesis of the 1922, 1930, and 1936 codifications of the rules relating to submarine warfare. Resolution I was said to be a statement of existing law, while Resolution II was said to constitute a change in the existing law.⁹⁰ An examination of the Root Resolutions, as minimally modified by the Conference, will enable us to determine what the rules of submarine warfare were then considered to be and what the representatives of the nations present considered that they should be, it being an accepted fact that the submarine was here to stay.

Root’s Resolution I⁹¹ became Articles I and 2 of the treaty then in process of being drafted, with only one major change: the logical addition of a second condition under which a merchant vessel might be attacked (when it refused “to submit to visit and search after warning, or to proceed as directed after seizure”).⁹² As adopted and included in the Treaty which was ultimately drafted,⁹³ these articles stated:

Art. 1. The Signatory Powers declare that among the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, the following are to be deemed an established part of international law;

(1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning, or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

(2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a 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.

Art. 2. The Signatory Powers invite all other civilized Powers to express their assent to the foregoing statement of established law so that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents.

The provisions of Article 1 have since been accepted as binding rules of the law of war at sea by reiteration in substance in international agreements subsequently drafted. It will become apparent that they formed the basis for the provisions of Part IV of the 1930 London Naval Treaty⁹⁴ and for those of its offspring, the 1936 London Submarine Protocol.⁹⁵

There can be no question but that the provisions of Root's Resolution II⁹⁶ represented a major addition to the restrictions on the use of submarines in war at sea. It condemned the submarine for what a belligerent had done in World War I. It was adopted as Article 4 of the Treaty with only minor amendments which did not affect its substantive content. It read:

Art. 4. The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations, they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto.

This Article, outlawing the use of submarines against merchant vessels, even if they complied with the provisions of Article 1, did not survive as a rule of the law of war. Had it done so, it would, as Root had indicated, have supplanted the rules set forth in Article 1, rules which codified then existing law.

Root's Resolution III⁹⁷ was adopted as Article 3 of the Treaty with only one major change. That change was the substitution of the words "rules declared by them with respect to attacks upon and the seizure and destruction of merchant ships" for the words "rules declared by them with respect to the prohibition of the use of submarines in time of war." Under either reading, the provisions cover violations of both Articles 1 and 4 of the Treaty. As Article 3 it now read:

Art. 3. 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.

During the discussion of this Resolution the Japanese delegate asked for an explanation of the meaning of the phrase “punishment as if for an act of piracy.” The ambiguity of the phrase was demonstrated by the fact that the Chairman, Secretary of State Hughes, said that he assumed that it meant that a violation should be treated as an act of piracy. Root was quick to indicate that it merely meant that there would be universal jurisdiction, as in the case of piracy.⁹⁸ Inasmuch as the provision already specifically so provided, there was, in reality, no need for the reference to piracy which merely caused confusion and antipathy.

Like Article 4, Article 3 has not survived as a separate rule of the law of war. However, like any other violation of the law of war, violations of the provisions of the customary or conventional law of submarine warfare constitute universal war crimes and the violator may still “be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found” — depending, of course, on the domestic law of that Power. In fact, as we shall see, after World War II two German Admirals, Doenitz and Raeder, were charged with and tried for having allegedly ordered illegal submarine warfare.

In its final form this 1922 Washington Treaty (which also contained a provision banning the use of noxious gases) included in its Article VI a provision which stated that it would “take effect on the deposit of all the ratifications.” Inasmuch as France failed to ratify it, the Treaty never took effect.⁹⁹ Perhaps this was just as well. Admiral William V. Pratt, of the United States Navy, is quoted as having written, a few days after the Conference ended, that the treaty was not practical and that it would not work.¹⁰⁰

This Diplomatic Conference created a Commission of Jurists with the task of determining the adequacy of certain rules of international law with respect to the law of war.¹⁰¹ The Commission produced two sets of rules, one on wireless telegraphy in time of war and one on aerial warfare. Article 6, paragraph 1, of the former stated:¹⁰²

The wireless transmission, by an enemy or neutral vessel or aircraft while being on or above the high seas, of any military information intended for a belligerent's immediate use, shall be considered a hostile act exposing the vessel or aircraft to be fired at;

As the Diplomatic Conference had adjourned sine die before the Commission completed its work, neither set of rules ever received codified international

status. However, they undoubtedly represented the customary international law on the subjects and are worthy of and have received considerable attention, despite their informal status.¹⁰³

Article 1, paragraph 1 of the Inter-American Convention on Maritime Neutrality¹⁰⁴ sets forth in considerable detail the rules with respect to the rights of belligerent warships towards merchant vessels, including a provision that a ship may not be rendered unnavigable before the crew and passengers have been placed in safety. Paragraph 2 makes these rules applicable to submarines with the specific proviso that “[i]f the submarine cannot capture the ship while observing these rules, it shall not have the right to continue to attack or to destroy the ship.”¹⁰⁵

The 1930 London Naval Conference

On January 21, 1930 another Conference on the Limitation of Armament convened, this time in London. It was officially known as the London Naval Conference of 1930. The participating Powers were the same as those which had been represented in Washington eight years earlier. At the very first Plenary Meeting at which the subject of submarines was discussed the British once again proposed the abolition of the submarine, this time with the full support of the United States; and once again this proposal received the support of all of the Commonwealth countries, but the opposition of France, Italy, and Japan.¹⁰⁶ The United States had submitted a proposed resolution calling for the appointment of a committee to consider (1) the abolition of the submarine; and (2) regulation of the use of the submarine “through subjecting it to the rules of war governing the use of surface craft.” France had submitted a proposed resolution “forbidding submarines to act towards merchant ships otherwise than in strict conformity with the rules, either present or future, to be observed by surface warships.”¹⁰⁷ These resolutions were referred to a Committee of Experts and a Committee of Jurists. The latter produced a Declaration¹⁰⁸ which was approved unanimously by the First Committee and which was approved without discussion by the Plenary Meeting.¹⁰⁹ As incorporated into the Treaty,¹¹⁰ it read:¹¹¹

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 the 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 aboard.

These rules were, in general, a rephrasing and amplification of the rules which had been included in Article 1 of the 1922 Washington Treaty.¹¹² It is important to note that while, pursuant to Article 23, the other provisions of the Treaty ceased to be effective on December 31, 1936, Article 22 was "to remain in force without limitation of time." Despite the fact that there was a provision for accession to Part IV of the Treaty by other Powers, no non-Conference Power ever acceded, perhaps because France and Italy did not ratify these provisions until 1936.

In addition to drafting the Declaration which became Article 22 of the Treaty, the Committee of Jurists made a statement which bears repeating. It said:

The Committee wishes to place it on record that the expression merchant vessels where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in the hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.¹¹³

This would certainly include the merchant vessel which, when a submarine surfaces in its vicinity, immediately opens fire or radios that it has sighted a submarine, giving its longitude and latitude.¹¹⁴

The 1935-1936 London Naval Conference

In 1935 another Diplomatic Conference convened in London to draft a new treaty limiting naval armament prior to the expiration of the 1930 London Naval Treaty. The 1936 London Submarine Protocol¹¹⁵ is frequently associated with the 1935-1936 London Naval Conference and with the Treaty for the Limitation of Naval Armament that was drafted at that Conference.¹¹⁶ Its relationship to that Conference and Treaty is rather tenuous. At the opening session of the Conference Stanley Baldwin, the Prime Minister of Great Britain, said:¹¹⁷

There is one further point that I should like to mention, because it appears to me very encouraging for our future deliberations. If it proves impossible to obtain agreement for the abolition of submarines, it is of vital importance to reach an agreement which will prevent their misuse. Part IV of the London Naval Treaty laid down rules for the treatment of merchant ships by submarines in time of war. These rules are already in force between the United States, Japan and the members of the British Commonwealth of Nations. But I am glad to be able to announce, as a result of the preliminary talks with representatives of other nations, that, once

these rules have been incorporated in an instrument which will be distinct from the London Naval Treaty, the French and Italian Governments who were unable to ratify the London Treaty as a whole will be in a position definitely to accept such an instrument. We hope that this will be the signal for the acceptance of these rules by all the maritime Powers of the world and that, by this means, unrestricted submarine warfare may in the future be averted.

However, at the Fifteenth Meeting of the First Committee, held on March 13, 1936, the French delegate found it necessary to state:¹¹⁸

I am surprised not to see on the Agenda a subject on which we appeared all to be agreed at the opening meeting of the Conference and which our First Committee has not yet examined, namely, the embodiment in the Acts which our Conference is to draw up of the rules of Part IV of the London Naval Treaty [of 1930], concerning the use of submarines against merchant vessels.

The British representative pointed out that the two treaties were quite separate (the Japanese had left the Conference and would not sign the Naval Treaty but would sign the Submarine Protocol) and that as another text had to be prepared they could only hope that the two could be signed at the same time.¹¹⁹ As a matter of fact they were not, the Treaty being signed on March 25, 1936 and the Protocol more than seven months later, on November 6, 1936. On the latter date it (the Protocol) was signed by the five nations which had participated in the drafting of both the 1930 and the 1936 London Naval Treaties: France, Great Britain (and the Commonwealth Nations), Italy, Japan, and the United States. Other nations were invited to accede to the Protocol and approximately 37 others had done so before World War II erupted, including all of the European belligerents in that war except Rumania. Japan was a Party, but China was not. Germany had acceded on November 23, 1936.¹²⁰

The Nyon Agreements

The Spanish Civil War which began in 1936 was the first such conflict since the American Civil War in which submarines played a part. Because of their method of operation, which included attacks on and the sinking of merchant ships which did not belong to either side in the conflict, a number of concerned nations met at Nyon, Switzerland, in 1937 and drafted the Nyon Agreement. This agreement provided:¹²¹

II. Any submarine which attacks such a ship [one not belonging to either side in the conflict] in a manner contrary to the rules 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.

In effect, the Parties to this Agreement were demanding that the contestants in a civil war comply with the provisions of the 1936 London Submarine Protocol.¹²² (A Supplementary Agreement, signed three days later, made the original agreement applicable to surface vessels and aircraft.) Nine European and Mediterranean States were Parties to these agreements. (Understandably, this did not include Germany and Italy, both of which were actively supporting the Franco insurgents who probably controlled all of the submarines involved.) Shortly thereafter, on 5 October 1937, the Council of the League of Nations adopted a Resolution which stated:¹²³

(7) Notes that attacks have taken place in violation of the most elementary dictates of humanity underlying the established rules of international law which are affirmed, so far as war time is concerned, in Part IV of the Treaty of London of April 22, 1930, rules which have been formally accepted by the great majority of Governments.

(8) Declares that all attacks of this kind against any merchant vessels are repugnant to the conscience of the civilised nations which now find expression through the Council.

It is strange that the League's Council referred to the 1930 Treaty, which had only a few ratifications, and not to the 1936 Protocol, which, by this time, had more than twenty-five ratifications and accessions.

Part IV World War II and Its Aftermath (1939-1947)

As in the case of World War I, the British Admiralty had prepared for another conflict by ensuring that many of its merchant ships had been built with reinforced areas for the mounting of guns and by storing guns to be used for arming those ships.¹²⁴ Moreover, the 1938 British *Defense of Merchant Shipping Handbook* included the following provisions:¹²⁵

As soon as the Master of a merchant ship realises that a ship or aircraft in sight is an enemy, it is his first and most important duty to report the nature and position of the enemy by wireless telegraph. Such a report promptly made may be the means of saving not only the ship herself but many others; . . .

Conditions under which fire may be opened:

(a) Against enemy acting in accordance with International Law.- As the armament is solely for the purpose of self-defence, it must only be used against an enemy who is clearly attempting to capture or sink the merchant ship. On the outbreak of war it should be assumed that the enemy will act in accordance with International Law, and fire should therefore not be

opened until he has made it plain that he intends to attempt capture. Once it is clear that resistance will be necessary if capture is to be averted, fire should be opened immediately.

(b) Against enemy acting in defiance of International Law.- If, as the war progresses, it unfortunately becomes clear that, in defiance of International Law, the enemy has adopted a policy of attacking 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 prevent her gaining a favorable position for attacking.

According to a British history of World War II “between the outbreak of the war and November 4 [1939], thirty-two British and three Allied ships had been sunk illegally . . . ; as many as thirty-three neutral ships had been attacked and at least sixteen sunk in circumstances which led to the conclusion that the sinking had been illegal.”¹²⁶

In his *Memoirs*, Admiral Doenitz, the Commander of the U-boat arm of the German Navy for a large part of the war, later the Commander-in-Chief of the German Navy, and, ultimately, Hitler’s successor, asserts that these Instructions were “a contravention of the Submarine Agreement.” He also indicates his belief that the convoy system was contrary to the same Agreement.¹²⁷ Neither arming merchant ships, nor ordering them to send by radio what can only be described as intelligence information, nor sailing them in convoy under the protection of warships, were acts contrary to the provisions of the 1936 London Submarine Protocol—but any of those acts removed the particular merchant ship involved from the limited category of ships protected by that Agreement.¹²⁸

On November 27, 1939 the British Government issued an Order in Council Restricting Further the Commerce of Germany which was intended, among other things, to eliminate all German exports.¹²⁹ In response to neutral complaints of violation of the 1856 Declaration of Paris,¹³⁰ the British Government said in notes to the Dutch and Italian Governments that “the main basis of their actions is admittedly the right of retaliation the essence of which is a departure from the ordinary rules as reprisal for illegal action by the enemy.”¹³¹ This was, of course, an admission by the British that the Order in Council did, in fact, violate the 1856 Declaration of Paris and a claim that it was, nevertheless, legal because by definition a reprisal contemplates an illegal action by the party undertaking reprisal action.¹³²

On May 8, 1940, Churchill, once again First Lord of the Admiralty, stated to the House of Commons that the Royal Navy had been instructed that in the Skagerrak (a narrow arm of the North Sea between Denmark and Norway leading into the Kattegat and the Baltic Sea) “all German ships by day and all ships by night were to be sunk as opportunity served.”¹³³ This action was frequently referred to by the Germans as a basis for their subsequent actions.¹³⁴ Although the International Military Tribunal found Doenitz guilty of violating

the 1936 London Submarine Protocol by establishing operational zones, it listed Churchill's order as one ground for not assessing punishment against Doenitz on the basis of German submarine warfare.¹³⁵

On August 28, 1939, a few days before the outbreak of World War II, Germany had issued its Prize Ordinance¹³⁶ which included some of the protections provided by the 1936 London Submarine Protocol. A week later, on September 3, 1939, Hitler issued Fuehrer's Directive No. 2, which provided that offensive actions by the German Navy against Great Britain were permissible but that "warfare against merchant shipping is for the time being to be conducted according to the prize regulations, also by submarines."¹³⁷ Fuehrer's Directive No. 4, September 25, 1939, extended this directive to include the French.¹³⁸

The minutes of a conference between Hitler and Admiral Raeder, Chief of the Naval Staff, held on September 23, 1939, reveal the following decisions:¹³⁹

2. The intensification of anti-submarine measures by aircraft and armed merchant vessels will apparently make it impossible to search British merchantmen in the future. The Fuehrer approved the proposal that action should be taken without previous warning against enemy merchant ships definitely identified as such (with the exception of unmistakable passenger steamers), since it may be assumed that they are armed.

3. The expression 'submarine warfare' is to be replaced by the expression 'war against merchant shipping.' The notorious expression 'unrestricted submarine warfare' is to be avoided. Instead of this, the proclamation of the 'siege of England' is under consideration; such a military system would free us from having to observe any restrictions whatsoever on account of objections based on International Law.

Fuehrer's Directive No. 5, September 30, 1939, implemented these decisions. It provided:¹⁴⁰

The war against merchant shipping is, on the whole, to be fought according to prize law, with the following exceptions:

(1) Merchantmen and troopships recognized beyond doubt as hostile may be attacked without warning.

(2) The same applies to ships sailing without lights in the waters around the British Isles.

(3) Armed force is to be employed against merchantmen which use their radio transmitters when stopped.

(4) As before, no attacks are to be made upon passenger vessels or large steamships as appear to be carrying passengers in large numbers as well as goods.

Even assuming that “hostile” merely meant “enemy,” the first part of the first exception (merchantmen, not armed merchantmen) was a violation of the Protocol; the second part of that exception (troopships) was valid; the second exception was probably justified;¹⁴¹ the third was undoubtedly justified;¹⁴² and the fourth was intended to avoid incidents such as that of the *Lusitania* in World War I and of the *Athenia* in World War II.¹⁴³

During World War II Germany contended that its use of the submarine as a commerce destroyer was a legal reprisal because of such British violations of the law of naval warfare as arming merchant vessels, ordering them to radio reports of submarine sightings, ordering them to navigate without lights at night, ordering them to ram submarines, violations of the rules pertaining to blockades, etc.¹⁴⁴ Thus, in his Memoirs, Doenitz wrote:¹⁴⁵

In the same way Naval High Command reacted only with extreme caution and step by step to the British measures which I have just described and which constituted a breach of the London Submarine Agreement. Slowly and one by one the restrictions on the conduct of U-boat operations were removed in a series of orders from Naval High Command — beginning with permission to fire upon vessels which used their wireless, which sailed without lights and which carried guns, followed (as a result of the instructions to ram given to British ships) by permission to attack all vessels identified as hostile and ending with a declaration of sea areas that would be regarded as operational zones. . . .

It is, then, an established fact that from the very outset the German Naval High Command painstakingly adhered to the provisions of international law contained in the London agreements and that it was only step by step, in response to breaches of these provisions by the enemy, that we allowed ourselves more and more latitude, until finally, we reached the stage, as it was inevitable that we would, where the London agreement was abandoned completely and for good.

Actually, there was no need for Germany to place its actions on a reprisal basis.¹⁴⁶ The British *modus operandi* constituted their merchant vessels naval auxiliaries, subject to the same treatment as warships — that of being attacked without warning immediately upon being sighted. As one author has stated the provisions of the 1936 London Submarine Protocol did not extend, and were not intended to extend, to the “warshiplike merchantmen” of the British merchant marine.¹⁴⁷ Many publicists are of the opinion that these, and other, British procedures changed the status of armed British merchantmen from noncombatants to combatants, that it integrated them into the British naval forces, and that the provisions of the 1936 London Submarine Protocol were, therefore, no longer applicable to them.¹⁴⁸ The *Commander's Handbook on the Law of Naval Operations*, issued by the United States Navy in 1987, states:¹⁴⁹

During World War II the practice of attacking and sinking enemy merchant vessels by surface warships, submarines, and military aircraft without prior warning and

without first providing for the safety of passengers and crew was widespread on both sides. Rationale for these apparent departures from the agreed rules of the 1936 London Protocol varied. Initially, such acts were justified as reprisals against illegal acts of the enemy. As the war progressed, however, merchant ships were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the enemy's war-fighting/war-sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.

Shortly after the beginning of World War II the United States Congress enacted a Neutrality Act which, among other things, authorized the President to place restrictions "on the use of the ports and territorial waters of the United States by the submarines or armed merchantmen of a foreign state." It also made it unlawful for foreign vessels to fly the American flag (a rather difficult provision to enforce) and authorized the President to designate "combat areas" within which American flag vessels were forbidden to proceed.¹⁵⁰ A Presidential Proclamation issued immediately thereafter placed such restrictions on the use of American ports and territorial waters on submarines, but not on armed merchantmen!¹⁵¹ Unlike the situation during World War I, the entrance into the ports of the United States by armed British merchantmen from the early days of World War II did not seem to cause the Administration any concern and was completely uncontrolled. From the very beginning of the war these vessels were treated as peaceable cargo ships and Borchard's strong protest appears to have occasioned little comment and no change of policy.¹⁵² This must be considered as one of the many indications of official American political policy favoring the British, rather than as a thoughtful interpretation of the applicable law.

In accordance with the authority granted by the Neutrality Act, President Roosevelt also issued a Proclamation designating a "combat area" within which American flag vessels were forbidden to navigate.¹⁵³ Germany availed itself of this combat zone and declared its zone, within which all vessels would be sunk without warning, to coincide with the American zone. During his cross-examination by Sir David Maxwell-Fyfe, the British prosecutor, before the International Military Tribunal, Doenitz testified:¹⁵⁴

I have already said that the neutrals had been warned not to cross the combat zones. If they entered the combat zones, they had to run the risk of suffering damage, or else stay away. That is what war is. For instance, no consideration would be shown on land either to a neutral truck convoy bringing ammunition or supplies to the enemy. It would be fired on in exactly the same way as an enemy transport. It is, therefore, quite admissible to turn the seas around the enemy's country into a combat area. That is the position as I know it in international law, although I am only a soldier.

Sir David Maxwell-Fyfe: I see.

Donitz: Strict neutrality would require the avoidance of combat areas. Whoever enters a combat area must take the consequences.

During this cross-examination Doenitz was also asked "if you sank a neutral ship which had come into that [declared operational] zone, you considered that you were absolved from any of your duties under the London Agreement to look after the safety of the crews?" To this, he replied: "In operational areas I am obliged to take care of the survivors after an engagement, if the military situation permits."¹⁵⁵

In finding Doenitz guilty of violating the 1936 London Submarine Protocol by virtue of the German establishment of "operational zones," the International Military Tribunal stated that the conferees in Washington in 1922, in London in 1930, and in London again in 1936, had had full knowledge of the fact that "operational zones" (or "war zones," or "exclusion zones," or "combat zones," under whatever name one may give to them), had been declared by both sides during World War I, "[y]et the protocol made no exception" for them.¹⁵⁶ It is of interest to note that there was no mention whatsoever of such zones during the discussions that accompanied the drafting of the provisions of the 1922 Washington Treaty, nor of those of the 1930 London Naval Treaty which became the 1936 London Submarine Protocol; and that there were no discussions whatsoever involved in the drafting of the Protocol itself. Would it not be just as logical to interpret all this as indicating that there was no intention on the part of the draftsmen of those agreements to legislate with respect to this problem, which went far beyond submarine warfare in the scope of its application, that there was no desire or authority on their part to establish rules in an area which did not relate exclusively to submarine warfare?¹⁵⁷ Moreover, while the Tribunal found Doenitz not guilty of waging unrestricted submarine warfare on what amounted to a *tu quoque* defense, it failed to find him not guilty of the use of operational zones on that same basis despite undisputed evidence that the British practice in this respect was identical with, and had preceded, that of the Germans.¹⁵⁸ There is one aspect of submarine warfare which appears to warrant mention even though there can be no question as to the criminal liability of any person engaged in it: the murder of the shipwrecked crews and passengers of ships which have been sunk. This problem arose during World War II because of an incident involving the *Laconia*, a British ship which was sunk in September 1942 by a German submarine which then discovered that a large number of Italian prisoners of war had been among those on board. The submarine took in tow several lifeboats (as it happened, the occupants of the lifeboats included a substantial number of members of the British crew), with a large Red Cross displayed, and sent a message, in English in the clear, asking for assistance in the rescue efforts, promising to take no aggressive action against any vessel coming to render assistance as long as none was taken against his U-boat. Unfortunately,

the only response was by an American bomber which attacked and damaged the U-boat, causing it to cast the lifeboats adrift and to submerge.¹⁵⁹ When this was reported to Doenitz he issued the so-called "Laconia Order" which provided:¹⁶⁰

(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 back 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.

At Nuremberg the British prosecutor contended that this was an order to destroy any survivors of the ships sunk by German submarines, contending that this had long been German submarine policy. Evidence was adduced of a conversation between Hitler and Oshima, the Japanese Ambassador to Germany, which the International Military Tribunal for the Far East reported as follows:¹⁶¹

OSHIMA had a conference with Hitler on January 3, 1942. Hitler explained his policy of submarine warfare, which he was conducting against Allied shipping, and said that although the United States might build ships very quickly, her chief problem would be the personnel shortage since the training of seafaring personnel took a long time. Hitler explained that he had given orders for his submarines to surface after torpedoing merchant ships and to shoot up the lifeboats, so that the word would get around that most seamen were lost in torpedoings and the United States would have difficulty in recruiting new crews. OSHIMA, in replying to Hitler, approved this statement of policy and stated that the Japanese would follow this method of waging submarine warfare.

Concerning this matter the International Military Tribunal said:¹⁶²

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 Doenitz deliberately ordered the killing of the survivors of shipwrecked vessels, whether enemy or neutral. The prosecution has introduced much evidence surrounding two orders of Doenitz, war order No.154, issued in 1939, and the so-called "Laconia" order of 1942. The defense argues that these orders and the evidence supporting 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 Doenitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.

The evidence further shows that the rescue provisions [of the 1936 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 Doentiz is guilty of a violation of the protocol.

To summarize, in passing upon the charges of illegal submarine warfare made against German Admiral Doenitz, the International Military Tribunal discussed and reached decisions on four aspects of the question: 1) waging unrestricted submarine warfare (not guilty);¹⁶³ 2) the proclamation of operational zones and the sinking of neutral merchant ships therein (guilty); 3) ordering that the shipwrecked be killed (not guilty); and 4) failure to rescue the shipwrecked (guilty). However, because of the evidence of a number of British and American practices, no sentence was assessed against Doenitz for the foregoing offenses of which he was found guilty.¹⁶⁴

What were the reasons for the failure to comply with the rules of customary international law with respect to submarine warfare during the course of World War I and for the failure to comply with those rules, as codified in the 1936 London Submarine Protocol, during the course of World War II? One student of the problem has answered that question as follows:¹⁶⁵

The non-observance of the rules of the Protocol could be explained with the help of military considerations: impossibility for the aircraft to act in conformity with the rules, impossibility for the German surface warships to penetrate into and effectively control the waters surrounding the British Isles, and, as far as submarines were concerned, the unacceptable risk involved in the procedure of surfacing, ascertaining the character of the ship and cargo, ordering the ship to be abandoned and waiting until the order was carried out and those on board as well as the papers and mail were safe in the ship's boats, in an area where the superior enemy forces, warned with the aid of technical devices like radio and radar or by air reconnaissance, could arrive on the scene in very little time.

Part V

Post-World War II (1948 - to date)

As the footnotes will have indicated, there has been much discussion of the question of restrictions on submarine warfare and the continued viability of the 1936 London Submarine Protocol since the end of World War II and the completion of the trial before the International Military Tribunal. However, unfortunately, there has been no attempt on the part of the international community to clarify a very confused situation, something that should be avoided at all costs in the law of war. The only "official" action which has been

taken in this respect during the past forty or more years is the issuance by the U.S. Navy of its *Commander's Handbook on the Law of Naval Operations*. That volume contains the following:¹⁶⁶

Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice of belligerents that evolved during and following World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, 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 summoned to do so
3. Sailing under convoy of enemy warships or enemy military aircraft
4. If armed¹⁶⁷
5. If incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces
6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces
7. If integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

In an earlier volume, entitled *Law of Naval Warfare*, sub-paragraph 4, above, had included the additional words "and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy."¹⁶⁸ In explanation of the deletion of those words, a proposed Annotated Supplement to the *Handbook*, which is unofficial and which is still in draft form, states:

In light of modern weapons it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively against an enemy or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination. Accordingly, this rule has been modified in this text from that previously appearing in NWIP 10-2, para. 503b(3).4.

In the 1987 volume we find a number of references to submarines and to submarine warfare. Having stated that "[t]he law of armed conflict imposes essentially the same rules on submarines as apply to surface warships (a paraphrase

of the first paragraph of the 1936 London Submarine Protocol), the Handbook goes on to say:¹⁶⁹

8.3.1. Interdiction of *Enemy Merchant Shipping by Submarines*. The conventional rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine's effectiveness as a weapons system is dependent upon its capability to remain submerged (and thereby undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 makes no distinction between submarines and surface warships with respect to the interdiction of enemy merchant shipping. The London Protocol specifies that except in the case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship, "whether surface or submarine" may not destroy an enemy merchant vessel "without having first placed passengers, crew, and ship's papers in a place of safety." The impracticality of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping. As in the case of such attacks by surface warships, this practice was justified either as a reprisal in response to unlawful acts of the enemy or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy's war-fighting/war-sustaining effort.

The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel unless:

1. The enemy merchant vessel refuses to stop when summoned to do so or otherwise resists capture.
2. The enemy merchant vessel is sailing under armed convoy or is itself armed.
3. The enemy merchant vessel is assisting in any way the enemy's military intelligence system or is acting in any capacity as a naval auxiliary to the enemy's armed forces.
4. The enemy has integrated its merchant shipping into its warfighting war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

In a learned discussion of this problem which arrives at conclusions closely resembling those reached by the draftsmen of the *Handbook*, one author states:¹⁷⁰

Besides the two circumstances mentioned in Article 22 (2) of the London Naval Treaty of 1930 — persistent refusal to stop on being summoned and active

resistance to visit and search — there are other situations in which international law may allow the attack and destruction of merchant vessels. They include:

- i) sailing under convoy of enemy warships or enemy military aircraft.
- ii) if armed, and there is reason to believe that such armament has been used, or is intended for use offensively against an enemy.
- iii) if incorporated into, or assisting in any way, the intelligence system of an enemy's armed forces.
- iv) if acting in any capacity as a naval or military auxiliary to an enemy's armed forces.

He immediately points out that “[m]any British writers question the validity of some of these situations.”

Conclusions

Can it be said that, after the experiences of two World Wars, the mandates of the 1936 London Submarine Protocol, codifying customary international law, are still a valid and binding part of the law of war at sea? The International Military Tribunal, sitting after the conclusion of those two conflagrations, left no doubt that in its opinion the provisions of the Protocol had been, during World War II, and still were, after that conflict, very much alive and binding. A majority of the writers who have studied the problem are of a similar opinion.¹⁷¹ Although it is unquestionably true that a rule of international law may be changed by evidence of a substantial change in the practice of States, the failure of one belligerent in World War I to comply with the applicable rules of customary international law, following which it was severely chastised for its action and the rules were codified, and the failure of three belligerents in World War II (Germany, Japan, and the United States), even though they may have been major maritime Powers, to comply with the provisions of the Protocol does not forever erase them from the rule book. During World War I all of the Entente Powers and the United States, both as a neutral and as a Power associated with the Entente Powers, insisted that the rules with respect to submarine warfare, which were then a part of customary international law and are now set forth in the 1936 London Submarine Protocol, were valid and binding rules. During the interim between the wars a large number of the nations of the world, including in many cases those which later did not comply therewith, accepted these rules in conventional form in 1922, in 1930, in 1936, and in 1937. The failure of Germany, Japan, and the United States to comply with those rules during World War II did not result in their nullification. It must also be borne

in mind that in both World Wars Germany contended that her failure to comply with the customary or conventional law of submarine warfare was an act of reprisal, i.e., an admittedly illegal act. The same argument may, perhaps, be made for the United States inasmuch as a Japanese submarine had already sunk an American merchantman without warning when the message ordering unrestricted submarine warfare by the United States Navy, concerning which Admiral Nimitz testified, was sent.¹⁷² (No evidence could be found that Japan claimed that her unrestricted submarine warfare was an act of reprisal.)¹⁷³

Which brings the present author to the following conclusions:

1. While, during World War II, the provisions of the 1936 London Submarine Protocol were largely not applied, this was frequently excused by the particular belligerent, not on the basis that they were no longer a part of the law of war at sea, but on the basis of reprisals against illegal actions on the part of the enemy (arming of merchant vessels with guns and depth charges, sailing them in warship-escorted convoys, ordering the immediate reporting by radio of submarine sightings, ordering merchant vessels to ram submarines, illegal mining, illegal expansion of the list of contraband, illegal blockades, declarations of war zones, etc.), in itself a recognition of the continuing validity of those provisions;

2. The 1936 London Submarine Protocol continues to be a valid and subsisting part of the law of war at sea;

3. If the establishment of zones (operations zones, war zones, exclusion zones, combat zones, etc.) is determined to be a legal method of making war at sea, the application of the rules of the 1936 London Submarine Protocol will be largely, but not entirely, nullified, at least in the zones so declared.

4. It is highly probable that in any World War III belligerents will again find reasons why the 1936 London Submarine Protocol should not be applied;

5. In any future armed conflict of lesser extent than a World War III the pressure of neutral Powers may be sufficiently strong to cause the belligerents to comply with the provisions of the 1936 London Submarine Protocol.

One cannot do better than to conclude a study of the submarine with a portion of the final conclusion reached by a noted expert in a book recently published:¹⁷⁴

The era of the submarine as the predominant weapon of power at sea must therefore be recognised as having begun. . . . Five hundred years ago, before the sailing-ship pioneers ventured into great waters, the oceans were an empty place, the only area of the world's surface in which men did not deploy military force against each other. In a future war the oceans might appear empty again, swept clear both of merchant traffic and of the navies which have sought so long to protect it against predators. Yet the oceans' emptiness will be illusory, for in their deeps new navies of submarine warships, great and small, will be exacting from each other the price of admiralty.

Notes

*Professor Emeritus of Law, Saint Louis University Law School; Former Charles H. Stockton Professor of International Law, U.S. Naval War College, Newport, R.I.

1. Frederick Wagner, *Submarine Fighter of the American Revolution: The Story of David Bushnell 56-74* (1963).

2. Quoted in Cynthia O. Philip, Robert Fulton: A Biography 74 (1985). The author states: "He realized that the submarine would be considered an illegal weapon and that if he or any of his crew were taken prisoner by the British they would be executed as common criminals. The objection to submarine warfare . . . was that the submarine would attack with unscrupulous stealth." *Id.* at 75.

3. Admiral Earl St. Vincent, the British First Sea Lord in 1804, is reputed to have said of Fulton's submarine:

Don't look at it, and don't touch it. If we take it up, other nations will; and it will be the greatest blow at our supremacy on the sea that can be imagined.

R. H. Gibson, *The German Submarine War, 1914-1918*, (1931).

4. The Union Navy made one attempt to construct a submersible to be used against the Confederate iron-clad *Merrimac*. This boat, the *Alligator*, was eventually lost, not through enemy action, without ever having been submerged. Bernard Brodie, *Sea Power in the Machine Age* 272 (1969).

5. One author says that *New Ironsides* "did not even need a major dockyard repair job." Edwin P. Hoyt, *Submarines at War: The History of the American Silent Service* 11 (1983); another author says that she was "out of action for a year." Alex Roland, *Underwater Warfare in the Age of Sail* 162 (1978).

6. Edwin P. Hoyt, *supra* note 5, at 10-13. The lessening of the interest of the Confederate Navy in submersibles may have been due to the difficulty of recruiting crews for what appeared to be suicide missions. However, it cannot be said that Confederate underwater activities (which included mines, another pioneering method) ceased. See Roland, *supra* note 5, at 162, where the following statistics are set forth:

By the end of the war the toll from Confederate underwater warfare was impressive. Damage was found to have been sustained by forty-three Union vessels, twenty-nine of which were sunk. This was more damage than was effected by the rest of the Confederate Navy.

It is to be noted that all actions of the Confederate submersibles were directed against Union warships. For a fairly detailed history of the "David" and the "Hunley", see Milton F. Perry, *Infernal Machines: The Story of Confederate Submarine and Mine Warfare* 63-108 (1965).

7. Hoyt, *supra* note 5, at 15.

8. Edwyn A. Gray, *The Killing Time, The U-Boat War, 1914-1918*, at 17 (1972).

9. *The Reports to The Hague Conferences of 1899 and 1907*, at 2, 3 (James B. Scott ed., 1917).

10. *The Proceedings of the Hague Peace Conference: The Conference of 1899*, at 367-368 (James B. Scott ed., 1920).

11. *Id.* at 296.

12. *Id.* at 299.

13. As late as 1935 the then Lieutenant Rickover wrote: "The submarine is the weapon par excellence of the weak naval power." Hyman G. Rickover, *International Law and the Submarine*. 61 U.S. Nav. Inst. Proc. 1213, 1224 (September 1935).

14. A 1917 Grotius Society Committee pointed out that until World War I "the employment [of submarines] as commerce destroyers was not seriously considered." Report of a Committee of the Grotius Society, *The Legal Status of Submarines*, 14 Trans. Grot. Soc. 155 (1929) [hereinafter Grotius Committee Report]. A later author said: "Perhaps the major flaw in the naval thinking of the years preceding World War I was the apparent lack of appreciation of the economic facet of naval warfare." William H. Barnes, *Submarine Warfare and International Law*. 2 World Polity 121, 132 (1960). The effectiveness of the British blockade of Germany early in World War I was undoubtedly a major reason for the decision of Germany to retaliate in the only way open to it, by the employment of the submarine as a commerce destroyer. Gray, *supra* note 8, at 38.

15. Bernard Brodie, *supra* note 4, at 287.

16. In 1901 France had 6 submarines, Italy 2, the United States 1, and Great Britain none; while in 1907 France had 49, Great Britain 39, Russia 13, the United States 10, Italy 7, Japan 5, and Germany 2. Barnes,

supra note 14, at 121, 127-128. By 1914 Great Britain had 76 (with 20 under construction), France had 70 (23), the United States had 29 (21), Germany had 27 (12), Russia had 25 (18), and Italy had 18 (2). *Id.*, at 131.

17. The Proceedings of the Hague Peace Conferences: The Conference of 1907, at 1 (James B. Scott ed., 3 vols. "1", i.e. 1921) [hereinafter Scott, Proceedings].

18. 3 *id.* at 741. That Commission had drafted the 1899 Hague Convention No. II with Respect to the Laws and Customs of War on Land and its attached Regulations, signed at The Hague, 29 July 1899, 32 Stat. 1803; 1 Am. J. Int'l. L. (Supp. 1907) 129; The Laws of Armed Conflicts 63 (Dietrich Schindler and Jiri Toman, eds., 3d ed., 1988) [hereinafter Schindler/Toman]. This Convention was readopted with only a few minor changes as the 1907 Hague Convention No. IV, signed at The Hague, 18 October 1907, 36 Stat. 2227; 2 Am. J. Int'l. L. (Supp. 1908) 90; Schindler/Toman, *supra*, and still constitutes a major portion of the conventional law of war on land.

19. See, for example, Pietro Verri, *Commentary on the 1913 Oxford Manual on Naval Warfare*, The Law of Naval Warfare 329, 331 (N. Ronzitti ed., 1988).

20. 3 Scott, Proceedings, *supra* note 17, at 792-793.

21. 1907 Hague Convention No. VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, signed at The Hague, 19 October 1907, 2 Am. J. Int'l. L. (Supp. 1908) 127; Schindler/Toman, *supra* note 18, at 791. The United States is not a Party to this Convention.

22. 1909 London Declaration Concerning the Laws of Naval Warfare, signed at London, 26 February 1909, 3 Am. J. Int'l. L. 179, 186 (Supp. 1909); Schindler/Toman, *supra* note 18, at 843. After an adverse vote in the British House of Lords, this Declaration received no ratifications and never became effective. One author has written

For belligerents [in World War I] the Declaration of London proved a remarkably flexible weapon, the more so because it was unratified. Since the London Conference had maintained the fiction that it was not writing new law, but declaring law, it was easy to use the declaration. Since it was unratified it was simple to announce interpretations by proclamation, or ignore it.

Calvin D. Davis, *The United States and the Second Hague Conference* 343 (1975).

23. The 1913 *Oxford Manual on the Law of Naval Warfare Governing The Relations Between Belligerents*, Resolutions of the Institute of International Law 174 (James B. Scott ed., 1913); Schindler/Toman, *supra* note 18, at 857), while perhaps even more extensive in its coverage than the 1909 Declaration of London, *supra* note 22, likewise contained no mention of the submarine.

24. It is worthy of note that the provision in this regard contained in Article 50 of the 1909 Declaration of London, *supra* note 22, applied only to neutral merchant vessels and that there are no comparable provisions relating to enemy merchant vessels. Perhaps this was because of the provision of the 1907 Hague Convention No. VI. See *supra* text accompanying note 21.

25. Hyman G. Rickover, *supra* note 13, at 1217.

26. For. Rel. 198, 199 (Supp. 1916); 10 Am. J. Int'l. L. 178, 179 (Spec. Supp. 1916).

27. 2 Lassa Oppenheim, *International Law, A Treatise* 469 (Hersch Lauterpacht ed., 7th ed. 1952) [hereinafter Lauterpacht's Oppenheim]. Another British writer concluded that "the introduction of the submarine does not call for the making of new laws for naval warfare, but demands the rigid application of those hitherto accepted." A. Pearce Higgins, *Submarine Warfare*, 1 Brit. Y.B. Int'l L. 149, 164 (1920-1921). However, an expert in the field of the law of war has written:

So in our own times, Professor Lauterpacht and the late Professor Oppenheim, Dr. Colombos and the late Professor Higgins and other Anglo-American publicists have regarded air and submarine craft as interlopers in naval warfare, which must play the game according to surface rules, or not at all, with no ground of complaint if the rules forbid their effective use. It is not believed that this is an adequate approach either for understanding the present state of international practice, or for moulding future practice.

Julius Stone, *Legal Controls of International Conflict* 603-604 (2d imp., 1959).

28. For. Rel. 768, 769 (Supp. 1916).

29. 50 Parl. Deb., H.C. (5th serv.) 1750 (1913). The 1907 Hague Convention No. VII Relating to the Conversion of Merchant Ships into War-Ships 2 Am. J. Int'l. L. 133 (Supp. 1908); Schindler/Toman, *supra* note 19, at 797; 100 B.F.S.P.377 had covered some, but not all, of the problems connected with such conversions, which created warships sometimes referred to as "armed merchant cruisers" and sometimes as "auxiliary cruisers." In particular, it had not solved the problem as to where such conversions could be accomplished.

30. For. Rel. 216 (Supp. 1914); 9 Am. J. Int'l. L. 1 (Spec. Supp. 1915).

31. For. Rel. 216-220 (Supp. 1914); 9 Am. J. Int'l. L. 1-6 (Spec. Supp. 1915).

32. For. Rel. 257-258 (Supp. 1914); 9 Am. J. Int'l. L. 7-8 (Spec. Supp. 1915).

33. Although food and clothing remained on the conditional contraband list, as Lauterpacht pointed out, this was "a distinction without a difference" as, contrary to the provisions of the 1909 Declaration of London, *supra* note 22, British prize courts applied the doctrine of continuous voyage to items of conditional contraband. Hersh Lauterpacht, *The Problem of the Revision of the Laws of War*, 29 Brit. Y.B. Int'l L. 360, 375 (1952). Concerning problems with respect to contraband during World War 1, see H. Reason Pyke, *The Law of Contraband of War 178-190* (1915).

34. On 5 September 1914, the British light cruiser *Pathfinder* became the first victim of a submarine's torpedo in World War I. As some indication of the naivete of the time with respect to submarines, on 22 September 1914 a German submarine sank another British cruiser, the *Aboukir* — and then sank two more such cruisers, the *Hogue* and the *Cressy*, which engaged in rescuing the crew of the first one, in complete disregard of the possible presence of the submarine. R.H. Gibson, *supra* note 3, at 6-7.

35. On 20 October 1914 a German U-boat sank the *Glitra*, a small merchant vessel, the first such to be sunk during World War I. This was accomplished in the manner prescribed for surface vessels and occasioned no outcry. Brodie, *supra* note 4, at 302.

36. For. Rel. 463, 464 (Supp. 1914); 11 Am. J. Int'l. L. 14, 15 (Spec. Supp. 1917).

37. Daniel P. O'Connell, *International Law and Contemporary Naval Operations*, 44 Brit. Y.B. Int'l L. 19, 46 (1970).

38. For. Rel. 94 (Supp. 1915); 9 Am. J. Int'l. L. 83-84 (Spec. Supp. 1915).

39. Declaration Respecting Maritime Law, signed at Paris, 16 April 1856, 1 Am. J. Int'l. L. 89 (Supp. 1907); 115 Perry C.T.S. 1 (1969); Schindler/Toman, *supra* note 18, at 787. One of the provisions of this Declaration, which the British were allegedly disregarding, stated: "The neutral flag covers enemy's goods, with the exception of contraband of war." Of course, the British would have denied any violation of the Declaration as they had included practically every conceivable item on their revised lists of contraband! For variously stated reasons, the United States is not a Party to this Declaration but can probably be said to recognize the applicability of its provisions.

40. For. Rel. 96-98 (Supp. 1915); 9 Am. J. Int'l. L. 84-85 (Spec. Supp. 1915). A memorandum to German U-boat commanders issued at the same time said:

The first consideration is the safety of the U-boat. Rising to the surface to examine a ship must be avoided for the boat's safety, because, apart from the danger of a possible surprise attack by enemy ships, there is no guarantee that one is not dealing with an enemy ship even if it bears the distinguishing marks of a neutral. . . . Its destruction will therefore be justified unless other attendant circumstances indicate its neutrality.

Bernard Brodie, *supra* note 4, at 304.

41. While, for a complete overview of the problem of submarine warfare against merchantmen, it will be necessary to refer to the use of "operational zones," the question of their legality is beyond the scope of this article. The reader interested in this subject is referred to the definitive discussion thereof in *Maritime War Zones and Exclusion Zones* by L.F.E. Goldie, 64 *International Law Studies* 156 (1991). See also W.J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 1986 Can. Y.B. Int'l L. 91. At this point it will suffice to say that "[t]he German operational area may be justified as a legitimate reprisal to the British one." William T. Mallison, Jr., *Submarines in General and Limited Wars*, *Studies in the Law of Naval Warfare* (1966).

42. 5 Ray S. Baker, Woodrow Wilson, *Life and Letters* 247, 250-251 (1935) [hereinafter Baker].

43. For. Rel. 98-100 (Supp. 1915); 9 Am. J. Int'l. L. 86-88 (Spec. Supp. 1915). The United States note said, in part:

To declare or exercise a right to attack any vessel entering a prescribed area without first certainly determining its belligerent nationality and the contraband character of the cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognized.

44. For. Rel. 100-101 (Supp. 1915); 9 Am. J. Int'l. L. 88-89 (Spec. Supp. 1915).

45. For. Rel. 119-120 (Supp. 1915); 9 Am. J. Int'l. L. 97-98 (Spec. Supp. 1915)

46. For. Rel. 127-128 (Supp. 1915); 9 Am. J. Int'l. L. 99, 101, 106 (Spec. Supp. 1915).

47. For. Rel. 393 (Supp. 1915); 9 Am. J. Int'l. L. 129, 131 (Spec. Supp. 1915). It will be noted that this protest repeated many of the arguments which had been advanced by the British in rejecting the proposal made by the United States.

48. For. Rel. 530-531 (Supp. 1915); 10 Am. J. Int'l. L. 166 (Spec. Supp. 1916). One author construes this decision as

a significant admission by Germany that the right of unarmed belligerent merchantmen were recognized by international law, and that the duty with respect to warning and the saving of human life was as applicable to the submarine as to the surface warship.

Horace B. Robertson, Jr., *Submarine Warfare*, JAG. J. 3 (November 1956).

49. Submarines 14 (1983).

50. Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, signed at London, November 6, 1936, 3 Treaties and Other International Agreements of the United States of America, 1776-1949, at 298 (Charles I. Bevans ed.) [hereinafter Bevans]; 31 Am. J. Int'l L. 137 (Supp. 1937); 173 L.N.T.S. 353; 140 B.F.S.P. 300; Schindler/Toman, *supra* note 18, at 883. Although it is officially a "Proces-Verbal," it is generally referred to as a "Protocol."

51. For. Rel. 232-234 (Supp. 1916); 10 Am. J. Int'l. L. 185, 190 (Spec. Supp. 1916).

52. For. Rel. 257, 259 (Supp. 1916); 10 Am. J. Int'l. L. 195, 198 (Spec. Supp. 1916).

53. For. Rel. 100 (Supp. I, 1917); 11 Am. J. Int'l. L. 332, 333 (Spec. Supp. 1917). One well-regarded expert in this field concluded that "in international law Germany had a good case. She failed to exploit it effectively in neutral eyes and eventually roused the neutrals to anger." O'Connell, *supra* note 37, at 48.

54. For. Rel. 106 (Supp. I, 1917); 11 Am. J. Int'l. L. 335-337 (Spec. Supp. 1917).

55. For. Rel. 171 (Supp. I, 1917); 11 Am. J. Int'l. L. 344-345 (Spec. Supp. 1917). The "Armed Ship Bill" passed the House by a lopsided margin but was successfully filibustered in the Senate. President Wilson then decided to exercise his authority as Commander-in-Chief to direct the Navy to furnish American merchantmen with guns and gun crews. Robert Lansing, *War Memoirs of Robert Lansing 224-225* (1970 ed.).

56. For. Rel. 195, 197 (Supp. I, 1917); 11 Am. J. Int'l. L. 350, 352 (Spec. Supp. 1917).

57. 1907 Hague Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, signed at The Hague. October 18, 1907, 36 Stat. 2415; T.S. 545; 2 Am. J. Int'l. L. 202 (Supp. 1908); 100 B.F.S.P. 448; Schindler/Toman, *supra* note 18, at 951.

58. For. Rel. 613 (Supp. 1914); 9 Am. J. Int'l. L. 238-239 (Spec. Supp. 1915).

59. The Dutch reply to a British protest, stated:

The observation of a strict neutrality obliges them to place in the category of vessels assimilated to belligerent warships those merchant vessels of the belligerent parties that are provided with an armament and that consequently would be capable of committing acts of war.

Brit. Parl. Papers, Misc., No. 14 (1917) Cd 8690, quoted in *International Law Situations, 1930*, at 14.

60. Edwin Borchard, *Armed Merchantmen*. 34 Am. J. Int'l. L. 107, 111 (1940).

61. Myres S. McDougal & Florentino Feliciano, *Law and Minimum World Public Order 565 n. 117* (1962). The authors also point out that:

The construction of this "right to resist" urged by the same writers and by the British Government was singularly liberal. Attack was said to include the attempt to capture, and the attempt to capture included the attempt to exercise visit and search. In net effect, an armed merchantman was, under this view, entitled to start firing upon being sighted and approached by an enemy force.

62. See *supra* note 29.

63. See *supra* text accompanying note 29.

64. 50 Parl. Deb., H.C. 1750 (5th ser. 1913). It will be noted that Churchill spoke of a British "armed merchantman" meeting a foreign "armed merchantman." Actually, he was undoubtedly referring to a foreign "armed merchant cruiser." Moreover, he continued to fail to make this verbal distinction. On June 11, 1913, during a question period, he was asked: "Is it not a fact that these ships are armed for defence only and not for attack?" to which he replied: "Surely these ships will be quite valueless for the purpose of attacking armed vessels of any kind. What they are serviceable for is to defend themselves against the attack of another vessel of their own standing." 53 *id.* at 1599 (1913). (The question was undoubtedly "planted!")

65. 59 *id.* at 1925 (1914). The extent of this operation is indicated by the fact that by the end of the war 4,139 merchant ships had been armed. Bernard Brodie, *supra* note 4, at 319. During World War I Germany had no "armed merchantmen" although it did have some "commissioned auxiliary cruisers"; and the guns to which Churchill referred were very much used against "ships of war" inasmuch as they were used against submarines. In a memorandum of October 13, 1914, the German Government stated that the purpose of the armament on the merchantmen was for armed resistance against German cruisers and that "[s]uch resistance

is contrary to international law because a merchant vessel is not permitted to defend itself against a war vessel." (The issue of the right of such armed vessels to remain in neutral ports more than twenty-four hours was also raised.) For. Rel. 613 (Supp. 1914); 9 Am. J. Int'l. L. 321 (Spec. Supp. 1916).

66. For. Rel. 598 (Supp. 1914); 9 Am. J. Int'l. L. 223 (Spec. Supp. 1915). The British Privy Council has held that "it must be recollected that defence is not confined to taking to one's heels or even returning a blow, but, in the jargon of strategy, may consist in an offensive-defensive, or in plain words in hitting first." International Law Situations, 1930, at 6, 8. And as one author stated: "[I]f a surprise shell which sent down a submarine and its crew had been fired in self-defence, the pity is that the drowning men would be unable to detect its difference from an offensive shell." Kenkichi Mori, *The Submarine in War 86* (1931) [hereinafter Mori].

67. For. Rel. 604 (Supp. 1914); 9 Am. J. Int'l. L. 230 (Spec. Supp. 1915). In view of the provisions of the 1907 Hague Convention No. XIII, *supra* note 57, the British Ambassador also stated that "His Majesty's Government hold the view that it is not in accordance with neutrality and international law to detain in neutral ports merchant ships armed with purely defensive armaments." For. Rel. 606 (Supp. 1914); 9 Am. J. Int'l. L. 231 (Spec. Supp. 1915).

68. For. Rel. 196 (Supp. 1916); 10 Am. J. Int'l. L. 332 (Spec. Supp. 1916).

69. 10 Am. J. Int'l. L. 339, 340 (Spec. Supp. 1916). On a number of occasions the United States called attention to the use of guns on merchant ships for offensive purposes. *See, e.g.*, For. Rel. 849-850 (Supp. 1915).

70. The same procedure was followed in World War II. 13 International Military Tribunal, Trial of Major War Criminals 258 (1947) [hereinafter T.M.W.C.].

71. For. Rel. 607, 608 (Supp. 1914); 9 Am. J. Int'l. L. 232 (Spec. Supp. 1915).

72. *See supra* note 39.

73. Lauterpacht's Oppenheim, *supra* note 27, at 469. Elsewhere he states that: "An overwhelming weight of authority recognized that their defensive armament in no way altered the legal status of these vessels." *Id.* at 468. While this is probably true as to most British writers on the subject, it is probably not true in general. *See, e.g.*, *infra* note 74, and the Borchard article cited *supra* in note 60.

74. For. Rel. 611-612 (Supp. 1914); 9 Am. J. Int'l. L. 234-235 (Spec. Supp. 1915). Secretary of State Bryan disagreed with this memorandum and in a letter to President Wilson he argued that "the character of the vessel is determined, not by whether she resists or not, but by whether she is armed or not . . . the fact that she is armed raises the presumption that she will use her arms." Baker, *supra* note 42, at 354. John Bassett Moore, one of the deans of international law in the United States, said of Secretary Bryan's position that "it was obviously founded in law and common sense." John B. Moore, *Fifty Years of International Law*, 50 Harv. L. Rev. 395, 439 (1937).

75. For. Rel. 749 (Supp. 1916).

76. Robert Lansing, *supra* note 55, at 100-101.

77. For. Rel. 146-148 (Supp. 1916); 10 Am. J. Int'l. L. 310, 312-313 (Spec. Supp. 1916). Of the problem created by permitting merchant vessels to be armed and yet considering them to be noncombatants, while requiring the submarine to comply with the law applicable to surface warships, one expert in the law of submarine warfare has written:

It soon became apparent [in World War I] that even a British armed merchant ship sailing alone presented a very real military danger to German submarines which attempted to comply with traditional law. The predictable result of the new situation was that consideration of military necessity, as well as simply self-preservation, led to the submarine remaining submerged and making torpedo attacks without warning.

William T. Mallison, Jr., *supra* note 41, at 107. A similar conclusion was reached by a number of other students of the problem. *See, e.g.*, the Grotius Committee Report, *supra* note 14, at 155; Hyman G. Rickover, *supra* note 13, at 1223; Alex A. Kerr, *International Law and the Future Of Submarine Warfare*, 81 U.S. Nav. Inst. Proc. 1105, 1109 (October 1955).

78. For. Rel. 211 (Supp. 1916); 10 Am. J. Int'l. L. 336 (Spec. Supp. 1916). The other Allied Governments answered in the same vein.

79. In his *Memoirs*, Lansing, although strongly pro-British, said:

Briefly, the British Government wished international law enforced when they believed that it worked to the advantage of Great Britain and wished the law modified when the change would benefit Great Britain.

Robert Lansing, *supra* note 55, at 111. The German response was a memorandum of 10 February 1916 in which it was stated that armed merchantmen were not entitled to the status of peaceable vessels of commerce and that German naval vessels were receiving orders "to treat such vessels as belligerents." For. Rel. 163-165 (Supp. 1916); 10 Am. J. Int'l. L. 314-318 (Spec. Supp. 1916).

80. For. Rel. 244-248 (Supp. 1916); 10 Am. J. Int'l. L. 367, 369-370 (Spec. Supp. 1916). The vacillation of the United States on this matter and its ultimate improper decision was pointed out with vigor by Borchard when the same problem arose in the early years of World War II. He termed the March 1916 memorandum a "humiliating retreat." Edwin Borchard, *supra* note 60, at 107. *But see* Mori, *supra* note 66, at 86-87. Another expert in the field asserted that it "represented a return to a pro-Allied policy in the guise of a return to traditional law." William T. Mallison, Jr., *supra* note 41, at 111.

81. Inter-American Convention on Maritime Neutrality, signed at Havana, February 20, 1928, 47 Stat. 1989; T.S. 845; 2 Bevens, *supra* note 50, at 721. (There are only eight Parties to this Convention, all of the major Latin-American nations having failed to ratify it.) Article 2 of the Harvard Research in International Law, *Rights and Duties of Neutral States in Naval and Aerial War*, 33 Am. J. Int'l. L. 167, 224 (Spec. Supp. 1939) provides that belligerent merchant vessels "shall, if armed for defense or offense, be assimilated to warships." See also Articles 28 and 55 of that document. However, Article 3(2) of the Scandinavian Declaration Regarding Similar Rules of Neutrality, signed at Stockholm, May 27, 1938, 188 L.N.T.S. 295, 32 Am. J. Int'l. L. 141 (Supp. 1938) states:

2. Access to [Danish] ports or to [Danish] territorial waters is likewise prohibited to armed merchant ships of the belligerents if the armament is destined to ends other than their own defense.

82. William T. Mallison, Jr., *supra* note 41, at 120.

83. It will have been noted that no mention has been made of the famous "Q-ships." These were warships disguised as unarmed merchant ships and were undoubtedly another reason why Germany elected to discontinue the practice of having a submarine surface and warn during the course of World War I. *Id.* at 67.

84. 2 David H. Miller, *The Drafting of the Covenant* 65, 74 (1928).

85. Treaty of Peace between the Allied and Associated Powers, of the One Part, and Germany, of the Other Part, signed at Versailles, June 28, 1919, 2 Bevens, *supra* note 50, at 43, 127; 112 B.F.S.P. 1, 94; 225 Perry C.T.S. 188, 276. (The United States did not ratify this Treaty because of the Senate's objections to the Covenant of the League of Nations which was a part thereof. However, Article 191 (in Part V) was carried over into the Treaty Between the United States and Germany for the Establishment of Friendly Relations, signed at Berlin, August 25, 1921, 42 Stat. 1939; T.S. 658; 114 B.F.S.P. 828.)

86. Within a few years of Versailles the German Navy was able to arrange to retain its expertise in the submarine field through the use of Dutch and Spanish connections. Erich Raeder, *My Life* 138-139 (1960); Francis L. Carsten, *The Reichwehr and Politics 1918-1933*, at 242-244 (1966); John Keegan, *The Price of Admiralty* 221 (1989).

87. Conference on the Limitation of Armament, Washington, November 12, 1921 - February 6, 1922, at 467 (1922) [hereinafter 1922 Washington Conference].

88. *Id.* at 486.

89. Yamato Ichihashi, *The Washington Conference and After: A Historical Survey* 81 (1928). World War I had already demonstrated the correctness of the British position and World War II confirmed it.

90. 1922 Washington Conference, *supra* note 87, at 610.

91. *Id.* at 596.

92. During the course of the discussion, the Italian representative stated that his delegation understood the term "merchant vessel" to refer to unarmed merchant vessels. *Id.* at 688. He adhered to this definition despite remonstrances from the British delegate. *Id.* at 690, 692. The Soviet text *International Law* 438 (F.I. Kozhevnikov ed., n.d.) indicates that the 1936 Protocol applies only to "unarmed merchantmen."

93. Treaty between the United States of America, the British Empire, France, Italy and Japan Relating to the Use of Submarines and Noxious Gases in Warfare, signed at Washington, February 6, 1922, *supra* note 87, at 1605; 16 Am. J. Int'l. L. 57 (Supp. 1922); Schindler/Toman, *supra* note 18, at 789. It must be emphasized that this Treaty never became effective. It required the unanimous acceptance of the drafting States and France refused to ratify it. Nevertheless, both the 1930 London Naval Treaty, *infra* note 94, and the 1936 London Naval Treaty, *infra* note 116, refer to the 1922 Washington Treaty as though it were an effective international agreement.

94. Limitation and Reduction of Naval Armament (London Naval Treaty) signed at London, April 22, 1930, 46 Stat. 2858; T.S. 830; 2 Bevens, *supra* note 50, at 1055; 112 L.N.T.S. 65; 132 B.F.S.P. 603.

95. See *supra* note 50.

96. 1922 Washington Conference, *supra* note 87, at 596.

97. *Id.*

98. *Id.* at 728. He added: "The peculiarity about piracy was that, though the act was done on the high seas and not under the jurisdiction of any particular country, nevertheless it could be punished by any country." Unfortunately, he had previously stated that the Conference was "competent to declare that those who violated the laws of war were guilty of acts of piracy." *Id.* at 720. Most commentators seem to have reached the conclusion that Hughes did. See, e.g., Herbert A. Smith, *The Law and Custom of the Sea* 93 n.3 (3rd ed., 1959) where the statement is made that "[t]he Washington text was objectionable by reason of provision that submarine officers who broke the rule should be treated as pirates." See also *infra* note 121.

99. One author calls attention to this by asserting that "the stipulation [in Article VI] dispels any misapprehension that the instrument would be obligatory as between the nations which have ratified it." Kenkichi Mori, *supra* note 66, at 118. But see *supra* note 93. In Mallison, *supra* note 41 at 43, the conclusion is reached that "the submarine came out of the Washington Conference with undiminished status as a lawful combatant."

100. Lawrence H. Douglas, *The Submarine and the Washington Conference of 1921*, 26 *Nav. War Coll. Rev.*, 86, 92 (March-April 1974); reprinted in 62 *International Law Studies* 479, 488 (Richard B. Lillich & John N. Moore, eds., 1980).

101. 1922 Washington Conference, *supra* note 87, at 814, 816; 2 Bevens, *supra* note 50, at 346.

102. Rules Concerning the Control of Wireless Telegraphy in Time of War, 32 *Am. J. Int'l. L.* 2 (Supp. 1938); *General Collection of the Laws and Customs of War* 819, 821 (M. Deltenre ed., 1943). In his testimony before the International Military Tribunal after World War II, German Admiral Doenitz pointed out that reference to this provision was contained in a footnote to the German Prize Ordinance. 13 *T.M.W.C.*, *supra* note 70, at 361. (Actually, it was in Article 39 (iii) of the Ordinance.)

103. In O'Connell, *supra* note 37, at 19, the author apparently takes the position that using a ship's radio to announce the appearance of a submarine and giving its location does not affect the ship's status as he calls the decision to sink vessels which follow that procedure a "dilution of Germany's standards" of submarine warfare.

104. See *supra* note 81.

105. The International Military Tribunal paraphrased this provision by stating that "[i]f the commander cannot rescue, then under its [the 1936 Protocol's] terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope". 1 *T.M.W.C.*, *supra* note 70, at 313; *Nazi Conspiracy and Aggression: Opinion and Judgement* 140 (1947) [hereinafter *Nazi Conspiracy*].

106. Documents of the London Naval Conference, 1930, at 187-202 (1930) [hereinafter 1930 London Conference].

107. *Id.* at 411.

108. *Id.* at 444.

109. *Id.* at 238.

110. See *supra* note 94.

111. In a criticism of these provisions (as reaff'd in the 1936 London Submarine Protocol), one author has written:

[T]he Protocol was much like an elegant carpet thrown over a littered and soiled passage, for it attempted reform with one sweeping gesture, while what was called for was a thorough airing and meticulous renovation of the laws governing submarine conduct. In essence the London Protocol was the product of an idealistic era which trusted in glib moralizing to right past wrongs and prevent future digressions.

Barnes *supra* note 14, at 189. However, another author takes the position that while the 1922 Washington Conference was influenced by the "spirit of Versailles," in the 1930 agreement "the tone of moral disapproval is wanting." Hyman G. Rickover, *supra* note 13, at 1220 and 1221.

112. See *supra* text accompanying note 93.

113. 1930 London Conference, *supra* note 106, at 443. Both the 1922 and the 1930 provisions have been properly criticized because "they attempt a regulation of submarine warfare without at the same time considering the question of the armed merchantman; yet the two problems are intimately connected." Rickover, *supra* note 13, at 1221.

114. See *supra* text accompanying note 102.

115. See *supra* note 50.

116. Treaty on the Limitation of Armament (Second London Naval Treaty), signed at London, March 25, 1936, 50 *Stat.* 1363; T.S. 919; 3 Bevens, *supra* note 50, at 257; 140 *B.F.S.P.* 243.

117. Documents of the London Naval Conference 1935, at 54 (1936) [hereinafter 1935 London Conference]. Prime Minister Baldwin's statement was confirmed by the French representative in his opening address. *Id.* at 63.

118. *Id.* at 741-742 and 104.

119. *Id.* at 742–743. For a discussion in depth of the background of the 1935 London Naval Conference, and its inevitable failure, see Stephen E. Pelz, *Race to Pearl Harbor* (1974).

120. 140 B.F.S.P. 300, 302. It is believed that Hitler did this as a political gesture and against the advice of his naval advisers. It is, perhaps, appropriate to note that when World War II began the United Kingdom and France both took the position that these rules applied to aircraft as well as to surface warships and submarines. 1 For. Rel. 547–48 (1939).

121. The Nyon Agreement, *signed at Nyon, Switzerland*, Sept 14, 1937, 181 L.N.T.S. 137; 33 Am. J. Int'l. L. 550 (Supp. 1939); Schindler/Toman, *supra* note 18, at 887. The Preamble stated that the submarine attacks were “contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy.” Thus, although the 1922 Washington Treaty, *supra* note 93, had never become effective, its provisions continued to be noted—and misinterpreted.

122. Antonio Cassese, *The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts*, Current Problems of International Law 287, 295–96 (A. Cassese ed., 1975).

123. League of Nations, Official Journal, December 1937, at 945–46; 33 Am. J. Int'l. L. 551 (Supp. 1939).

124. Bernard Brodie, *supra* note 4, at 341. He also states that by the spring of 1939 over 9,000 officers of the British merchant marine had received instruction in gunnery and in convoy tactics. The statistics in 1 Stephen W. Roskill, *The War at Sea, 1939–1945*, at 22 (1954) [hereinafter Roskill] disclose that by the end of 1940 some 3,400 ships had been fitted with low-angle guns for protection against submarines and some 20,000 members of the Royal Navy had been trained to use these “defensive” armaments, as well as a large number of the members of the merchant crews.

125. 40 T.M.W.C., *supra* note 70, at 88–89. The British moved to the implementation of paragraph (b) on 13 June, 1940. *Id.* at 90. It will be observed that the Handbook assumed that a merchant vessel had a right to use its arms to resist visit and search and capture by an enemy warship—an action that Churchill had once said a merchant vessel had no rights to take. See *supra* text accompanying note 65.

126. 1 William M. Medlicott, *The Economic Blockade* 113 (1952). On the other hand, it is reported that until late in 1943 the primary objectives of British submarines were the enemy's surface warships. 1 Roskill, *supra* note 124, at 334. However, restrictions on attacks by British submarines on enemy merchant shipping were relaxed in Norwegian waters in 1940, *id.* at 172, and were removed in the Mediterranean on February 5, 1941, *id.* at 439.

127. Karl Doenitz, *Memoirs: Ten Years and Twenty Days* 35 (1959). For a discussion of the Battle of the Atlantic and of the convoy system, see Keegan, *supra* note 86, at 213–65.

128. See *infra* text accompanying note 149, concerning the convoying of neutral merchant ships. See Frits Kalshoven, *Belligerent Reprisals* 139 (1971) where the following appears:

On the other hand, neutral merchant vessels on their way to or from Great Britain in this period gradually took to sailing under the protection of the British navy and air force. Attacks on such escorted vessels could not be considered unlawful; by the voluntary acceptance of direct armed protection of one of the belligerents, the vessels in question assumed the character of legitimate objectives for the armed attacks of the other belligerent.

A fortiori, the same rule would apply to belligerent merchant vessels in convoy. Concerning neutral merchant vessels in a convoy escorted by neutral warships, see Articles 61 and 62 of the 1909 Declaration of London, *supra* note 22, which sets forth the customary rule in this respect. See also Article 64a, Harvard Research, *supra* note 81, at 653 and *Kyriakides v. Germany*, 8 Recueil des Decisions des Tribunaux Arbitraux Mixtes 349, summarized in the Harvard Research at 679. In S.S. Hall, *Submarine Warfare*, 5 Trans. Grot. Soc. 82, 89 (1920), the author, a Rear Admiral in the Royal Navy, stated that merchantmen in convoys “appear to lose their non-combatant standing” and that “from the day we [the British] adopted the convoy system the German submarine campaign became legitimate.”

129. Order in Council Restricting Further the Commerce of Germany, November 27, 1939, Stat. R. & O. 1939, no. 1709. For a full discussion of the contents of this Order and its effect, see Frits Kalshoven, *supra* note 128, at 118–19. For the reaction of the United States, see the U.S. note *British Blockade of German Exports*, 1 Dep't St. Bull. 651 (No. 24, December 9, 1939).

130. See *supra* note 39.

131. Cmd. 6191, 1940, at 5 (as quoted in Kalshoven, *supra* note 128, at 143). The preamble of the Order in Council asserted violations by Germany of, among others, the 1936 London Submarine Protocol, *supra* note 50. One expert in this field points out that at this stage German exports were Government controlled and that probably the provision of the 1856 Declaration of Paris, *supra* note 39, did not apply “to the public interests of the enemy State.” Kalshoven, *supra* note 128, at 143. (A typographical error substituting “to” for “not” in the original text was corrected by letter from the author, May 25, 1989.)

132. Kalshoven, *supra* note 128, at 33.

133. 360 Parl. Deb., H.C., 5th Ser., col. 1351. (There has been considerable discussion as to whether Churchill (and the International Military Tribunal) said, and meant, "night" or "sight": See, e.g., 10 Digest of International Law 663-64 (M. Whiteman ed., 1968). The Parliamentary reporter recorded it as "night" which, in the context of the sentence, is much more logical than "sight": otherwise the sentence would read "all German ships by day and all ships by sight").

134. "This order went far beyond anything contained in German orders, since it meant that in these waters from then onward neutral ships sailing with full lights would also be sunk by British submarines." Doenitz, *supra* note 127, at 59. (Emphasis in original.)

135. 1 T.M.W.C., *supra* note 70, at 313; Nazi Conspiracy, *supra* note 105, at 140.

136. German Prize Ordinance, August 28, 1939, at 149 B.F.S.P. 663. After providing that ships in convoy had no protection (Article 32), that forcible resistance could be overcome by force (Article 36), and that the use of the wireless constituted assistance to the enemy (Article 39), the Ordinance stated, in Article 74:

(1) The destruction of vessels in accordance with articles 72 (enemy) and 73 (neutral) is only permissible if the passengers, the crew and the ship's papers are placed in safety before destruction.

(2) The ship's boats are not deemed to be a place of safety unless under the prevailing conditions of the sea and weather the safety of the passengers and the crew is assured by the proximity of land or by the presence of another vessel which is capable of taking them on board.⁴⁸

48 The contents of this article correspond to the London Rules of Submarine Warfare (printed in the annex). (Note in original.)

The German Navy had proposed a "prohibited area" which would, in effect have been a "free fire" zone but this proposal was apparently rejected at that time. 7 Documents on German Foreign Policy, 1918-1945, at 546, Series D (1956).

137. 7 Fuehrer's Directive No. 2, Documents on German Foreign Policy, 1918-1945, at 548, Series D (1956).

138. Fuehrer's Directive No. 4, Fuehrer's Directives for the Conduct of the War 53, 54 (1947). A British historian asserts that these decisions "were not issued in any altruistic spirit but in the hope that after Poland had been crushed, Britain and France—and especially the latter—would make peace. As soon as it was realised that this hope was vain, removal of the restrictions on the methods of waging war at sea started." 1 Roskill, *supra* note 124, at 103. He is undoubtedly correct.

139. 1 Fuehrer Conferences on Matters Dealing with the German Navy 9 (1947).

140. 8 Fuehrer's Directive No. 5, Documents on German Foreign Policy, 1918-1945, at 176, 177, Series D (1954). Fuehrer's Directive No. 7, October 18, 1939, *id.* at 316, authorized the Navy to "attack enemy passenger ships which are in a convoy or sailing without lights."

141. In his cross-examination before the International Military Tribunal, Doenitz stated:

If a merchant ship sails without lights, it must run the risk of being taken for a warship, because at night it is not possible to distinguish between a merchant ship and a warship. At the time the order was issued, it concerned an operational area in which blacked-out troop transports were traveling from England to France.

13 T.M.W.C., *supra* note 70, at 357.

142. See *supra* notes 102 and 103. See also Doenitz's testimony before the International Military Tribunal, 13 T.M.W.C., *supra* note 70, at 253.

143. The *Athenia*, a passenger vessel, had been torpedoed without warning by a German U-boat on September 4, 1939. The Germans denied that its sinking had resulted from the action of a German U-boat and accused Churchill of having ordered a British submarine to sink the vessel in order to stir up feeling against Germany. When German officials learned that the *Athenia* had, indeed, been the victim of a German torpedo they continued to deny this and it was not until after the war had ended that the truth was learned. 1 T.M.W.C., *supra* note 70, at 316; Nazi Conspiracy, *supra* note 105, at 143.

144. In 2 George Schwarzenberger, International Law as Applied by International Courts and Tribunals 433 (1968), the following apt statement appears:

It is always possible to maintain legal continuity on this issue [warfare at sea] by explaining the departures from the traditional law by way of reprisals and counter-reprisals. At least in the relations between the belligerents, this type of argument can claim a modicum of formal validity. In substance, however, reasoning on these lines merely hides a breakdown of the law and the resumption by belligerents at sea of an almost complete freedom of action.

145. Karl Doenitz, *supra* note 127, at 58-59. The International Military Tribunal had found more or less to the same effect. 1 T.M.W.C., *supra* note 70, at 311-12; Nazi Conspiracy, *supra* note 105, at 138-139. Compare the enumeration of events leading to unrestricted warfare by Germany during World War II which appears in 1 Roskill, *supra* note 124, at 103-104.

146. In Mallison, *supra* note 41, at 66-67, the author takes the position that "the actual British blockade methods [such as including food on the list of contraband] also provided adequate justification for the submarine operational zones as a legitimate reprisal."

147. Frits Kalshoven, *supra* note 128, at 128. In his testimony before the International Military Tribunal Doenitz said:

It is a matter of course that if a ship has a gun on board she will use it. It would have been a one-sided obligation if the submarine, in a suicidal way, were then to wait until the other ship fired the first shot. That is a reciprocal agreement, and one cannot in any circumstances expect the submarine to wait until it gets hit first. And as I have said before, in practice the steamers used their guns as soon as they came within range.

13 T.M.W.C., *supra* note 70, at 360.

148. See, e.g., Edwin I. Nwogugu, *Submarine Warfare, The Law of Naval Warfare 358-59* (N. Ronzitti ed., 1988) [hereinafter Nwogugu]. See also Robert W. Tucker, 50 *International Law Studies* 68 (1957). There does not appear to have been any dispute that merchant vessels, armed or unarmed, sailing in a convoy under the protection of warships, were beyond the ambit of the Protocol, even though the British did attempt to entice neutral ships into their convoys by claiming that such action "affords neutral merchant vessels greater protection and does not signify a breach of neutrality" and the Germans disagreed. 8 *Documents on German Foreign Policy, 1918-1945*, at 319-20, Series D (1954).

149. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (NWP 9), 1987, para. 8.2.2.2. [hereinafter *Commander's Handbook*].

150. Joint Resolution to Preserve the Neutrality and Peace of the United States etc., November 4, 1939, 54 Stat. 4; 34 Am. J. Int'l. L. 44, 51 (Supp. 1940).

151. Presidential Proclamation of November 4, 1939, *Use of Ports or Territorial Waters of the United States by Submarines of Foreign Belligerent States*, 54 Stat. 2672 (1939); 1 Dep't St. Bull. 456 (No. 19, November 4, 1939); *International Law Situations 1939*, at 48 (Paul S. Wild ed., 1940).

152. Edwin Borchard, *supra* note 60, at 107. He pointed out that these ships were far more powerful than their World War I predecessors as they carried four six-inch guns, mounted fore and aft. See *supra* text accompanying note 65.

153. Presidential Proclamation of November 4, 1939, *Definition of Combat Areas*, 54 Stat. 2673 (1939); 1 Dep't St. Bull. 454-55 (No. 19, November 4, 1939); 1939 *International Law Situations*, *supra* note 151, at 146. Germany urged other neutrals to designate a similar zone.

154. 13 T.M.W.C., *supra* note 70, at 365. One author goes even further, asserting that: "There is no logical difference between the merchant ship on the one hand and the railroad train or the factory on the other." Alex A. Kerr, *supra* note 77, at 1108.

155. 13 T.M.W.C., *supra* note 70, at 367. Later answers indicated that he was referring to the provisions of Article 16 of the 1907 Hague Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, signed at The Hague, October 18, 1907, 36 Stat. 2371; 2 Am. J. Int'l. L. 153 (Supp. 1908); Schindler/Toman, *supra* note 18, at 313.

156. 1 T.M.W.C. *supra* note 70, at 312-13; Nazi Conspiracy, *supra* note 105, at 139.

157. Another argument criticizing the Tribunal's logic on this matter will be found in Mallison, *supra* note 41, at 80, where the author points out:

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 [Doenitz's defense attorney] 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 authors of two post-war studies of submarine warfare both recommend the affirmative legalization of "war zones" or "operational zones." Alex A. Kerr, *supra* note 77, at 1109; and Barnes, *supra* note 14, at 197-98.

158. See, e.g., the testimony of Admiral Gerhard Wagner, 13 T.M.W.C. *supra* note 70, at 453. See also *supra* the text accompanying note 36.

159. 13 T.M.W.C. *supra* note 70, at 281-95; James McMillan, *Five Men at Nuremberg 181-85* (1985).

160. 35 T.M.W.C. *supra* note 70, at 270.

161. Judgment of the International Military Tribunal for the Far East, November 4–12, 1948, at 1072–73 (mimeo, n.d.) [hereinafter Judgment]; 1 The Tokyo Judgment 412 (B.V.A. Roling & C.F. Ruter ed., 1977) [hereinafter The Tokyo Judgement] definitely implemented by the Japanese. Judgment, 1073–74; The Tokyo Judgment, *supra*.

162. 1 T.M.W.C., *supra* note 70, at 313; Nazi Conspiracy, *supra* note 105, at 139–40. Concerning the *Laconia* order, one analysis states:

The ambiguity of the order apparently was considered to stem from an uncertainty as to whether its intent was only to forbid submarine commanders from making any attempt to rescue survivors or was intended to enjoin them deliberately to kill survivors. The International Military Tribunal seemed to have been of the opinion that if the former interpretation was intended the order was a lawful one. But even this opinion is doubtful, since the rule in question allows only for circumstances of operational necessity. The most favorable interpretation of the *Laconia* Order was that it laid down a policy of no rescue, not solely — or perhaps not even primarily — for reasons of operational necessity, but because rescue was deemed to run “counter to the rudimentary demands of war for the destruction of enemy ships and crews.” On this basis alone the unlawful character of the order would seem to be readily apparent.

Tucker, *supra* note 148, at 73.

163. One commentator construes this portion of the opinion as indicating that the Tribunal had found that “the British merchant marine was no longer entitled to be considered as non-combatant. It had become an auxiliary to the British naval forces.” Horace B. Robertson, Jr., *supra* note 48, at 6–7.

164. 1 T.M.W.C., *supra* note 70, at 311–13; Nazi Conspiracy, *supra* note 105, at 138–40. The Tribunal made the same findings on these charges with respect to German Grand Admiral Raeder. 1 T.M.W.C. 317; Nazi Conspiracy 143.

165. Frits Kalshoven, *supra* note 128, at 139–40.

166. Commander's Handbook, *supra* note 149, at para. 8.2.2.2. Relevant quotations from this volume will also be found in the text accompanying notes 149, *supra*, and 168, *infra*. Earlier the U.S. Navy had issued Law of Naval Warfare (NWIP 10–2) (1955) [hereinafter Law of Naval Warfare]. Strange to relate, there is no mention of the submarine in that volume. The word “submarine” does not even appear in its Index!

167. A Soviet volume entitled *The International Law of the Sea* recently published in English in Moscow (I.P. Blishchenko, gen., 1988) states, at 229:

The arming of merchant ships in contravention of the VII Hague Convention on the transformation of merchant ships into naval vessels, especially accompanied by a request of civilian status for armed ships, eliminates the difference between military and civilian objects. In this case such ships cannot be regarded either as noncombatants or as legitimate combatants, and therefore cannot be protected under international law.

It is of interest to note that Russia never ratified the 1907 Hague Convention No. VII and that the Soviet Union is not a Party thereto.

168. Law of Naval Warfare, *supra* note 166, at para. 503b(3).

169. Commander's Handbook, *supra* note 149, at para. 8.3.1.

170. Edwin I. Nwogugu, *supra* note 148, at 355–56.

171. Of the publicists whose works have been reviewed who express an opinion on the subject, the following take the position that the 1936 London Submarine Protocol is still binding law: Eric Castren, *The Present Law of War and Neutrality* 289 (1954); C. John Colombos, *The International Law of the Sea* 388 (3d ed., 1954); Gerald I.A.D. Draper, *Rules Governing the Conduct of Hostilities—the Laws of War and Their Enforcement*, 18 Nav. War Coll. Rev. 22, 30 (November 1965), reprinted in 62 *International Law Studies* 247 (Richard B. Lillich & John Norton Moore eds., 1980); William T. Mallison, Jr., *supra* note 41, at 118–1221; Edwin I. Nwogugu, *supra* note 148, at 359–60; Daniel P. O'Connell, *supra* note 37, at 52; Horace B. Robertson, Jr., *Submarine Warfare*, in JAG J. 7 (November 1956); Herbert A. Smith, *The Law and Custom of the Sea* 198 (3rd ed., 1959); and Robert W. Tucker, *supra* note 148, at 352. The United States Navy's position, as expressed in Commander's Handbook *supra* note 149, at para. 8.3.1 is to the same effect. See *supra* text accompanying note 169. The publicists taking the position that the 1936 London Submarine Protocol is no longer an effective part of the law of maritime warfare include Barnes, *Submarine Warfare and International Law*, 2 *World Polity* 121, 187 (1960); Kerr, *supra* note 77, at 1110; William O. Miller, *The Law of Naval Warfare*, 24 *Nav. War Coll. Rev.* 35 (February 1972), reprinted in 61 *International Law Studies* 263 (Richard B. Lillich & John Norton Moore eds., 1980); W. Hays Parks, *Conventional Aerial Bombing and the Law of War*, 108 *U.S. Nav. Inst. Proc.* 98, 106 (May 1982); and Julius Stone, *Legal Controls of International Conflict* 428 (2nd imp., 1959). As quoted in O'Connell, *supra* note 37, at 51, the 1966 *Manual of International Maritime Law of the Soviet*

Navy states that submarine warfare is regulated by the Protocol, among other treaties, and then says that all of these rules are obsolete.

172. Robert W. Tucker, *supra* note 148, at 66. In answer to interrogatories prepared by Doenitz's defense counsel, Admiral Chester Nimitz, Commander-in-Chief of the United States Pacific Fleet at the time of the attack on Pearl Harbor on December 7, 1941, stated that on that date he had received a message ordering unrestricted submarine warfare. 40 T.M.W.C., *supra* note 70, at 108-11. This could, of course, also be attributed to the nature of the attack on Pearl Harbor.

173. Japanese merchant ships acted very much the same as British merchant ships, being armed, reporting submarine sightings, attempting to ram, etc. William T. Mallison, Jr., *supra* note 41, at 89-90. This would have justified unrestricted submarine warfare in the Pacific by the United States. However, it would not be a justification for such action from the very first day of the war. Another author justifies the action of the United States on the basis that the Japanese merchant marine was integrated into the Japanese Navy (armed, sent radio sightings, etc.), that there was no danger to neutrals (there were no neutral vessels in the Pacific), and that there were no neutrals in the declared operational zones. Horace B. Robertson, Jr., *supra* note 48, at 8.

174. John Keegan, *supra* note 86, at 274-75. The final chapter of this book (266-75) contains a succinct discussion of the tremendous technical evolution which the submarine has undergone since the end of World War II.

Comments on Howard S. Levie's Paper: Submarine Warfare: With Emphasis on the 1936 London Protocol

By
A. V. Lowe *

Comments on the Conduct of Submarine Warfare 1920-1936

The story of the negotiations on submarine warfare during the inter-War years is an instructive one and I would like to single out some of the points which contain lessons for us now. I will try to confine myself to the subject of this session, and not to stray into the subject of the next, on the practice of the belligerents in World War Two.

First, I would like to say something about the circumstances of the negotiations from the British viewpoint. Howard Levie notes that Britain proposed the total abolition of submarines at the 1921 Washington Conference and the 1930 London Conference. The context in which Britain made those proposals is interesting, for behind them lay a considerable ambivalence in the British position. The most distinguished historian of British naval history during this period has concluded that Britain never entertained any serious expectation of abolition being accepted.

It is true that there was a widespread view that submarines were an unacceptable means of waging war. Admiral Wilson had described them, before the First World War, as "unfair, underhand, and damned un-British"; and it is known that King George V put strong pressure on the British Prime Minister Ramsay MacDonald, just before the 1930 London Conference, to secure the abolition of what he called "this terrible weapon". But the British Navy was less convinced. The Admiralty's reply to the King was that the Royal Navy would gladly give up submarines in conjunction with all the other nations of the world, but that the French would not agree to give them up.

That might appear to be simple prudence in the face of the impending negotiations. But it seems that the Royal Navy did not entirely share the view expressed by U.S. Admiral William V. Pratt in 1930, when he said that the importance of submarines would diminish and that they could be controlled by good air work; although it is true that the Navy believed that the development of Asdic had reduced the submarine threat very considerably. In 1929 the British Admiral Sir John Fisher had conducted a review of Britain's naval needs. He had in mind primarily the possibility of a future threat from Japan, then the largest naval power after the United States, and envisaged the creation of a major

naval base in Singapore to counter the local supremacy with which Japan had been left in the Far East after the 1922 Conference. Fisher concluded that Britain's war needs would include 60 large submarines for overseas patrol and fleet work. The Cabinet Fighting Services Committee recommended in January 1930 that 3 new submarines should be laid down in the following year. But the Treasury sought budget cuts, and also argued that it was inappropriate to include new submarines in the procurement programme when Britain was arguing for their abolition at the impending naval conference. The Treasury cut all the submarines from the plans; but in the light of the French attitude at the 1930 Conference, and in the face of opposition within the Government to the defense cuts, it was ultimately decided to restore the submarine. Britain built 3 submarines each year between 1930 and 1935, then 8 in 1936 and 7 in 1937. This compares with a total of 19 built during the 1920's.

It was, perhaps, just as well that Britain did not entirely hold back on submarine procurement during the years when it was seeking abolition and announcing its willingness to scrap its entire submarine fleet if others would follow suit. Although Germany, in common with Austria, Hungary, Bulgaria and Turkey, was bound by the Treaty of Versailles not to construct any submarines even for commercial purposes, it subsequently came to light that throughout the 1920's and 1930's German plans for the construction of modern submarines were being kept up to date at a secret office in the Hague.

In the autumn of 1933 Hitler made known that, in the words of Anthony Eden (then in the British Foreign Office), besides seeking "a certain eastward expansion in eastern Europe he also wanted some submarines". He secured British agreement to this in the Anglo-German Naval Agreement of 1935, on condition that Germany would not build a navy of more than 35% of the strength of the British fleet or more than 45% of the British submarine strength - an offer which Britain thought too good to refuse.

Under the agreement, however, Germany was to retain the right to build up to 100% of the British submarine tonnage "in the event of a situation arising which, in their opinion (i.e., Germany's opinion) makes it necessary for Germany to avail herself of her right." In fact, Germany had already been building submarines secretly in segments, ready for assembly, at various secret bases. (Germany was not alone in this practice: the US secretly shipped submarines in sections to Canada at a stage in the First World War when the US was neutral and Canada belligerent).

As Howard Levie has noted, the successive failures of attempts to ban the submarine were followed by attempts to constrain the manner in which they might be used. This familiar shift in policy was, I think, one of the saddest and most bewildering episodes in arms limitation. Article 4 of the 1922 Washington Treaty strikes me as a statement of real pathos. It is difficult now to imagine how hard-bitten men who had seen the horrors of World War I could agree to a

clause saying that “The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without, violating . . . the requirements universally accepted by civilized nations”, and then go on to pledge themselves not to use submarines as commerce destroyers. It seems utopian to agree to forego the very role for which submarines had shown themselves best suited – it should be recalled that while not a single life was lost to submarine attack among the troops transported during World War I (excepting those on hospital ships), 20,000 civilian lives and 12 million tons of shipping were lost through attacks on merchant ships which threatened to bring Britain to its knees before the United States intervened in the War – and it is hard to see how the drafters of the Washington Treaty could have expected that act of self-denial to be adhered to in later conflicts.

What are the lessons of this episode? It is tempting to conclude that arms abolition or limitation agreements can never withstand situations where the survival of the State appears to depend upon their violation. Indeed, there is something to be said for this view. But it is, perhaps, too crude. The first lesson I derive from these events is that arms limitation agreements exercise their primary influence in time of peace, not war. This may be a commonplace, but I think that the truth is an important one.

It is evident that British thinking throughout the 1920's was powerfully influenced by the existence of the bans included in the peace treaties which followed World War I, on the construction of submarines by Germany. The paper agreement was too insubstantial to prevent Germany building submarines, but influential enough to blinker British perceptions of the kind of naval threat which the Royal Navy might have to meet. In that decade, naval thinking was, quite simply, not directed towards what turned out to be the first major threat faced by the Navy. It was not until 1934 that the British Chiefs of Staff came to consider Germany to be both a greater and a more immediate threat than Japan, and not until 1939 that Britain adopted a “two fleet” policy, preparing independent fleets in Europe and the Far East to meet the German and Japanese threats of that time.

The peculiar magic of the treaty wrought other constraints. I have noted the manner in which the Treasury, keen as ever to make economies, used British proposals for the abolition of submarines as an argument for not building them. The logic of the Treasury argument is impeccable. Fortunately, British procurement policy did not follow logical lines.

The abjuration of certain uses of the submarine made it politically impossible to train naval personnel in the inter-war years in the task of attacking merchant ships, and I suspect that little training was given in the defense of merchant ships against submarine attacks. Training for proscribed activities seemed unnecessary and improper, and as a result when World War II broke out the wartime role of submarines bore little relation to their peacetime tactical training.

Furthermore, the effects upon morale in the submarine service of fifteen years of attempts to secure its abolition and of repeated assertions of the inhumanity of the submarine should not be underestimated. Stephen Roskill, the leading historian of British naval policy in this period, has observed that submarine officers in this period conducted themselves too much in the spirit and guise of a "private navy" whose arcane mysteries were not for communication to outsiders – a problem exacerbated by the small number of submarine specialists on the Naval Staff proper and the failure to integrate their weapons into the fleet's strategy and tactics as a whole.

In all these ways, the Treaty negotiations and agreements exercised a powerful influence on the Navy's preparedness for submarine warfare. But as we know, they exercised little influence on the actual use of submarines during World War II.

Perhaps a more cautious inference is therefore legitimate: that arms negotiators should have their eyes set as much, if not more, on the peacetime implications of their work as on the effect which their agreements might have on the conduct of hostilities. Perhaps, too, we should deduce that no arms limitation agreement should be expected to survive the historical context in which it was negotiated. The world in 1935 was a rather different place from the world in 1920 or 1922; and in retrospect it was a clear mistake for the British at the time of Fisher's 1929 review and of the 1935 Anglo-German Naval Agreement to have their eyes set on the Treaty of Versailles and the Washington Treaty, rather than on the likely course of the events unfolding in Europe in the 1930's.

The world has changed much more since that time. Two developments seem to me to be of particular importance. The first is the drafting of the UN Charter. As you know, the Charter builds on the prohibition on the waging of aggressive war set out in the Kellogg-Briand Pact and forbids the unilateral threat or use of force in international relations except in self defense.

Although the point may seem rather abstract, I believe that this has a significant effect upon thinking. Since all unilateral uses of force under the Charter appear to require justification in terms of self defense, it seems to me to be that much harder to draw lines between legitimate and illegitimate weapons and between lawful and unlawful tactics. Since all force is now claimed to be force used in self defense, there is an apparent inbuilt moral bias in favour of the use of force and the purposes for which it is used. When war was permitted, it made sense to ask if the war was right or wrong. It is harder to ask if it is right to use force in self defense. This inevitably influences attempts to prohibit the use of force in general, and of particular weapons, such as submarines, and tactics.

There is a further aspect of this problem, deriving less from the Charter itself than from the significance which we attach to it. It is no secret that during the recent Gulf war, as during the 1982 Falklands conflict, Britain regarded not only

the rights of the combatants, but also the right of the Royal Navy to use force as being limited by article 51 of the U.N. Charter. The United States took a markedly different view, apparently regarding the conflict as falling for analysis within the traditional categories of belligerent and neutral rights and duties. On the latter view, for instance, belligerent rights of visit and search are significantly wider than on the view that each instance of visit and search must be justified under article 51. I suspect that this lack of accord over the nature of the conflict was one factor which made it difficult to agree to joint rules for all the western fleets operating in the Gulf. It would similarly impede attempts to agree upon rules for the operation of submarines.

The second development is that submarines are no longer a homogeneous class, if indeed they ever were. The roles of attack submarines and submarines carrying the nuclear deterrent are very different, as are the threats which each presents. The kind of action which might be justifiable by foreign naval or merchant ships in defense against the threat which one type of submarine is perceived to present is by no means necessarily the same as the kind of action which might be justified against the other. I hope that we will be able to pick up these points later on.

But let me return to the specific question of the pre-War attempts to regulate the use of submarines. The difficulty of the submarine was not unique. The submarine was designed as a weapon system which could not be used optimally without violating pre-existent rules of law. The same is true of nuclear weapons. And, I might add, the development of weapons such as the stealth bomber seems to me to erode the practicality of persisting with the established rules on self defense: I wonder how much sense it makes to adhere to the view that self defense exists only in the face of an imminent attack at the same time that we seek to develop weapons systems which minimize or eliminate all warning of an attack. But it is plain that the submarine was not itself the entire problem. What caused the difficulty was the mismatch between one of its prime natural targets - the merchant ship - and the inevitable operational constraints of the submarine itself. Submarines are good at sinking merchant ships. Often they cannot take survivors on board. Often, they cannot function effectively as weapons systems without violating the traditional laws of war.

Perhaps we should have approached that problem in the 1920's not by looking at the submarine, but by concentrating harder upon the merchant ship. Some attention was given to the problem of arming merchant ships; but States were reluctant to see them armed, and would doubtless have rejected any legal presumption that they were armed and therefore hostile. That view has some force as long as there are merchant ships which have occasion to exercise their freedom of the seas without making a contribution to the war effort of the belligerent in doing so. It makes sense while there is a clear distinction between

contraband and non-contraband goods. And it makes sense in circumstances where the distinction between combatants and non-combatants is clear.

If it had been accepted that merchant ships were legitimate targets, more attention might have been paid to the question of how they could best be defended. That would, of course, have had implications for the design and construction both of merchant ships and warships, and for the kind of tactical training in which the Navy engaged.

The question I am raising can be put simply. Does it make sense to distinguish between enemy warships and enemy merchant ships in the context of all-out conflict, such as occurred in World War II and, more recently, in the Gulf war? Are not both integral parts of the war effort? Are not both legitimate targets? And if so, are the lives of civilian crews to be given a greater degree of protection than is afforded to civilians living near the targets of aerial bombardment?

I express no opinion on the morality of this view, although I believe that to be a crucial question to which the closest consideration must be given. I seek only to draw attention to what strikes me as an inconsistency in the reasoning which seeks to distinguish between the two cases.

Finally, let me make two points. The first is that the comments I have made already are directed primarily at situations of all-out war. The position in more limited hostilities – and particularly in hostilities more limited in duration, where continuity of supplies may be relatively less important – may well be very different.

The last, and related point, is that I agree with all Howard Levie's conclusions, including the conclusion that the operation of exclusion zones may render the limitations on the actions of submarines irrelevant or inoperable. In the context of all-out conflict I agree for the reasons which I have stated. In more limited conflicts the reasoning is rather different.

Briefly, I think that with modern weapons systems the difficulties of determining hostility on the part of vessels encountered by warships (whether they be other warships or merchant ships which might use limited armaments or ramming to damage or destroy a submarine) are practically insuperable. Zones of reasonable extent in which hostile intent is presumed on the part of all ships transiting without notice or permission seem the best device we have come up with so far for meeting this problem. If such zones operate, in conjunction with a system of permits for transit of the zone on particular routes at particular times and for particular ships, as an extension of the old navicert system, then many of the problems concerning limitations on the operation of submarines are overcome, or at least rendered irrelevant.

Comments on Howard S. Levie's Paper: Submarine Warfare: With Emphasis on the 1936 London Protocol

By
Dieter Fleck *

The 1936 London Protocol in Today's Perspective

Professor Levie's study¹ offers an impressive historical review of a development that finally has led to the present state of complex arguments, controversial opinions and uncertain results. I agree with his statement that for the conduct of submarine operations such important issues as the arming of merchantmen and their sailing under military convoy, the use of false colors, the establishment of "war zones," the sinking of merchantmen without warning, and failure to assure the safety of passengers and crews are relevant.² While it is certainly true that only the latter two issues were expressly addressed in the 1936 London Protocol, a present-day interpretation of this instrument must be based on a wider spectrum of aspects relevant in this context.

Let me try to formulate a European opinion on the question as to what extent the 1936 London Protocol is still valid today. This includes the question of which existing rules should be reaffirmed or further developed in international cooperation. I do not attempt to give definite answers since the topic has rightly been described as one of the least developed areas of the law of armed conflict.³ I consider it a pioneer achievement that this subject has been taken up in the NWP 9 – the first time in a modern military manual – and I believe that the comments and, indeed, also dissenting opinions should be discussed in detail to strengthen international cooperation.

I. Actions Against Enemy Merchantmen

A systematic evaluation of existing rules for "action with regard to merchant ships", to use the language of the 1936 London Protocol, has to start with a definition. What do we mean by "merchant ships"? What are the conditions under which such ships would lose their status as civilian objects protected under international law? Merchant ships may only be attacked if they comply with the definition of a military objective, i.e. if by their nature, location, purpose or use such ships make an effective contribution to military action and their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁴

The key problem posed by this definition is how to define an “effective contribution to military action” and how such a contribution can be concluded from the nature, location, purpose or use of the particular object. It has correctly been argued that “no basis will be found until the whole matter is conscientiously viewed in the context of the full emergence of the economic arm of warfare, with the annihilation of enemy maritime commerce as a major naval objective.”⁵ But legal criteria to be developed for this purpose can hardly be different in land, sea, and air warfare: The standards are uniform, even if their implementation poses specific problems in the different theatres.

A list of activities liable to render enemy merchant vessels military objectives was recently discussed in detail at the Bochum Round Table of Experts, convened by the International Institute of Humanitarian Law (San Remo) under its 1988 Madrid plan of action.⁶ The results go far beyond a simple reference to ships that are armed or are sailing under enemy military convoy. Also, certain qualifications were formulated that could deserve consideration by all who implement or interpret existing national bright line rules. The Bochum Round Table has defined eight categories in which enemy merchant vessels are to be considered as military objectives:

- (1) engaging in acts of war on behalf of the enemy, e.g. laying mines, minesweeping, cutting undersea cables and pipelines, visiting neutral merchant ships for the purpose of search, or attacking other merchant ships;
- (2) acting as auxiliaries to the enemy’s armed forces; e.g. troop carrying or replenishing warships;
- (3) being incorporated into, or assisting the enemy’s intelligence system;
- (4) sailing under convoy of enemy warships or military aircraft;
- (5) refusing an order to stop or actively resisting visit, search or capture;
- (6) being armed to an extent that they could inflict considerable damage on a warship (this excludes small arms for the defense of personnel, e.g. against pirates, and purely deflective systems);
- (7) being engaged in the enemy’s war-fighting effort, e.g. carrying military materials; or
- (8) being engaged in any other activity bringing them within the definition of a military objective.

In some aspects these categories are more specific than the NWP 9. The latter is phrased in general terms as far as military objectives are concerned.⁷ It uses a very similar list of categories to define the circumstances under which enemy merchant vessels may be attacked and destroyed by surface warships. The authors suggest that these categories were modifications of the 1936 London Protocol “in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice

of belligerents that evolved during and following World War II.⁸ Is such complex argumentation necessary? The London Protocol did not establish rules for surface warships but reaffirmed the applicability of existing rules to submarine warfare. Such rules did not and do not include a special protection for military objectives. Merchant ships which fall under one of the eight categories described earlier are military objectives and cannot, therefore, be expected to be safe against attacks. Indeed, the London Protocol could not extend to “warshiplike merchantment”.⁹ The prohibition of the effective use of submarines against such ships was not part of the London Protocol.¹⁰ Attacks must, however, be confined to military objectives and they must comply with the principles of proportionality and necessity.

As far as submarine warfare is concerned, NWP 9 states that the London Protocol, coupled with the customary practice of belligerents, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship’s papers before destroying an enemy merchant vessel, unless:

- (1) the enemy merchant vessel refuses to stop when summoned to do so or otherwise resists capture;
- (2) the enemy merchant vessel is sailing under armed convoy or is itself armed;
- (3) the enemy merchant vessel is assisting in any way the enemy’s military intelligence system or is acting in any capacity as a naval auxiliary to the enemy’s armed forces;
- (4) the enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.¹¹

But should attacks on certain merchant ships be made dependent upon a decision that the enemy has integrated its merchant shipping in general under its war-fighting or war-sustaining effort? Should such attacks on the other hand be considered lawful in all situations where they may be deemed necessary for mission accomplishment? A thorough assessment shows that the definition of military objectives in the specific situation offers the best possible criterion for drawing the line between legal and illegal attacks at sea. Mission accomplishment in my opinion is too vague a notion to allow for clear legal qualifications.

The implementation of the described categories of military objectives is still difficult enough in practice. Identification of arms may pose problems, even if we no longer insist on the impossible investigation of whether a certain armament has been used, or is intended for use, offensively against an enemy.¹² Merchant ships involved in armed conflicts since 1945 have wisely avoided armament. Effective contribution to military action is a legal term of art which

requires policy decisions to be taken in practice. Such decisions are dependent upon the threat imposed and the military advantage anticipated. Armed forces which adhere to the principle of damage limitation will be rather restrictive in this respect. In all circumstances the rule of proportionality requires responsible commanders to abstain from attack when seizure or capture are possible by other means.

II. Actions Against Merchant Vessels of Non-Belligerents

A slightly different approach for action with regard to vessels of non-belligerents should be considered in this context. It was discussed at the Bochum Round Table that such vessels may not be attacked unless:

- (1) after prior warning, they intentionally and clearly refuse to stop after being summoned to do so;
- (2) after prior warning, they intentionally and clearly resist visit, search or capture;
- (3) they engage in acts of war on behalf of the enemy;
- (4) they act as auxiliaries to the enemy's armed forces;
- (5) they are incorporated into, or assist, the enemy's intelligence system;
- (6) they sail under convoy of enemy warships or military aircraft; or
- (7) they make an effective contribution to military action (e.g. carrying military materials) and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless the circumstances do not permit they are to be given a warning, so that they can reroute or take other precautions.

Quite obviously, the decision to attack a merchant vessel flying the flag of a non-belligerent state could not be based on the simple fact of it being armed. Action against such ships is based on the principle of law enforcement, enforcement of control, rather than self-defense. This requires additional considerations in balancing the rule of proportionality. It is for this reason that prior warning is felt essential in case a non-belligerent merchant vessel which refuses to stop or resists visit, search or capture should be made the object of attack.

III. Special Situation in War Zones

Particular considerations are required for merchantmen sailing in a zone of restriction. The establishment of danger zones is widely accepted as being within reasonable limits of the freedom of the high seas. The proclamation of exclusion zones, however, which implies a sink-on-sight policy, remains controversial. The purpose of such exclusion zones should be directed to assist in identifying

hostile targets and putting up a defense against hostile acts rather than to campaign against the enemy's war economy. All restrictions have to be limited with severe requirements accordingly, so that the size, location and duration of a maritime exclusion zone reflect the principles of proportionality and necessity.¹³

But I have difficulties in sharing Professor Levie's assumption that the application of the 1936 London Protocol would largely, though not entirely, be nullified if the establishment of maritime exclusion zones were determined a legal method of naval warfare. If exclusion zones were established in accordance with the principles I have described, the zone regime may be implemented by submarines as well as surface warships.

IV. False Flags

Legal experts are relatively silent on the use of deceptions by merchant ships. But feigning civilian or neutral status may not only serve the purpose of fulfilling a specific military mission but also that of simply escaping attack. Merchant ships have, indeed, often used false flags for better protection. While this is prohibited under the terms of various national laws, international law is not clear in this respect.¹⁴ There is not only the question of whether or not such feigning is prohibited, but also, and even more important, the question exists of possible consequences for the relations between merchant vessels and warships at sea. The transfer of enemy vessels to a neutral flag is void under the conditions set up in Articles 55 and 56 of the 1909 London Declaration. Enemy merchant ships resorting to such practice are in any event subject to lawful capture by belligerent warships.¹⁵

Using false flags may no longer be a desirable practice in naval warfare. At least the feigning of signals and flags for long distance identification, however, requires a distinct solution.

V. Prior Warning

The question of prior warning is one element of the rule of proportionality in the exercise of self-defense. Article 57 (2c) of Protocol I Additional to the Geneva Conventions reaffirms an existing rule which is applicable also in naval warfare.¹⁶ It provides that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit." Flexibility in the implementation of this rule remains essential: the offensive use of weapons can create a danger for enemy submarines. In that case the latter are entitled to launch appropriate preemptive strikes, including sinking without warning.¹⁷

VI. Safety for Passengers and Crew

The 1936 London Protocol reaffirmed that merchant ships, "except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search," may not be sunk or rendered incapable of navigation without the safety of the passengers, crew and ship's papers having first been ensured. This clearly describes a situation where there is time for consideration and appropriate action to arrange for safety. The merchant ship must not persistently refuse to stop and must not actively resist a visit or search if such protection is to be claimed. Submarines engaged in such situations are by definition well in a position to arrange for the safety of passengers and crew since there is no immediate threat from the latter that excludes such action.

On the other hand the London Protocol does not address the question of rescuing personnel after the sinking of a ship.¹⁸ The search for and rescue of survivors after each naval engagement is a legal requirement which stems from the prohibition of unnecessary suffering. Article 18 of the Second Geneva Convention of 1949 provides that 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." As Pictet put it in his commentary,¹⁹ the obligation to act without delay is strict; but only measures within the possibilities of the parties are to be taken, for one cannot lay down an absolute rule that the commander of a warship must engage in rescue operations if, by so doing he would expose his vessel to attack. In this regard Protocol I Additional to the Geneva Conventions has added important clarifications to existing conventional law: shipwrecked persons shall continue to be considered shipwrecked during their rescue, "provided that they continue to refrain from any act of hostility."²⁰ Protection and care are to be rendered "to the fullest extent practicable."²¹

Conclusion

Is it true to say that the 1936 London Protocol is of legal relevance only in a situation where the submarine can act with minimal risk on the surface, a situation which is hardly ever likely to occur?²² A careful evaluation of history and text of this instrument certainly supports the conclusion that it has only reaffirmed rules for situations where minimal risk for submarines was involved. The rules so interpreted have not been derogated by subsequent state practice and are still worth maintaining. A continuous reaffirmation of these rules is of political and practical importance.²³

While I support Professor Levie's general statement that the 1936 London Protocol continues to be valid, I believe one should not draw too quick a

conclusion by arguing that compliance with its rules can be expected in limited conflicts only. If this argument held true there would still remain the problem of how to define the difference between general and limited armed conflicts, for though even recent wars may have been limited in terms of participation, theatre, and weapons employed, they have not necessarily been limited from the point of view of the belligerents.²⁴ The remaining task in my opinion is, therefore, not only to maintain and properly implement the 1936 London Protocol in all types of armed conflict, but also to supplement its provisions with rules that would guarantee both sufficient self-defense against attacks and cooperative action by the belligerents for the humanitarian protection of civilians and civilian objects.

Notes

*Director, International Legal Affairs, Federal Ministry of Defense, Bonn. The views expressed in this paper are those of the author and do not necessarily reflect either the policy or the opinion of the German Government.

1. Howard S. Levie, *Submarine Warfare: With Emphasis on the 1936 London Protocol*.
2. *Id.* at 12.
3. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations (NWP 9)* (1987), at para. 8.3.1. [hereinafter *Commander's Handbook*].
4. This definition of military objectives may be considered customary law. It is applicable also in armed conflicts at sea though reaffirmation of this rule by Art. 52 (2) of Protocol I Additional to the Geneva Conventions is confined "to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land" as well as to "attacks from the sea or from the air against objectives on land." *Cf.* Art. 49 (3).
5. Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* 606 (1954).
6. See Wolff Heintschel von Heinegg (Ed.), *The Military Objective and the Principle of distinction in the Law of Naval Warfare, Report, Commentaries and Proceedings of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Ruhr-Universität Bochum November 10-14, 1989, Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht, Band 7, 1991*.
7. U.S. Department of the Navy, Office of the Judge Advocate General, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 9)(Rev. A)* (1989), at para. 8.1.1 [hereinafter *Annotated Supplement*].
8. *Id.* at para. 8.2.2.2.
9. Frits Kalshoven, *Belligerent Reprisals* 128 (1971).
10. William T. Mallison, Jr., *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars* 119 (1968) [hereinafter *Mallison*].
11. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations (NWP 9)* (Rev. A), FMFM 1-10 (1989), at para. 8.3.1.
12. Art. 503 (b) (3) (4) of the 1955 *Law of Naval Warfare*; Robert W. Tucker, 50 *International Law Studies* (1957), which established this requirement, has been very convincingly criticized already by Mallison, *supra* note 10, at 120-22.
13. W. J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 *Can. Y.B. Int'l L.* 91-126 (1986).
14. Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *Revue de Droit Pénal Militaire et de Droit de la Guerre*, 269, 292-95 (1974).
15. *Commander's Handbook*, *supra* note 3, at para. 7.9.
16. Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 367-68 (1982).
17. Karl Zemanek, *Submarine Warfare*, 4 *Encyclopedia of Public International Law* 233-35 (R. Bernhardt ed., 1982).

18. Louise Doswald-Beck, *The International Law of Naval Armed Conflicts: The Need for Reform*, 7 *It. Y. B. Int'l L.* 251, 257 (1986-1987).
19. 2 The Geneva Conventions of 12 August 1949, Commentary 130-31 (J. Pictet ed., 1960).
20. Article 8 lit. b.
21. Article 10 para. 2.
22. Daniel P. O'Connell, *The Influence of Law on Sea Power* 78 (1975).
23. Edwin I. Nwogugu, *Commentary on the 1922 Washington Treaty, the 1930 London Treaty (Part IV), and the 1936 London Protocol, The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 353, 364 (N. Ronzitti ed., 1988).
24. Louise Doswald-Beck, *supra* note 18, at 271.

Chapter III

The Naval Practices of Belligerents in World War II: Legal Criteria and Developments

A paper by
Sally V. Mallison ★
and
W. Thomas Mallison ★★

Comments by
Mark W. Janis
William J. Fenrick

The Naval Practices of Belligerents in World War II: Legal Criteria and Developments

There was a continuity manifested between naval practices during the First World War and the second one. The continuity may appear to be surprising because the period 1914–1918 was governed almost exclusively by customary law, while the period 1939–1945 was also governed by treaty law. Before considering the naval practices of belligerents in World War II, it is essential to examine the international law concerning such practices, including naval targeting, which was developed between the World Wars. The subsequent war crimes trials further developed the law applicable to those practices.

I. A Summary of Naval Practices in the First World War

Enemy warships remained lawful objects of attack without warning during the period 1914–1918 as they have always been historically up to the present time. Because of the functional equivalency with warships of those merchant ships which participated in the naval war effort of a belligerent by, *inter alia*, sailing in naval convoys or operating under orders to attack submarines, it would appear to be logically required that they also be lawful objects of attack without warning. This view was advanced by Germany as the preeminent submarine naval power. From the German perspective, the proclamation of large submarine operational areas in the Atlantic Ocean where “unrestricted submarine warfare” was conducted provided adequate notice to neutrals to keep their merchant ships out of the proscribed areas. In a functional sense, Germany was conducting a similar comprehensive method of economic warfare to the “long-distance blockade” conducted by the Allied naval powers except that the German technique was enforced by submarines rather than by surface warships.¹ There is no reason to believe that gunfire by surface warships, the ultimate sanction of the long-distance blockade, was more humanitarian than torpedoes fired by submarines.

The views just summarized, however logical, were decisively rejected by Great Britain and the United States which claimed that the traditional procedures of visit and search were still required of submarines. International conferences between the World Wars provided the opportunity for them to advance their claims in international law.

II. Legal Developments Between the World Wars

During the Washington Naval Conference (1921–1922) Great Britain proposed the abolition of the submarine and Lord Lee made it clear at the outset that in doing so “the British Empire had no unworthy or selfish motives.”² He continued in reference to the submarine:

It was a weapon of murder and piracy, involving the drowning of non-combatants. 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.³

The French, Italian, Japanese, and United States delegations joined with the British in deploring the claimed inhumane and illegal use of submarines by Germany but favored their retention.⁴ Secretary of State Charles Evans Hughes, the chairman of the conference, read into the record the full report on submarines which was prepared by the Advisory Committee of the United States delegation. It contained the following:

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.⁵

During the drafting of the proposed submarine treaty, Senator Schanzer, the head of the Italian delegation, thought that it would “be useful to give a clear definition of merchant craft.”⁶ Senator Elihu Root, a distinguished former Secretary of State of the United States and a senior member of the U.S. delegation, responded:

Throughout all the long history of international law no term had been better understood than the term “a merchant ship.” It could not be made clearer by the addition of definitions which would only serve to weaken and confuse it.⁷

No clarification was provided and the ambiguity remained.

Senator Root proposed in Article I of the draft treaty concerning submarines certain rules of naval warfare, which were stated to be “an established part of international law.” These rules provided visit and search of merchant vessels by submarines as well as by surface warships. 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 capture and to permit the merchant vessel to proceed unmolested.⁸

Article III stated the necessity for enforcement of the above rules and provided that:

any person in the service of any . . . [Power] who shall violate any of . . . [these 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.⁹

The quoted provisions never became effective in spite of the support of the other participants in the Washington Conference because initially France and then the others refused to ratify the draft treaty.

Another attempt to draft rules concerning naval targeting was made in 1930. Article 22 of the London Naval Treaty¹⁰ of that year specified the law applicable to both surface and submarine warships. This treaty was terminated in 1936 except for Article 22 which was continued in effect “without limitation of time” as the *Proces-Verbal Relating to the Rules of Submarine Warfare (1936)*.¹¹ It provides:

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.¹²

The interpretation and application of these binding rules of law was left to the belligerent practices of the Second World War and its juridical aftermath including the war crimes trials “and the teachings of the most highly qualified” scholars and publicists, to use the wording of the Statute of the International Court of Justice.¹³

III. Continuation of Naval Practices in the Second World War

Writing at the beginning of the Second World War, Professor H. A. Smith, a frequent lecturer at the Royal Naval College, Greenwich, pointed out the dramatic differences between trading practices at the time of the Declaration of

90 Targeting Enemy Merchant Shipping

Paris¹⁴ (the first multilateral convention on the law of naval warfare) in 1856 and those in 1939:

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. . . . Today he has become a disciplined individual mobilised in the vast military organization of the totalitarian state.¹⁵

At the start of the Second World War, the naval belligerents on both sides continued the practices which had been started in the First World War and made every effort to improve upon them. Great Britain had such complete control of the surface of the oceans that it was able to force neutral merchant ships to participate in the Allied war effort. Ms. Behrens, writing in the official British history of the Merchant Navy, described the intensification of the system in 1940:

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 essential. 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.¹⁶

Throughout the Second World War the United States, first as a neutral and then as a belligerent, cooperated fully with the British methods.¹⁷ As a matter of theory, neutral states did not have to cooperate with the Allied naval powers, but they realized that failure to cooperate would result in the application of much more stringent economic warfare measures against them. The result of this integration of neutral merchant ships into the Allied war effort is that they became lawful objects of attack like similarly employed belligerent merchant ships. Only those few neutral merchant ships engaged in genuine inter-neutral trade were immune from attack.

The British *Defense of Merchant Shipping Handbook* (1938) was distributed to the masters of the Merchant Navy in 1938. On the subject of "conditions under which fire may be opened," it 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.¹⁸

Subsequent instructions stated that the enemy had adopted the policy of sinking without warning.

At the outset of the Second World War, the German Navy incorporated the *Proces-Verbal* Relating to the Rules of Submarine Warfare, also known as the Protocol of 1936, into the German Prize Code which was distributed to submarine commanders.¹⁹ By October 17, 1939, Germany issued the order to attack all enemy merchant ships without warning.²⁰ Thus, early in the conflict submarines and merchant ships incorporated in the naval war effort were attacking one another without warning. Germany declared that vast areas of the North Atlantic Ocean were a submarine operational zone in which Germany could assume no responsibility for either damage to ships or injury to personnel.²¹

On December 7, 1941, immediately following the attack on Pearl Harbor, the U.S. Chief of Naval Operations sent a secret message to the Commander-in-Chief, Pacific Fleet which stated: "EXECUTE AGAINST JAPAN UNRESTRICTED AIR AND SUBMARINE WARFARE."²² Even though the "unrestricted" warfare was directed against Japan, it could nevertheless present a possible danger to neutral shipping in the vast Pacific Ocean areas. Because the message was secret, it could not have provided notification to neutral states. However, the almost complete absence of neutral shipping in the Pacific made this problem more theoretical than real. The only significant shipping which the Japanese treated as neutral consisted of Russian ships sailing across the North Pacific between Siberian ports and Canadian and United States ports in the Pacific Northwest. While the Soviet Union was a belligerent in the European war, it remained technically neutral in the Pacific war until a few days before the Japanese surrender.

Throughout the Pacific War, as in the Atlantic War, the merchant ships of the naval belligerents and participating neutral merchant ships were fully integrated into the naval war efforts. As a practical matter, such ships were indistinguishable from formally commissioned naval auxiliary warships,²³ and, like warships, were lawfully subject to attack without warning. The United States reversed its prior position advanced in the First World War and, along with Japan and the other naval belligerents, recognized that such merchant ships were functional warships and were subject to the same rules of international law. The United States has also reversed its position in domestic law by the enactment of legislation which results in according to U.S. merchant mariners who served in active theaters of war the benefits of veterans' status.²⁴

IV. Post World War II War Crimes Trials

A. *The Trial of Admiral Doenitz*

The only war crimes trials conducted by international tribunals were those before the International Military Tribunal at Nuremberg and the International

92 Targeting Enemy Merchant Shipping

Military Tribunal for the Far East at Tokyo. The International Military Tribunal at Nuremberg conducted the trial of the principal leaders of the former German Government who were accused of war crimes or crimes against humanity. The important case in which the Tribunal directly addressed the law of naval warfare was that of Admiral Doenitz who initially commanded the German submarine force and was subsequently commander-in-chief of the navy. Admiral Doenitz was charged with planning aggressive war (count one), conducting aggressive war (count two), and with war crimes (count three) by “waging unrestricted submarine warfare contrary to the Naval Protocol of 1936.”²⁵ Sir Hartley Shawcross, the chief British prosecutor, stated to the Tribunal:

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.²⁶

The judgment of the Tribunal, after stating that it “is not prepared to hold Doenitz guilty for his conduct of submarine warfare against British armed merchant ships,” 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 Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.²⁷

The failure to mention operational zones in the Protocol of 1936 could, of course, be equally consistent with the conclusion of their lawfulness. The unreasonable and unworkable result of the holding is that the Tribunal accepts the legality of German operational or exclusion zones as applied to belligerent merchant vessels but regards the same zones as unlawful when applied to neutral merchant vessels. In doing this, the Tribunal ignored the fact that in the Second World War many neutral merchant vessels were sailing in the same naval convoys with belligerent merchant vessels and the two were functionally indistinguishable from one another.

The term “neutral merchant vessels” used by the Tribunal is more precise than the wording concerning merchant vessels in the Protocol, but it remains ambiguous and comprises at least two distinct categories: those engaged in genuine inter-neutral trade which does not contribute to the economic warfare resources of a belligerent, and those neutral vessels which, through acquiescence

or coercion, participate in the naval war effort of a belligerent. The factual reality was that there were no immune neutral merchant vessels in the Atlantic Ocean proscribed areas. The Tribunal's invocation of the broad term, "neutral merchant vessels," enabled it to avoid facing the facts concerning the integration of neutral shipping into the Allied naval war effort. The Tribunal applied the Protocol to Doenitz as if it were a criminal statute. He was found innocent on count one (planning aggressive war), guilty on count two (conducting aggressive war), and guilty on count three (war crimes). However, the ten year sentence imposed upon Doenitz was stated to not be based upon count three because the United States also conducted "unrestricted submarine warfare" in the Pacific. The result of this is that the sentence was based only on count two, according to the Tribunal, which involved nothing more than Doenitz carrying out his regularly assigned duties as a line officer. The principal criticism concerning the Doenitz case, however, is properly directed at Sir Hartley Shawcross and the other British prosecution lawyers. They either knew, or should have known in the exercise of at least minimum standards of professional responsibility, the factual reality of the integration of almost all neutral shipping into the Allied naval war effort.²⁸ As it was, they permitted the Tribunal to make a determination of guilt based on an erroneous factual assumption even though the Tribunal stated that the sentence was not based on Doenitz carrying out unrestricted submarine warfare.

In the Doenitz case the Tribunal also referred to the "*Laconia* order" and this portion of the case is considered in the ensuing subsection because the order is more directly involved in other cases.

B. Other War Crimes Trials

The war crimes trials other than the major trials at Nuremberg and Tokyo took place before national military tribunals which applied the international law of armed conflict. In addition to the trial of Admiral Doenitz, two other cases were stated to involve the "*Laconia* order" issued by him on September 17, 1942 while he was serving as the commander of the German submarine force. This order provided in English translation:

- (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 life boats, righting capsized life boats 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.

94 Targeting Enemy Merchant Shipping

(4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities.²⁹

The *Laconia* order immediately followed Admiral Doenitz' attempt to establish a rescue zone of immunity during the period September 12-16, 1942. Captain Roskill has described the facts:

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 troop ship *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.³⁰

Admiral Doenitz ordered other U-boats to the rescue and the Vichy French Government was asked to send help from Dakar. The U-boats then took the principal role in the rescue operations which included towing lifeboats toward the African coast. This, of course, diverted the submarines from their regular wartime missions. Captain Roskill's account continues:

All went well until the next afternoon [September 16] when an American Army aircraft from the newly established base on Ascension Island 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.³¹

In 1960 the Historical Division of the U.S. Air Force 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 lifeboats and was in the process of picking up two more, was displaying a white flag with a red cross. The sub did not show any 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.³²

The officer who issued the order to attack and the aircraft commander who carried it out were each *prima facie* guilty of a war crime. The conduct of the aircraft commander is entirely inexcusable since he must have observed the rescue operation. During the time that they are engaged in such an operation, enemy ships are no longer lawful objects of attack. The fact that the U.S. Army Air Forces took no action to investigate this incident and that no trials took place under the then-effective domestic military code, the Articles of War, is a serious reflection on the entire chain of military command. The attempt by Doenitz

and Hartenstein to establish a rescue zone of immunity would have been effective had it not been for the bombing. As it was, many of the personnel of the *Laconia*, including Italian prisoners of war and British military dependents, were rescued in an attempt which exemplifies the highest humanitarian traditions. The rescue attempt was entirely consistent with the central objective of the law of armed conflict to avoid unnecessary destruction of human values. In addition to the destruction involved in frustrating the rescue attempt, the action of the U.S. Army Air Forces resulted in the issuance of the *Laconia* order and the ensuing uncounted deaths of Allied seamen. Admiral Doenitz was charged with violating the rescue provisions of the Protocol of 1936 by issuing the order. There is, unfortunately, no evidence that the International Military Tribunal gave appropriate consideration to the rescue zone of immunity as indispensable context for the *Laconia* order. The Tribunal did not find him guilty on this charge, but it stated that the ambiguous terms of the order deserve the strongest censure.³³

The second case, the *Trial of Moehle*³⁴ before a British military tribunal, involved a German U-boat flotilla commander who was charged with a war crime in reading the *Laconia* order to captains of U-boats in his flotilla and of resolving the ambiguity in the order by providing examples in which the killing of survivors was approved. In convicting the defendant, the Tribunal accepted the contention of the prosecution that the examples used amounted to an order to kill.

Although the third case, the *Trial of Eck* ("The Peleus Trial")³⁵ is widely regarded as an implementation of the *Laconia* order, it is significant that the defense did not invoke it as a superior order which mandated the killing of survivors. In this case, also before a British military tribunal, the captain, two officers and a rating of the German submarine U-852 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.³⁶

The prosecution resolved the ambiguity in the charge by stating that the defendants were not accused of sinking a merchant ship without warning, but of killing its survivors. The *Peleus* was of Greek registration and under charter to the British Ministry of War Transport. Following the sinking, the defendants spent approximately five hours attacking the survivors and the floating wreckage with machine gun fire and hand grenades. All of the survivors except three were either killed or subsequently died of wounds. The three were rescued about a month later and recounted the grim events. The evidence indicated that the captain, Eck, ordered the shooting and that the others carried out his orders. The principal defense claim was that the actions were necessary to eliminate all

traces of the sinking. An experienced U-boat commander, who was called on behalf of the defense, testified that the approved method of evading Allied anti-submarine attack following a sinking was to leave the scene at high speed. All of the accused were found guilty and Eck and the other two officers were condemned to death.³⁷

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.³⁸

The commander of the Japanese First Submarine Force at Truk issued an order on March 20, 1943 which is translated and quoted by the Far East Tribunal:

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.³⁹

Several examples of the carrying out of this flagrantly unlawful order are referred to in the judgment of the Tribunal.⁴⁰ One which is described in detail involved the sinking of the United States flag Liberty-type merchant ship *Jean Nicolet*, which had an armament manned by a U.S. Navy armed guard, and the brutal murder of most of the survivors of the sinking.⁴¹ The Tribunal stated, *inter alia*, that the ship's boats were smashed by gunfire and that some of the crew members, with their hands tied behind their backs, had to run a gauntlet on the deck of the submarine before being forced into the water. The remainder of the crew was left on the deck of the submarine when it submerged. Twenty-two crew members who survived these grim events were rescued the next day and provided the testimony upon which the Tribunal's findings of fact were based.

In summary, the *Moehle* case involved an order to kill survivors and the *Eck* case involved the killing of survivors. The judgment and proceedings of the International Military Tribunal for the Far East set forth facts which demonstrated both the order to kill survivors and the execution of that order.

During the Second World War, aircraft attacked merchant vessels engaged in a belligerent's war effort. No trials took place involving aircraft attacks. If such trials had taken place, they should have been conducted under the same legal criteria which would be properly applied in the trials concerning surface and submarine warfare.

Captain Roskill, the official British Historian of the Naval War 1939-1945, has written:

It is fair to mention here that, with one conspicuous exception, the captains of the German disguised raiders conducted their operations, which were a perfectly legitimate form of warfare, with due regard to international law.⁴²

The exception referred to by Captain Roskill was the commander of a surface raider charged in the *Trial of Von Ruchteschell*⁴³ before a British military tribunal with failure to give quarter during an attack on a British merchant ship. The facts involved a daylight attack against the ship in which its wireless aerial was destroyed with the raider's first salvo. The raider maintained heavy fire and signaled that the ship attacked was not to use its radio. The case report states: "The captain of the *Davisian* stopped his engines, hoisted an answering pennant and acknowledged the signal." The raider's gunfire continued, however, for another fifteen minutes and wounded several crew members while they were trying to abandon ship. Captain Von Ruchteschell was convicted on the apparent basis that the ship attacked had given an unequivocal indication of surrender. After this manifestation of surrender, the *Davisian* was no longer a lawful object of attack.

V. The Killings Following the Battle of the Bismark Sea

Unfortunately, it is not possible to state that only Germans and Japanese murdered survivors of ships which had been attacked and sunk. In March, 1943 the Japanese attempted to move about seven thousand soldiers by ship from Rabaul, New Britain where their military situation was increasingly precarious, to reinforce the Japanese Army in Lae, New Guinea.⁴⁴ This involved the transit of the Bismark Sea by a convoy of eight transports escorted by eight destroyers.

The U.S. Army Air Forces in the Pacific had had a poor record for accurately targeting small islands, much less targeting moving ships, up to this time. The new commander of the Fifth Air Force under General Douglas MacArthur, the Commander-in-Chief Southwest Pacific, was Lieutenant General George C. Kenney, who changed the situation by having his medium bombers practice low-level attacks so that this capacity was added to the existing capability of heavy bombers in high-level bombing. The result was apparent in the Battle of the Bismark Sea where the B-25 and other medium bombers sank every transport in the convoy (except one sunk by high-level heavy bombers) and half of the destroyers. Once the ships were sunk, the U.S. Armed Forces followed practices, much criticized when the offenders were German or Japanese, of killing as many of the helpless survivors in the water as possible. Professor Samuel Eliot Morison, the official historian of the U.S. Navy during the Second World War, provides the following account:

Meanwhile planes and PTs went about the sickening business of killing survivors in boats, rafts or wreckage. Fighters mercilessly strafed anything on the surface.

98 Targeting Enemy Merchant Shipping

On 5 March the two PTs which had sunk Oigawa Maru put out to rescue a downed pilot and came on an enemy submarine receiving survivors from three large landing craft. Torpedoes missed as the I-boat crash-dived. The PTs turned their guns on, and hurled depth charges at the three boats—which, with over a hundred men on board, sunk. It was a grisly task, but a military necessity since Japanese soldiers do not surrender and, within swimming distance of shore, they could not be allowed to land and join the Lae garrison.

Japanese submarines and destroyers saved 2,734 men from the convoy, but over 3,000 were missing.⁴⁵

It is difficult to accept Professor Morison's facile statement that Japanese soldiers do not surrender and his conclusion that a legitimate military necessity was involved. Even if such a military necessity had existed, it would not change the substantive provision of the law of armed conflict which prohibits the killing of survivors because considerations of military necessity, along with those of humanity, have been taken into account in writing the law. Some members of the Japanese armed forces, including the highly motivated Kamikaze pilots who participated in the Phillipine and Okinawa operations, did surrender. It is not credible that Japanese soldiers who, it is assumed, could have made it to the New Guinea shore would have become a military asset to the Japanese Army there. The greater probability concerning a then-unknown future is that they would have become an additional burden upon the supply and medical resources of that army.⁴⁶ Another historian, Professor Ronald H. Spector, has provided a substantially similar factual account of the events following the Battle of the Bismark Sea but has indicated skepticism concerning the claim of military necessity.⁴⁷

If the same legal standards applied to Germans and Japanese who killed helpless survivors are followed in evaluating the actions of the U.S. Army Air Forces and the U.S. Navy following the Battle of the Bismark Sea, there is no way they can be described as other than in flagrant violation of customary and treaty law. It is a serious reflection on the entire chain of command that there was no investigation and no charges were brought against those who issued the orders and carried them out. Justice Robert H. Jackson, the chief United States prosecutor before the International Military Tribunal at Nuremberg, set forth the basic legal principle in 1945:

If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.⁴⁸

Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (1907),⁴⁹ a treaty of the United States, is

applicable to the events following the Battle of the Bismark Sea and provides in relevant part:

After each engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.⁵⁰

The limitation in the treaty concerning “military interests” refers to legitimate military interests which are recognized as including lawful objects of attack and therefore prohibiting attacks on survivors.

VI. The Protocol of 1936 in Context

The principal juridical basis on which the factual events of naval armed conflict have been appraised is the *Proces-Verbal* Relating to the Rules of Submarine Warfare,⁵¹ also known as the Protocol of 1936. There are inconsistent analyses concerning its interpretation and application to the events of the Second World War. Professor Robert Tucker, writing in a Naval War College “Blue Book”, has stated concerning 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. . . .⁵²

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 submarine warfare.⁵³

Professor Tucker has also commented on the legal situation in the Pacific War:

In the Pacific War no attempt was made by either of the 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 Protocol⁵⁴

His interpretation of the Protocol provides adequate illustration of the fallacies of the so-called “plain meaning” interpretation of a “normatively ambiguous” legal text. “Normatively ambiguous” refers to a legal term which purports to establish a norm or category but is in fact so unclear that it requires interpretation in relevant context rather than according to “plain meaning”. The “plain meaning” method involves these three sequential fallacies: (1) the “plain meaning” exists;

(2) it is ascertainable; and (3) it controls interpretation without regard to relevant contextual factors. Professor Tucker has apparently interpreted “merchant ships” and “a merchant vessel” as stated in the 1936 Protocol as referring by “plain meaning” to all such ships without regard to the integration of these ships into the naval war effort. The result of the so-called “plain meaning” interpretation here is to actually change the text so that the term “all merchant ships” is inserted in lieu of “merchant ships.” If insertions are to be made in the text, it would be more in keeping with the purposes of the Protocol to insert “genuine merchant ships” or “merchant ships not participating in the armed conflict.”

Professor Myres McDougal has emphasized the importance of contextual interpretation and set forth its major features.⁵⁵ Applying this methodology to the Protocol, it is necessary to consider the following: the pre-existing customary law; the intention, if any, to change it; the preparatory work including statements of the drafters; the final text; the working interpretation given to the text by the state-parties; and the principle of effectiveness.

The long-established customary law applicable to land, sea and air warfare is that the exercise of belligerent functions always carries with it susceptibility to being attacked. Application of this common-sense principle results in merchant ships which perform belligerent functions being liable to the same treatment as warships. This was established long before the World Wars in the era of sailing ships. There is no indication in the records of the working papers leading to Article 22 of the London Naval Treaty of 1930 and in the reaffirmation of that agreement in the *Proces-Verbal* of 1936 of any intention to change the customary law. The most significant statement recorded in the preparatory work is contained in the Report of the Committee of Jurists of April 3, 1930 written by the lawyers who drafted the text.

The Committee wish to place it on record that the expression “merchant 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.⁵⁶

This stated criteria is significant in that it demonstrates a clear purpose to make a distinction between merchant ships based upon participation in the armed conflict.

It is now crystal-clear that the terms “merchant vessel” or “merchant ships” does not include all such ships. None of the state-parties to the treaty have suggested any dissent from the criteria of the Committee of Jurists. Consequently, the normatively ambiguous references to merchant ships which appear in the final text are clarified by the undisputed statement of the drafters of the treaty.⁵⁷ It is highly significant in providing accurate interpretation that the naval belligerents, the Germans and Japanese on one side and Great Britain and the United States on the other, gave identical working interpretations to the treaty in spite of their

highly divergent interpretations of most other major issues. The working interpretation of the state-parties is of great importance, and this is particularly true where it produces complete uniformity in interpreting the treaty.

Finally, the cardinal interpretative principle of effectiveness must be considered. This requires that any treaty must be given a practical meaning so that it is susceptible of application in the real world. In the present situation, this means that the agreement must be effective in actual naval armed conflict. It is by applying its protections to only merchant vessels which are not participating in the armed conflict that it is given a practical meaning. The contrary interpretation based upon a supposed "plain meaning" would result in the treaty becoming a nullity rather than effectuating its purpose of providing humanitarian protections. A conclusion written several years ago is equally applicable now.

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.⁵⁸

Hospital ships,⁵⁹ cartel ships,⁶⁰ coastal fishing boats and small boats engaged in coastal trade⁶¹ are also immunized under international law from attack.

As reflected in the decisions of the war crimes trials which have been examined, the central humanitarian purpose of the law is to protect human values. Although it is clear under the Protocol of 1936 that merchant ships participating in the naval armed conflict may be sunk without warning, an absolute standard of immunity from attack for the survivors of sunken ships is required by international law. The ships that were sunk in the Battle of the Bismark Sea were combatant warships (destroyers) and auxiliary warships (transports) and the identical protection for survivors is applicable.

One of the post-World War II treaties, Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)⁶² specifies affirmative protections for survivors of armed forces at sea including merchant marine seamen and the crews of civil aircraft of the parties to the conflict.⁶³ Article 18(1) provides:

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 and to ensure their adequate care, and to search for the dead and prevent their being despoiled.

The significance of this provision is that it imposes affirmative duties in terms of the protection of "shipwrecked, wounded and sick" and their care on a non-discriminatory basis. Thus the post World War II treaty law enhances the

legal standards of the customary law and treaty law developed by the post World War II war crimes trials.

Notes

*Research Associate, International and Comparative Law Program, George Washington University.

**Emeritus Professor of Law, George Washington University. Twice the former Charles H. Stockton Professor of International Law, U.S. Naval War College, Newport, R.I.

1. For a more comprehensive analysis of belligerent naval practices during World War I, see William T. Mallison, Jr., *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars, passim* (1966) [hereinafter Mallison].
2. International Law Documents: Conference on the Limitation of Armaments 49 (1921).
3. *Id.* at 53.
4. *Id. passim*.
5. *Id.* at 61.
6. *Id.* at 122.
7. *Id.* at 124.
8. *Id.* at 116.
9. *Id.*
10. 46 Stat. 2858, 2881-82 (1930); Dietrich Schindler & Jiri Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* 793 (1981) [hereinafter Schindler & Toman].
11. Schindler & Toman, *id.* at 795-96.
12. *Id.*
13. Art. 38 (1)(d).
14. Schindler & Toman, *supra* note 10, at 699-700.
15. *The Declaration of Paris in Modern War*, 55 L.O.Rev. 237, 249 (1939).
16. Merchant Shipping and the Demands of War, *History of the Second World War* 96 (1955).
17. See Steven W. Roskill, *Capros not Convoy: Counter-Attack and Destroy!*, 82 U.S. Nav. Inst. Proc. 1047 (October 1956). CAPROS = Counter-Attack Protection and Routing of Shipping.
18. Portions of the *Handbook* are reprinted in 40 Proceedings of the International Military Tribunal at Nuremberg 88-89 (1947-1949) [hereinafter IMT].
19. See note 12 and accompanying text. Art. 74 of the German Prize Code, which reproduces the 1936 Protocol, appears in 7 Hackworth, *Digest of International Law* 248 (1944).
20. This was stated by Fleet Judge Advocate Kranzbuhler in his argument in behalf of Admiral Doenitz, 18 IMT 312, 323.
21. Mallison, *Supra* note 1, at 75-84.
22. The text is taken from a photographic copy of the original which was declassified on December 2, 1960.
23. Mallison, *Supra* note 1, at 121-22.
24. The G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, 91 Stat. 1433 (1977). Title 38 of the U.S. Code entitled Veterans Benefits is amended in scattered sections by the 1977 statute. See Charles Dana Gibson (the attorney who successfully advanced the claims of U.S. merchant mariners), *Merchantman? Or Ship of War* (1986).
25. 1 IMT 311.
26. 19 IMT 469.
27. 1 IMT 312-13.
28. Merchant Shipping and the Demands of War, *supra* note 16 and accompanying text.
29. The text of the order is in Trial of Moehle, 9 Repts. U.N.Comm. 75 (1946).
30. Trial of Moehle, *Supra* note 29 at 224.
31. *Id.* at 224-25.
32. Excerpt of letter from Historical Division, U.S. Air Force to Mr. David D. Lewis (April 12, 1960). The excerpted letter appears as an enclosure to letter from Director, Research Studies Institute, Air University, Maxwell Air Force Base to President, Naval War College (April 19, 1961).
33. 1 IMT 313.
34. 9 Repts. U.N. Comm. 75 (1946).

35. 1 Repts. U.N. Comm. 1 (1945); also reported in the entire volume one of War Crimes Trials (Maxwell-Fyfe ed., 1948) which contains the entire record of proceedings of the trial.
36. *id.* at 2 (1945).
37. *id.* at 13.
38. Judgment and Proceedings of the International Military Tribunal for the Far East (April 29, 1946-April 16, 1948 with sequential numbering of typewritten pages and separate volume for each day of the trial) [hereinafter FEIMT Judg. or FEIMT Proc.]. The textual quotation is from FEIMT Judg. at 1,072.
39. FEIMT Judg., *supra* note 38, at 1,073.
40. *Id.* at 1,073-74.
41. The textual account is based upon FEIMT Proc. 15,095 148 and FEIMT Judg. 1,074-75, *supra* note 38.
42. Steven W. Roskill, *White Ensign: The British Navy at War 1939-1945*, at 97 (1960).
43. 9 U.N. War Crimes Comm., Reports of Trials of War Criminals 82 (1947) [hereinafter Repts. U.N.Comm.].
44. The factual account is based upon 6 Samuel Eliot Morison, *History of the United States Naval Operations in World War II 62 et seq.* (1950) (This volume is sub-titled *Breaking the Bismark Barrier*) [hereinafter Morison], and upon Ronald H. Spector, *Eagle Against the Sun 226-28* (1985) [hereinafter Spector]. Professor Spector served as the Director of Naval History, Dept. of the Navy, 1986-1989.
45. Morison, *supra* note 44, at 62.
46. Professor Spector has reported the actual event: "by spring [1943] about 40 percent of Japanese front-line troops in New Guinea were suffering from disease or malnutrition." Spector, *supra* note 44, at 228.
47. *Id.*
48. Report of Justice Robert H. Hackson, U.S. Representative to the International Spector, Conference on Military Trials, Document XLIV, Minutes of Conference session of July 23, 1945, 330 (1945).
49. 36 Stat. 2371 (1909).
50. *Id.* at art. 16(1).
51. Schindler & Toman, *supra* note 10.
52. Robert W. Tucker, *The Law of War and Neutrality at Sea*, 1955 Naval War College International Law Studies 64 (1957).
53. *Id.* at 66.
54. *Id.*
55. Mynes S. McDougal & Associates, *Studies in World Public Order 723-32*, and *passim* (1960). See James W. Garner, *Harvard Research Draft on Treaties*, 29 Am. J. Int'l L. Supp. 947 (1935) and Myres S. McDougal, Harold D. Lasswell & James C. Miller, *The Interpretation of Agreements in World Public Order, passim* (1967).
56. Proceedings of the London Naval Conference of 1930 and Supplementary Documents 189 (1931).
57. See *id. passim*; see also International Law Situations 1-65 (1930) and particularly the section entitled *Classes of ships* at 41-44.
58. Mallison, *supra* note 1, at 120.
59. Mallison, *supra* note 1, at 124-25.
60. *Id.* at 126.
61. *Id.* at 126-28.
62. 6 U.S.T. 3217; Schindler & Toman, *supra* note 10, at 333.
63. *Id.* at art. 13(5).

Comments on Sally V. and W. Thomas Mallison's Paper: The Naval Practices of Belligerents in World War II: Legal Criteria and Developments

by
M. W. Janis *

The London Protocol and the Judgment at Nuremberg: A Commentary on Mallison

It is with some trepidation that I venture to comment on Sally and Tom Mallison's "The Naval Practices of Belligerents in World War II: Legal Criteria and Developments."¹ I have known Sally and Tom since the early 1970's when I was a very junior naval officer on study leave here at the Naval War College from my teaching post at the Naval Postgraduate School in Monterey. I have the greatest respect for their fine book, *Studies in the Law of Naval Warfare: Submarines in General and Limited War*, which is one of the volumes in the distinguished "Blue Book" series published by the Naval War College.² That book and today's paper by the Mallisons raise some of the same fundamental questions, questions at the very heart of the relationship between international law and military activities.

In the essay on "Neutrality" that I wrote for Admiral Robertson for his Commentary on *The Commander's Handbook on the Law of Naval Operations*³, I discuss my belief that international law is not a single system of legal rules and legal procedure, but really constitutes many such systems: some "harder" and some "softer."⁴ In that essay I argue that it is a mistake to think about the laws of neutrality as a form of hard law, rather "the rules respecting neutrality . . . will be rules tailor-made to fit particular conflicts and will neither be norms of general specificity nor will they be enforced by a coercive apparatus comparable to that available for "harder" forms of international law."⁵ In general, it is, I think, unrealistic to assume that all international law is of the same certainty or of the same legally binding effect.

It was John Austin, the English legal positivist, who wrote in 1832:

[T]hat the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . . [T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.⁶

As early as 1836, Henry Wheaton, the American author of the first English language textbook on international law, was already having to cope with Austin's critique of international law as being merely a form of morality.⁷ Although some are satisfied as to the law-like quality of international law, others are doubtful. The English legal philosopher, H.L.A. Hart, for example, in a modern reformulation of legal positivism, argues that international law is more like primitive law than like municipal law because international law lacks "the formal structure of . . . a legislature, courts with compulsory jurisdiction and officially organized sanctions."⁸

However, neither Austin's nor Hart's nor most other general jurisprudential characterizations of international law pay particular attention to the diversity of international law. That is, most discussions of the problems of the certainty and efficacy of international law assume that there is *a* system, uncertain and ineffective though it may be, of international law and suppose that there is something like a single general integrated, if not hierarchical, international legal process. Reality is otherwise.

Different sorts of international law vary along what might be called a "structural spectrum," there being "a great variety of international legal systems, some more structured than others."⁹ In some of its forms, for example, the system regulating nuclear weapons, international law may be so unstructured in terms of both rule-specificity and rule-enforcement as to be, at best, a kind of Hart's so-called "primitive law".¹⁰ In some other of its manifestations, for example, the systems of European Economic Law Community and of European Human Rights Law, international law may be so well-structured in terms of rule-specificity and rule-enforcement as to be virtually as "hard" as any ordinary domestic law.¹¹

Given the diversity of international legal systems, we should assume that there will be differences in the certainty of their rules and the efficacy of their enforcement processes. In analyzing the relationships between law and society, Max Weber, at the turn of the century, defined "law" as "an order system endowed with certain specific guaranties of the probability of its empirical validity."¹² Weber's necessary "guarantees" for law are more sophisticated than Austin's necessary "sovereigns" for law. Weber wrote of a "coercive apparatus, i.e., that there are one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement." The coercive apparatus "may use psychological as well as physical means of coercion and may operate directly or indirectly against the participants in the system."¹³ Weber's conceptual framework is, I submit, a more useful and realistic way to understand the nature and diversity of international law than the theories provided by Austin and Hart.

In general, I feel that the law relating to naval attacks on merchant shipping in World War II was, at best, a sort of very "soft" international law. As a focus

for my comments on the Mallisons' paper, let me mostly discuss their treatment of the Nuremberg Tribunal. Let me begin by noting an oversight in their original paper, i.e., the assertion that "there was only one case before the Tribunal directly involving law of naval warfare, i.e., the individual case of Admiral Doenitz."¹⁴ In reality, the Tribunal judged not only Karl Doenitz for violations of the laws of naval warfare,¹⁵ but also, on like charges, Admiral Eric Raeder, the commander of the German Navy between 1928 and 1943.¹⁶ The charges and the findings of the Court were not dissimilar between the two.¹⁷

The trial of the two German admirals raised in a specific context two jurisprudential questions that had and still have broad public appeal. The first is how definite were and are the rules of international law relating to submarine attacks on merchant shipping? The second is how should such rules have been and be enforced? At the time of their trial, Doenitz and Raeder received considerable support in Western public opinion for their position that the crimes of which they were accused were neither properly defined nor were they properly prosecuted. Airey Neave, the brilliant English lawyer who followed a distinguished war service with service on the British legal team at Nuremberg and who, so many years later, was tragically assassinated while trying to sort out the troubles in Northern Ireland, wrote in his insightful account of Nuremberg how he believed that it was the sympathy of Western public opinion that saved Doenitz and Raeder from the gallows to which the German generals, Keitel and Jodl, were condemned.¹⁸ Even as late as 1976, two Americans edited a book filled with more than one hundred testimonials, mostly by Western military officers, protesting the Nuremberg trial of Doenitz.¹⁹ Neave himself, knowing both the men and their war records in great detail, surmised that "[a]llied naval officers, accustomed to the traditions of their service, may not have known the true Karl Doenitz. . . . They did not see him as a political admiral but that is what he was."²⁰

The Mallisons are critical of the Nuremberg judgment, too, especially with the way in which the Court defined the term "merchant vessels" in the applicable international convention, the 1936 London Protocol.²¹ In the context of their critique of the interpretation of the London Protocol, the Mallisons are especially critical of Robert W. Tucker's analysis of the Protocol in another of the fine Blue Books, *The Law of War and Neutrality at Sea*.²² The Mallisons feel that Tucker was wrong when he wrote that belligerents in the Pacific War did not "observe the obligations laid down by the 1936 London Protocol."²³ The Mallisons argue that Tucker committed a "plain meaning" fallacy and that Tucker should have understood that the text of the Protocol was "normatively ambiguous."²⁴ Although I am sympathetic with what I would perceive to be the Mallison's "bottom line," I must say that I think they are wrong and Tucker right about whether or not the Protocol was violated.

As I see it, the Mallisons' "bottom line" is the worthy goal of preserving some validity for an international law norm even when the efficacy of that norm has been called into serious question by considerable contrary state practice. As an international lawyer, I applaud their mission. Furthermore, I understand its relevance given the relationship between the 1936 Protocol and the 1939-1945 War. I think that the Mallisons err, however, in attempting to save the norm about submariners' duty to merchant vessels by their restrictive definition of "merchant ships."²⁵ The principal proof in their argument is a paragraph from the Report of the Committee of Jurists of April 3, 1930, a paragraph that I think is circular and unhelpful if it means what the Mallisons use it to say.²⁶ If "participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel" leaves out merchant ships participating in the armed struggle and if in practice virtually every possible merchant ship is a participant in the armed struggle, then the Protocol is saved from the challenge of inefficacy only by being robbed of its substance.

Theirs is an argument and a result propounded as long ago as March 5, 1946, by the able counsel for Admiral Doenitz, the German naval lawyer, Otto Kranzbuehler. In the proceedings before the Nuremberg Court, Kranzbuehler submitted, and submitted successfully, that he should be permitted to put interrogatories to Admiral Nimitz about U.S. submarine operations in the Pacific:

I in no way wish to prove or even to maintain that the American Admiralty in its U-boat warfare against Japan broke international law. On the contrary, I am of the opinion that it acted strictly in accordance with international law. . . .

My point is that, because of the order to merchant vessels to offer resistance, the London Agreement is no longer applicable to such merchant men; further, that it was not applicable in declared operational zones in which a general warning had been given to all vessels, thus making an individual warning unnecessary before the attack.²⁷

While I understand the nature of the Mallisons' argument about limiting the definitional reach of the term "merchant shipping," I cannot myself see why the argument is necessary or even particularly useful. What is wrong with saying, as Tucker did, that the London Protocol of 1936 established rules and that the belligerents in World War II violated those rules? From my perspective this is the statement that is honestly reflective of the realities of the "soft" international law then regulating activities like submarine attacks on merchant shipping. And what is wrong with deciding, as the Nuremberg judges did, that Doenitz and Raeder were guilty of violating the 1936 London Protocol, but then choosing not to punish them for it.²⁸

The judgment distinguished between attacks on British merchant vessels and those on neutrals.²⁹ The judges rejected the notion about operational zones saying that “the Protocol made no exception” for them.³⁰ Though this is a holding that the Mallisons call “unreasonable and unworkable,”³¹ it seems to me to be consistent with the Protocol. Frankly, I see none of the ambiguity that the Mallisons see. To me it is simply a case of “soft” international law, an aspirational law that has trouble being effectively applied.

I, too, am much more sympathetic than the Mallisons with the sentence of the Court. The Mallisons seem to imply that they feel that, despite its protestations, the Court did take Doenitz’ submarine activities into account when it sentenced him to ten years of prison.³² Looking at the sentences for others, including Raeder, the Doenitz sentence does not seem to me to be extreme. I think it likely that the submarine program did not finally weigh against Doenitz.

Furthermore, the reasons why the Court did not punish Doenitz for his violations of the 1936 London Protocol make sense, especially in light of the strategy adopted by Doenitz’s lawyer. Kranzbuehler, after all, had argued that U.S. Pacific submarine operations were so similar to German Atlantic operations that neither the U.S. nor Germany were violating international law. The answer preferred by the Court was that the London Protocol was violated but that the violation was not reason enough to punish the Admiral.

Notes

*Professor of Law, University of Connecticut School of Law.

1. Sally V. Mallison & William T. Mallison, *The Naval Practices of Belligerents in World War II: Legal Criteria and Developments* [hereinafter *The Paper*].
2. William T. Mallison, *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars*, 58 *U.S. Naval War College International Law Studies* 1966 (1968).
3. U.S. Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations* (NWP 9) 1987.
4. Mark W. Janis, *Neutrality*, *The Law of Naval Operations*, at 148 (Horace B. Robertson, Jr. ed., 1991).
5. *Id.* at 153.
6. J. Austin, *The Province of Jurisprudence Determined* 208 (1st ed. 1832).
7. Henry Wheaton, *Elements of International Law with a Sketch of History of the Science* 47 (1st ed. 1836).
8. H.L.A. Hart, *The Concept of Law* 209, 226 (1961).
9. Janis, *Do Laws Regulate Nuclear Weapons?*, *Nuclear Weapons and International Law* 53, 60 (1987).
10. *Id.* at 53-54, 59-61.
11. Mark W. Janis, *An Introduction to International Law* 229-230 (1988); Janis, *International Courts and the Efficacy of International Law*, 2 *Conn. J. Int’l. L.* 261 (1987).
12. Max Weber, *Law in Economy and Society* 13 (Max Rheinstein & Edward Shills trans., 1954).
13. *Id.* at 13.
14. *The Paper*, *supra* note 1, at 92.
15. *The Nuremberg Trial*, 6 *F.R.D.* 69, 167-70 (1946) [hereinafter *The Judgment*].
16. *Id.* at 170-72.
17. *Id.* at 171-72.
18. Airey Neave, *On Trial at Nuremberg* 200-213 (1978) [hereinafter cited as *Neave*].
19. Harold K. Thompson, Jr., & Henry Strutz, *Doenitz at Nuremberg: A Reappraisal: War Crimes and the Military Professional* (1976).

20. Neave, *supra* note 18, at 200.
21. The Paper, *supra* note 1, at 96-98.
22. Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 International Law Studies 1955, at 66 (1957).
23. The Paper, *supra* note 1, at 99.
24. *Id.* at 99-100.
25. *Id.* at 99-102.
26. *Id.* at 100.
27. Trial of the Major War Criminals Before the International Military Tribunal, 8 Proceedings 549 (14 November 1945 - 1 October 1946)(1947).
28. *The Judgment*, *supra* note 15, at 169, 171-72.
29. *Id.* at 168-169.
30. *Id.* at 169.
31. The Paper, *supra* note 1, at 92.
32. *Id.* at 93.

Comments on Sally V. and W. Thomas Mallison's Paper: The Naval Practices of Belligerents in World War II: Legal Criteria and Developments

by
W. J. Fenrick *

Some Reflections on History and Law

One of the primary purposes of the law of armed conflict is to minimize net human suffering. The law must be both relevant and usable. A body of law which sets irrelevant or impossible standards may allow lawyers and diplomats to indulge in mutual self congratulation but it will be of little use to those very practical men, the commanders of naval forces engaged in combat. It is not essential that international law, to be valid, should always be compatible with state practice. If, however, the law of naval warfare is to have an impact on the conduct of warfare, there should be a crude congruence between law and practice so that it is marginal, extreme conduct which is condemned, not activities which are routine operations of war.

In this area of law, history compels agreement with the remarks of Julius Stone:

It is idle to seek to reduce this matter to a *cri de coeur* of humanity. War law, even at its most merciful, is no expression of sheer humanity, save as adjusted to the exigencies of military success, a truth as bitter (but no less true) about attacks on merchant ships, as about target area saturation bombing. And it is also quite idle for Powers whose naval supremacy in surface craft enable them to pursue the aim of annihilating the enemy's seaborne commerce without "sink at sight" warfare, to expect that States which cannot aspire to such supremacy will refrain from seeking to annihilate that commerce by such naval means available to them as submarines, aircraft and mines. To refuse to face this will save neither life nor ship in any future war; and it will also forestall the growth of real rules for the mitigation of suffering under modern conditions.¹

Up until the Second World War, it appears to have been in fashion for international lawyers to write books reviewing state practice and compliance with international law in particular conflicts. For example, an American professor, Amos Hershey, published *The International Law and Diplomacy of the Russo Japanese War* in 1906, and James Wilford Garner, another American professor, published his two volume study, *International Law and the World War* in 1920. Such books appear to have gone out of fashion since the Second World War. J. M. Spaight, a British civil servant, published the third edition of his *Air Power*

and War Rights in 1947 and this book provides a usable, albeit not comprehensive, survey of state practice in air warfare. The apparent demise of the genre is unfortunate as the authors of these books at least identified the legal issues although their legal reasoning was often somewhat partisan.

One, but hopefully not the only, indicator of the relevance of law to state practice in naval warfare during the Second World War is the body of work published by naval historians. The practice of law requires lawyers to develop reasonably thick skins. This is fortunate because the references of naval historians to the law of naval warfare and to the 1936 London Protocol in particular are less than flattering. Theodore Roscoe, for example, in his semi-official 1949 book, *United States Submarine Operations in World War II*, indicates that all United States Navy submarines were supplied with a small volume entitled "Instructions for the Navy of the United States Governing Maritime and Aerial Warfare" which required compliance with the London Protocol. After Pearl Harbor, however, submarines were ordered to wage unrestricted warfare as a reprisal. Roscoe goes on to say:

In any event, realistic thinking demanded recognition of the fact that a nation's economic forces and its fighting forces bear the inseparable relationship of Siamese twins. Any reduction of a nation's economic resources weakens its war potential. Sever the commercial arteries of a maritime nation and its industrial heart must fail, while the war effort expires with it. Therefore, it was not reprisal so much as military imperative that caused Washington to reverse its opinion on the already abrogated naval laws.

Webster defines a merchant vessel as "a ship employed in commerce." There were to be no merchant ships in the Pacific for the duration of the war – cargo carriers were merchantmen by genesis only. The U.S. Navy was to consider all Japanese shipping as engaged in prosecution of the war effort – either carrying men, munitions, and equipment to areas under attack or occupation, or freighting home the plundered raw materials from conquered territory.

Armed or not, these merchantmen were in effect combatant ships. "Transports," "freighters," "tankers" were hollow titles for auxiliaries of war, and it was the realistic duty of the submarine forces to reduce these ships to hulls as hollow as their titles. The polite little law book went overboard. Converted by a directive into commerce raiders, American submarines in the Pacific went to war to sink everything that floated under a Japanese flag.²

Roscoe's somewhat cavalier approach to the law of armed conflict is more common among naval historians than most lawyers would like to think. Historians do, however, on occasion raise issues which international lawyers must advert to if they wish to assess the law in something other than a legal vacuum. Professor Talbott's thoughtful study, *Weapons Development, War Planning and Policy: the US Navy and the Submarine, 1917-41*, argues that the United

States Navy had in fact made the decision to wage unrestricted submarine warfare in the Pacific if war occurred some time before the attack on Pearl Harbor. In his view, technology drove policy. The actual decision of the United States to wage unrestricted submarine warfare after Pearl Harbor was less significant than:

the decision to build a long-range submarine, the resolution of the technical problems that such a project raised, and the decision to pursue a strategy of economic warfare. The history of submarine development also affirms that when the responsible authorities find in their hands a weapon that promises to make the waging of war more efficient, they will use it.³

Perhaps the impressionistic observations of the late D. P. O'Connell concerning the role of law in naval warfare, albeit somewhat modest, are as accurate as any:

The only prediction that can be made with assurance is that the lower the level of conflict, the more localized the situation and the more restricted the objectives, the more predominant will be the element of law in the governing of naval conduct; and that the law will assume a diminished role – as it did in the Second World War – when the conflict becomes global, when the neutrals have been mostly drawn into it or their sympathies engaged, and when an element of desperation has entered into operational planning.⁴

It would appear that no nation had a monopoly on atrocities during the Second World War although, depending on national perspectives, some atrocities might be referred to as regrettable incidents. In addition to the somewhat questionable “*Laconia* incident”⁵ and the Battle of the Bismark Sea killings referred to by Professor Mallison, there is some indication that the crew of the US submarine *Wahoo* massacred thousands of survivors of a Japanese troop transport in early 1943 and the *Wahoo*'s commanding officer, who reported the incident, was decorated for it.⁶ Although the German and Japanese appear to have provided all of the accused in naval war crimes trials, there is also some indication that on a few occasions the British deliberately attacked the shipwrecked, particularly during unsuccessful efforts to defend against the German invasion of Crete.⁷ These occasional tragic incidents notwithstanding, there has been no suggestion that attacks on the shipwrecked should be legally permissible.

There is also little doubt that those belligerents with the capability and requirement to do so engaged in substantially similar anti-commerce campaigns with both submarines and aircraft. As the Mallison paper has indicated, the belligerents applied essentially similar operational definitions of the term “merchant ship” as used in the London Protocol. The legitimacy of that operational definition was appraised, perhaps inadequately, by the International Military Tribunal at Nuremberg. It is suggested that, in some respects, the analysis of the

London Protocol and of the legitimacy of state practice by Admiral Doenitz's lawyer, Flottenrichter Otto Kranzbuhler, is superior to the analysis in the IMT judgment itself.

Concerning belligerent vessels, Kranzbuhler focused on the ambiguity of the concept "merchant ship" and the uncertainty connected with the words "active resistance" in the London Protocol. Bearing in mind that ships sailing in enemy convoy are usually deemed to be engaged in "active resistance," he argued that all armed merchantmen should also be deemed to be engaged in active resistance as arming served the same purpose as a naval escort and as it was not possible to distinguish between defensive and offensive weapons.

And this very same common sense demands also that the armed merchantman be held just as guilty of forcible resistance as the convoyed ship. Let us take an extreme instance in order to make the matter quite clear. An unarmed merchant ship of 20,000 tons and a speed of 20 knots, which is convoyed by a trawler with, let us say, 2 guns and a speed of 15 knots, may be sunk without warning, because it has placed itself under the protection of the trawler and thereby made itself guilty of active resistance. If, however, this same merchant ship does not have the protection of the trawler and instead the 2 guns, or even 4 or 6 of them, are placed on its decks, thus enabling it to use its full speed, should it in this case not be deemed just as guilty of offering active resistance as before? Such a deduction really seems to me against all common sense. In the opinion of the Prosecution the submarine would first have to give the merchant ship, which is far superior to it in fighting power, the order to stop and then wait until the merchant ship fires its first broadside at the submarine. Only then would it have the right to use its own weapons. Since, however a single artillery hit is nearly always fatal to a submarine but as a rule does very little harm to a merchant ship, the result would be the almost certain destruction of the submarine.⁸

He goes on to argue:

However, another factor of greater general importance, and also of greater danger to the submarines, was the order to report every enemy ship in sight, giving its type and location. This report was destined, so said the order, to facilitate taking advantage of an opportunity which might never recur, to destroy the enemy by naval or air forces. This is an unequivocal utilization of all merchant vessels for military intelligence service with intent directly to injure the enemy. If one considers the fact that according to the hospital ship agreement even the immunity of hospital ships ceases if they relay military information of this type, then one need have no doubts about the consequences of such behavior on the part of a commercial vessel. Any craft putting out to sea with the order and intention of using every opportunity that occurs to send military reports about the enemy to its own naval and air forces is taking part in hostilities during the entire course of its voyage and, according to the aforementioned report of 1930 of the committee of jurists, has no right to be considered a merchant vessel. Any different conception would not do justice to the immediate danger which a wireless report involves

114 Targeting Enemy Merchant Shipping

for the vessel reported and which subjects it often within a few minutes, to attack by enemy aircraft.⁹

Concerning enemy merchant vessels, he concludes:

All of the Admiralty's directives, taken together, show that British merchant vessels, from the very first day of the war, closely cooperated with the British navy in combating the enemy's naval forces. They were part of the military communications network of the British naval and air forces and their armament of guns and depth charges, the practical training in manipulation of the weapons, and the orders relative to their use, were actions taken by the British Navy.

We consider it out of the question that a merchant fleet in this manner destined and utilized for combat should count among the vessels entitled to the protection of the London Protocol against sinking without warning. On the basis of this conception and in connection with the arming of all enemy merchant vessels, which was rapidly being completed, an order was issued on 17 October, 1939 to attack all enemy merchant ships without warning.¹⁰

The IMT did, of course, accept Kranzbuhler's argument concerning belligerent merchant vessels and, although it held Doenitz not guilty for his conduct of submarine warfare against "British armed merchant ships," considered in context, the judgment actually exonerated Doenitz from responsibility for attacks on all belligerent merchant vessels because of the general belligerent practice of incorporating all such vessels into the war effort.

Kranzbuhler's arguments were less successful where neutral vessels were concerned. His first argument was that all vessels, including neutral vessels, which sailed blacked-out in the "war area," an undefined term, were subject to attack.

Examining the question of blacked-out vessels from the legal standpoint, Vanselow, the well-known expert on the law governing naval warfare, makes the following remark:

In war a blacked-out vessel must in case of doubt be considered as an enemy warship. A neutral as well as an enemy merchant vessel navigating without light voluntarily renounces during the hours of darkness all claim to immunity from attack without being stopped.

I furthermore refer to Churchill's declaration, made in the House of Commons, on 8 May 1940, concerning the action of British submarines in the Jutland area. Since the beginning of April they had orders to attack all German vessels without warning during the daytime, and all vessels, and thus all neutrals, as well, at night. This amounts to recognition of the legal standpoint as presented. It even goes beyond the German order, insofar as neutral merchant vessels navigating with all lights on were sunk without warning in these waters. In view of the clear legal aspect it would hardly have been necessary to give an express warning to neutral

shipping against suspicious or hostile conduct. Nevertheless, the Naval Operations Staff saw to it that this was done.¹¹

The second danger to neutral shipping was what Kranzbuhler referred to as "zones of operations" and what have since been referred to as "exclusion zones." He argued that the fact that such zones were not referred to in the London Protocol did not mean they were not permissible. Such zones constituted a normal part of state practice and it was open to the tribunal to find that they were legally permissible subject to certain criteria of reasonableness. Technology compelled changes in the 19th century law.

It is a well-known fact that operational areas were originally proclaimed in the first World War. The first declaration of this kind came from the British Government on 2 November 1914, and designated the entire area of the North Sea as a military area. This declaration was intended as a reprisal against alleged German violations of international law. Since this justification naturally was not recognized, the Imperial Government replied on 4 February 1915 by designating the waters around England as a military area. On both sides certain extensions were made subsequently. I do not wish to go into the individual formulations of these declarations and into the judicial legal deductions which were made from their wording for or against the admissibility of these declarations. Whether these areas are designated as military area, barred zone, operational area, or danger zone, the point always remained that the naval forces in the area determined had permission to destroy any ship encountered there. After the World War the general conviction of naval officers and experts on international law alike was that the operational area would be maintained as a means of naval warfare. A development, typical for the rules of naval warfare, was confirmed here, namely, that the modern technique of war forcibly leads to the use of war methods which at first are introduced in the guise of reprisals, but which gradually come to be employed without such a justification and recognized as legitimate.

The technical reasons for such a development are obvious: [t]he improvement of mines made it possible to render large sea areas dangerous. But if it was admissible to destroy by mines every ship sailing, despite warning, in a designated sea area, one could see no reason why other means of naval warfare should not be used in this area in the same way. Besides, the traditional institution of the blockade directly off enemy ports and coasts by mines, submarines, and aircraft was made practically impossible, so that the sea powers had to look for new ways to bar the approach to enemy coasts. Consequently it was these necessities which were the compelling factors in bringing about the recognition of the operational area.

It is true that there was by no means a uniform interpretation concerning the particular prerequisites under which the declaration of such areas would be considered admissible, just as there was none with regard to the designation which the belligerent power must choose. The conferences of 1922 and 1930 did not change anything either in that respect, as can be seen, for instance, from the efforts made after 1930, especially by American politicians and experts in international law, for a solution of this question.

Unfortunately, there is no time at my disposal to discuss these questions in detail and therefore it must suffice for the purposes of the defense to state that during the conferences in Washington in 1922 and in London in 1930 the operational area was an arrangement or system known to all powers concerned, which operated in a way determined by both sides in the first World War: that is, that all ships encountered in it would be subject to immediate destruction. If the operational area were to have been abolished in the aforementioned conferences, especially in the treaty of 1930, an accord should have been reached on this question, if not in the text of the agreement than at least in the negotiations. The minutes show nothing of the kind. The relationship between operational area and the London Agreement remained unsettled.¹²

As is well known, the IMT did not accept Kranzbuhler's arguments concerning operational or exclusion zones and found Doenitz's orders to sink neutral ships without warning in these zones a violation of the Protocol. It then went on to announce that no sentence would be assessed on the ground of his breaches of the Protocol because of similar practices by the Allied Powers,¹³ the only known successful use of the *tu quoque* plea in a war crimes trial. The IMT's condemnation of exclusion zones notwithstanding, such zones have been used in a number of recent conflicts.¹⁴

Assessing the impact of the IMT judgment on the scope and applicability of the London Protocol is not a simple task. Professor O'Connell has attempted to "cut the Gordian knot" by arguing:

The truth is that the requirements of the London Protocol are to be observed only in the situation where the submarine can act with minimal risk on the surface. Since that situation is now an ideal hardly ever in practice to be realized, one is compelled to draw from the Doenitz trial the conclusion that submarine operations in time of war are today governed by no legal text, and that no more than lipservice is being paid in naval documents to the London Protocol.¹⁵

There is some basis for arguing that the London Protocol was drafted in favor of surface naval powers, particularly Great Britain, as a fall back position after efforts to outlaw the employment of submarines in a commerce destruction role had failed and as an attempt to neutralize the effectiveness of the submarine in such a role. The Protocol, if it is given a literal interpretation, is virtually unworkable in a general war between naval powers where one side has a substantial preponderance in surface naval strength because it does not confer substantially equal benefits to both sides. The practical effectiveness of the law of war in a particular conflict is conditional upon, among other factors, a crude reciprocity and rough equivalence of benefits.

The key to a workable interpretation of the London Protocol lies in determining the proper meaning of the undefined term "merchant vessel" in that document. In a general war, the true merchant vessel is rarely to be found because the belligerent states normally assume such a degree of control over their

own vessels and neutral vessels engaged in trading with them as to convert them into *de facto* naval auxiliaries. As *de facto* naval auxiliaries they should be subject to the same treatment as *de jure* naval auxiliaries, that is, they may be sunk on sight outside of neutral waters. Even in a general war, however, there may be genuine neutral traffic which is entitled to proceed unmolested. For example, in World War II, before the USSR declared war on Japan in 1945, there was a significant neutral merchant traffic to and from the Pacific coast of the USSR which passed through the US declared Pacific War Zone and was not molested by U.S. Navy submarines. In a war more limited than that of World War II, for example Korea or the Falklands, many merchant vessels, even those of the contending parties, will be engaged in normal trade quite unconnected with the war effort. Such merchant vessels are clearly not *de facto* naval auxiliaries. As such they are entitled to all of the benefits of the London Protocol. In other words, this writer finds the analysis of the London Protocol in the Mallison paper quite persuasive.

Considered in conjunction, the London Protocol, the state practice of the Second World War, and the Nuremberg response indicate that cargo carrying vessels may, under the law of naval warfare, constitute legitimate military objectives in some circumstances when they are not sailing under convoy or actively resisting visit and search. An interpretation of the London Protocol which suggested that all cargo carrying vessels are merchant vessels and therefore exempt from attack would appear to be unduly simplistic. The problem is, however, where do we go from there? Do we assume that World War II was *sui generis*? Do we assume that cargo carrying vessels do not constitute legitimate military objectives unless they are operated under a system which meets all of the Nuremberg indicia? The system approach is one we in Canada have been thinking about for our Canadian Forces Law of Armed Conflict Manual. Our current draft indicates that enemy merchant vessels may be attacked and destroyed if they are incorporated into the belligerent war effort. A decision concerning whether or not enemy merchant vessels may be generally deemed to be incorporated into the belligerent war effort will be made at the governmental level. Indicators that all enemy merchant shipping is incorporated into the belligerent war effort include:

- a) state control over merchant shipping to ensure that only items essential to the war effort are imported or exported;
- b) general use of convoys;
- c) general integration of merchant vessels into intelligence networks by, for example, requiring reports of sighting of all enemy vessels or aircraft;
- d) standing instructions to resist submarines by ramming; and

e) arming of merchant vessels.

This approach is probably broad enough to encompass the main categories of enemy merchant ships attacked during the unrestricted submarine warfare campaigns of the two World Wars. It should be noted that the approach in our Draft Manual may be too restrictive, however, as it does not include neutral merchant ships incorporated in the belligerent war effort as military objectives. One might suggest that the unconvoyed neutral tankers which transported the oil essential to the Iranian war economy and were attacked by Iraq constituted legitimate military objectives. Is there a valid legal reason for distinguishing between neutral and enemy merchant ships on the basis of flag alone when they are functionally indistinguishable?

As every naval lawyer knows, it is extremely difficult to provide accurate, simple bright line legal rules concerning the targeting of merchant shipping. Although the task is difficult, we still have a professional obligation to provide as accurate an assessment of the law as we are capable of, and to make that assessment as clear as possible for our clients. We must also ensure that we do not merely indulge in a creative labeling approach whereby “our side has merchant vessels which are exempt from attack while theirs has naval auxiliaries which we can sink on sight.” The task of developing a usable word picture to describe when the merchant ship becomes a legitimate military objective has merely been begun. We in Canada have tended to use the expression “incorporation into the belligerent war effort.” The Mallison paper uses expressions such as “performing belligerent functions” or “participation in the armed conflict.” NWP 9 uses expressions such as “acting in any capacity as a naval or military auxiliary” and “integrated into the war-fighting/war sustaining effort.” The Bochum Conference on the Military Objective in the Law of Naval Warfare used the expression “making an effective contribution to military effort.” All of these expressions are useful starting points. It is essential, however, that we now begin to fill in the details of our word picture.

Notes

*Commander W. J. Fenrick, Canadian Forces, Director of Law/Operations and Training, Department of National Defense, Ottawa. The views expressed herein are those of the writer and do not necessarily reflect either the policy or the opinion of the Canadian government.

1. Julius Stone, *Legal Controls of International Conflict* 606-7 (1954).
2. Theodore Roscoe, *United States Submarine Operations in World War II* 19 (1949).
3. J. E. Talbott, *Weapons Development, War Planning and Policy: The US Navy and the Submarine* May-June 1984, 37 N.W.C.R. 53, 68.
4. Daniel P. O'Connell, *The Influence of Law on Sea Power* 3 (Manchester, 1975).
5. M. Maurer & L. J. Paszek, *Origin of the Latoria Order*, R.U.S.I. Journal 338-44 (November 1964).
6. 1 Clay Blair, *Silent Victory* 352-60 (1975).
7. S. O'Dwyer-Russell, *Was Royal Navy VC Submariner A War Criminal*, *The Sunday Telegraph*, Feb. 5, 1989, at 1; A. De Zayas, *The Wehrmacht War Crimes Bureau* 1939-45, at 245-68 (1989).

8. 18 Trial of the Major War Criminals Before the International Military Tribunal Nuremberg, 14 November 1945 - 1 October 1946, at 319 (1948) [hereinafter IMT].
9. *Id.* at 323.
10. *Id.* at 323.
11. *Id.* at 327.
12. *Id.* at 329-30
13. *Id.* at 557-60
14. W. J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 Can. Y. B. Int'l. L. 91-126 (1986).
15. Daniel P. O'Connell, *International Law and Contemporary Naval Operations*, 1970 44 Brit. Y. B. Int'l. L. 52.

Chapter IV

State Practice Following World War II, 1945-1990

A paper by
George K. Walker *

Comments by
L. C. Green

State Practice Following World War II, 1945-1990

I. Introduction

At least ten armed conflicts at sea since World War II have involved targeting issues concerning enemy merchant shipping and neutral vessels that have acquired enemy character: the Korean conflict of 1950-53 and naval actions connected with the civil war in China, 1949-58; the Arab-Israeli conflicts of 1948-57, 1967, 1973 and 1982; the India-Pakistan wars of 1965 and 1971; the Vietnam War, with principal U.S. forces involvement between 1962 and 1973; the Falklands/Malvinas War of 1982; and, most importantly, the Iran-Iraq Tanker War of 1980-88. There was no global war similar to the experiences of World Wars I and II; in all cases the arenas of attack were relatively localized. However, to some participants the conflict was total, *e.g.*, the Tanker War as to the belligerents, Iran and Iraq; to neutral bystanders, involved to a greater or lesser degree (*e.g.* the United States in the Tanker War), the conflict was only a regional, second or third level affair.

Although these conflicts overlapped each other in point of beginning and duration, they may be analyzed conveniently in the sequence listed above. This chapter will also attempt to interweave other major sources of state practice - *e.g.*, treaties,¹ in some cases like UNCLOS,² not yet in force - that may have impact on this area, albeit tangentially, in the future. It might be noted that other sources of state practice or custom, the theme of this chapter, may be found in

[D]iplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, *e.g.* manuals of military law, executive decisions and practices, orders to naval forces, etc., comments by governments on drafts produced by the International Law Commission; state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, and resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and such depends on the circumstances.³

Most modern military manuals, *e.g.*, *NWP 9A*, contain a "disclaimer clause," which says that although the publications cannot be considered as binding on courts, "their contents may possess evidentiary value in matters relating to U.S. custom and practice."⁴ And besides customary and treaty sources, there may be general principles of law, authoritative treatises, other research of competent scholars, court decisions, or perhaps resolutions of international organizations,

that may impact the law-defining process.⁵ Some of these sources, *e.g.*, actions of international organizations, may appear for the first time in the time frame of this analysis, 1945–90, while others have been sources, perhaps subsidiary to custom, treaties and general principles, for a long time.⁶

The general format of this chapter is analysis, on a general time line when the conflict occurred, grouping adversaries where successive conflicts have occurred, *e.g.*, Korea, 1950–53, and naval activity connected with the Chinese civil war, followed by the 1948–1957, 1967, 1973, and 1982 Arab-Israeli conflicts, etc. Within each conflict, or set of conflicts, state practice will be analyzed first. This will be followed by other primary sources developed during the time frame, *e.g.*, treaties binding on the parties, and then by other developments in international law – *e.g.*, treaties that would apply to future wars at sea, treaties not related to armed conflict but whose principles may be arguably applicable in the future, and the research results of major commentators. While this has made for a longer chapter, it is hoped (and submitted) that the comprehensive approach may be more useful than examination of state practice in isolation from other sources.

This chapter is limited to its topic. Full analysis of issues involving the results of attacks on truly neutral merchant shipping, which are strictly prohibited;⁷ attacks on enemy warships or naval auxiliaries, which are permitted;⁸ attacks on warships of neutrals, which are prohibited;⁹ and attacks on certain protected vessels, *e.g.*, hospital ships, which are prohibited;¹⁰ are not always given full analysis. For example, specific humanitarian law rules that flow from such attacks may be discussed only tangentially, *e.g.*, the particular rules for notification of casualties. The same is true for claims concerning accidental attacks in peacetime, or sea–air warfare, such as the Airbus incident during the Tanker War. The chapter confines itself to high seas situations.

II. State Practice and Other Sources of International Law Since World War II

The postwar era began with ratification of the U.N. Charter, whose articles 51 and 52 recognize the inherent right of individual and collective self-defense, and the right to establish regional arrangements or agencies to deal with matters relating to the maintenance of international peace and security as appropriate for regional action. Article 2(4) of the Charter declares that all U.N. members shall refrain from the threat, or use, of force against the territorial integrity or political independence of any state. Article 2(3) states the correlative principle that U.N. members must settle international disputes by peaceful means so that “international peace and security, and justice, are not endangered.” There is, of course, an inherent tension between the principles of Articles 2(3) and 2(4) and Articles 51 and 52, in that the use of force in self-defense, perhaps through an Article 52 agency, will almost invariably involve the territorial integrity or political

independence of a state to which the defensive response is directed. Settlement by peaceful means is the polar opposite to the threat or use of force permitted under the principles of self-defense. However, Article 2(3)'s peaceful means provision is qualified by the paramountcy of international peace and security, and the order of listing of Purposes of the United Nations, as well as the content of subsequent Charter provisions, supports the view that the maintenance of peace and security is "the primary purpose of the Organization and takes priority over other purposes."¹¹ Since the "inherent right of self-defense" is preserved under article 51 in the absence of action by the Security Council, and is a correlative of actions the Council might take,¹² the right of self-defense is part of the corrective mechanisms (albeit through self-help) the Charter contemplates.

Besides the preservation of the right of self-defense, the Charter also provides, in Chapter VI, for pacific settlement of disputes, including investigations, recommendations and decisions by the Security Council of disputes "likely" to endanger the maintenance of international peace and security.¹³ The Charter also gives the Security Council, in Chapter VII, authority to act to deal with threats to the peace, breaches of the peace, or acts of aggression. Nonforce actions that the Council may direct include "complete or partial interruption of economic relations and of . . . sea, air and other means of communications" under Article 41. Article 42 gives the Council the option of deciding on force, including "demonstration, blockade, and other operations by air, sea, or land forces of Members. . . ." (Chapter VII also includes Article 51, with its statement of the inherent right of individual and collective self-defense.¹⁴) Although the principal institution for implementing Council action, the Military Staff Committee, withered during the Cold War,¹⁵ U.N. Members remain liable to obey the Council's "decisions,"¹⁶ which have been issued only rarely because of that Cold War. Thus one of the primary foci for enforcement of states' rights under international law for 1945-90 has been self-help, through claims of self-defense, anticipatory self-defense, nonforce reprisal and retorsion.

Self-defense has two elements, necessity and proportionality, and for U.S. practice includes the right of anticipatory self-defense, perhaps on a global scale, involving use of armed force where there is a clear necessity that is "instant, overwhelming, and leaving no reasonable choice of peaceful means."¹⁷ The basic self-defense principles, tersely articulated in the Charter in 1945 and developed through state practice since then, might come into play at the beginning of any armed conflict where enemy merchant ships are at sea or are being convoyed by enemy warships, or situations might develop during armed conflict involving neutral vessels. Two views have developed as to the scope of self-defense after ratification of the Charter. The U.S. position has been that a parallel customary right of self-defense exists alongside Article 51,¹⁸ while others have argued that the Charter comprehends the scope of the right, *i.e.*, that the right to self-defense occurs only when there is an armed attack.¹⁹ And, as will be seen, the peacetime

law of the sea declares that merchant ships have the nationality of the state whose flag they fly, so long as there is a “genuine and effective link” between the flag state and the vessel.²⁰ Thus a violation of Charter Article 2(4) might be claimed if there is an unwarranted attack on a neutral merchant ship as much as if a battleship bombarded a neutral coast or an army invaded neutral territory.²¹ Self-defense, whether anticipatory or in response to an attack, can be asserted in several contexts, *e.g.*, unit self-defense, where a particular ship, aircraft or group of units (*e.g.*, a carrier battlegroup) responds to use, or threat of use, of force; national self-defense, where other forces, citizens or territory are involved.²²

Those who would deny validity to the U.S. position would also say that there is therefore no right of anticipatory self-defense, although Professor Dinstein has taken an interesting middle view in suggesting a right of “interceptive” self-defense, *i.e.*, that an attack “occurs” when one party “embarks upon an irreversible course of action, thereby crossing the Rubicon.”²³ This is close to the U.S. position of anticipatory self-defense, which in the U.S. view is permitted when “there is a clear necessity that is instant, overwhelming and leaving no reasonable choice of peaceful means,”²⁴ as stated above.

Beyond the case of self-defense for a single state, the Charter, Article 51, affirms the right of collective self-defense. The result has been formation of bilateral and multilateral treaties, which, when duly published, communicate the existence of a critical defense zone (CDZ), perhaps of half a continent. For the now-defunct USSR, this had been Eastern Europe.²⁵ The Western Europe counterpart has been NATO, with its carefully-delineated boundaries that do not include all the national territories of its partners as applicable for a required collective response.²⁶ The existence of a formal treaty arrangement may not be necessary to signal a CDZ,²⁷ but it frequently is, as in the case of NATO.

There is a similar division of authority on the use of armed force reprisals after 1945 in situations not involving armed conflict. Reprisals are proportional responses, illegal as a matter of international law, to a prior act illegal under international law by another nation.²⁸ Most authorities say that reprisals involving use of force cannot be asserted as a matter of self-defense;²⁹ a few have taken a contrary position.³⁰ *NWP 9A* appears to take no position on the issue, but its analysis of wartime reprisals and the severe limitations that international law and U.S. policy would place on such reprisals³¹ would tend to the view that U.S. policy opposes forcible reprisals in peacetime. Reprisals of a non-force nature, *e.g.*, economic sanctions directed at a nation violating international law, are valid in the Charter era.³² Retorsions – unfriendly but legal responses to other nations’ actions, *e.g.* conscious refusal of a warship to respond to a dipped ensign of another nation’s merchantmen – also remain valid responses.³³

The problem has been compounded by the recognition that there has been no bright-line division between peace and war,³⁴ and that therefore a static set

of rules, some to be applied during wartime and others applicable during peace, is not a useful concept for many situations.

For the particular issue of this book – attacks on merchant ships – there is another set of issues, springing from the nature of commercial ventures at sea for most of this century. Flags of convenience, now euphemized as open registry, have called into question the nationality of the merchantman, whose connection with the flag state may be nominal.³⁵ The ship may be crewed by nationals of several states, while its officers may have allegiance to another nation. The vessel may be owned by a corporation whose stockholders are not nationals of the flag state. The insurance coverage may be spread among still other states' nationals. The cargo may be consigned to one person, or it may be beneficially owned by many, and the same may be said of cargo insurers. The ship may be chartered to another national, and there may be subcharterers as well, each with their own insurance coverage. Today nonbulk cargo is frequently lifted by sealed containers, perhaps loaded and sealed by the consigner, for which the bill of lading may recite that the container is "said to contain" certain items, with a resulting problem for a visiting officer searching for contraband.³⁶ Even though the USSR with its system of state ownership is collapsing, many nations operate commercial shipping companies, for which the defense of sovereign immunity may or may not be available, depending on the cargo.³⁷ Although the rule of the 1909 London Declaration that warships may rely on the flag the merchantman flies for visit and search purposes,³⁸ the existence of other interests, and behind them the states whose nationals are interested, cannot be dismissed as a factor in the problem. Given the "intermediate" status of most armed conflict situations today – somewhere on the continuum between peace and total war³⁹ – the problem is likely to be more difficult, and claims more frequent, than in a World War II-style scenario.

These preliminary remarks are generally directed at the beginning of hostilities in the Charter era, *i.e.*, after 1945, but they might also apply if a neutral merchant vessel is perceived to be on unneutral service⁴⁰ or if a neutral power becomes involved in the conflict after initial commencement of hostilities.

From the problems of *jus ad bello* to problems of *jus in bello* in recent armed conflict situations⁴¹ we now turn.

A. Korea: 1950-53, and the Civil War in China, 1949-58

Immediately after the invasion of the Republic of Korea (ROK) in late June 1950, the U.N. Security Council authorized the United States to respond to the attack and called upon all nations to assist in that effort. The Soviet Union was not present when the Council vote was taken and hence did not veto these resolutions.⁴²

As part of this response, the United States, on July 4, 1950, informed the U.N. Secretary-General "that, in support of the resolution approved by the

Security Council relative to the attack upon the Republic of Korea [ROK] involving forces from North Korea, . . . a naval blockade of the entire Korean coast" had been ordered by the President of the United States.⁴³ Notice of the blockade had been broadcast on July 4; its 39° 35'N and 41° 51'N limits "were established to keep all sea forces well clear of both Russian and Chinese territory," thus allowing access to territory of nonbelligerents. Both the USSR and the People's Republic of China (PRC) protested the blockade and refused to acknowledge its existence or legality although both observed it. All warships except North Korean vessels were allowed to enter North Korean ports; all other ships were barred. Although blockading forces were meager at first, the blockade was soon set and became effective along 500 miles of the Korean peninsula. After initial attempts to break the blockade, there was no active surface or submarine and little air opposition. Mines laid by North Korea with Soviet assistance were employed, however.⁴⁴

The blockade of Korea had several important ramifications for international law. First, it was part of the first major peacekeeping operation authorized by the Security Council under the Charter. Second, the Council authorization for U.S. leadership in the defense of Korea began the practice of the "agency principle"⁴⁵ used in subsequent operations directed by the Council - *e.g.*, Rhodesia⁴⁶ - or recommended by the General Assembly.⁴⁷ Third, practice under the blockade conformed to previously-established principles of the law of blockade and thereby reinforced them.⁴⁸

U.N. naval forces also evacuated diplomatic personnel and U.S. civilians aboard U.S. warships after the initial North Korean attack in 1950; some dependents were evacuated by commercial shipping.⁴⁹ Substantial numbers of Koreans who wanted to leave North Korean-occupied South Korea or North Korea were also evacuated by these ships when U.N. land forces later rolled north or were pushed south.⁵⁰ The evacuations were well-advertised in the media, although there were no formal agreements between U.N. forces and North Korea, as customary law would dictate. Adversaries to these operations did not attack the evacuation ships, but if they had, there would have been possible violations of the rules against attacking cartel vessels or ships performing humanitarian missions.⁵¹ The use of media announcements in lieu of agreements was an extension of the traditional rule requiring prior agreements between belligerents.⁵² As such, the U.N. procedure was the beginning of incipient custom as to the procedure.

Local convoy operations began soon after hostilities;⁵³ no trans-Pacific conveying was employed.⁵⁴ Vessels escorted included at least 40 Japanese-owned freighters under the control of Shipping Control Administration, Japan (SCAJAP); U.S. Army transports and cargo ships, and Military Sea Transportation Service (MSTS) vessels under command of the Chief of Naval Operations of the U.S. Navy. SCAJAP was part of the U.S. administrative structure for the

occupation of Japan. MSTs vessels included commissioned naval vessels (designated U.S.S. like warships but primarily cargo carriers in nature), U.S. civil service-manned ships (designated U.S.N.S.), and a tanker fleet under time charter to MSTs from private companies.⁵⁵ As in the case of ships involved with evacuations,⁵⁶ there were no attacks on the convoys, which shuttled warfighting and war-sustaining personnel and goods from Japan and elsewhere to the Korean peninsula. Attacks on these convoys, whether the ships were under SCAJAP, U.S. Army, or MSTs control, would have been justified as military convoys for the warfighting/war-sustaining effort.⁵⁷ Since some of the same merchantmen may have been employed for law-protected voyages (*e.g.*, cartels or evacuations), and at other times in carriage of warfighting or war-sustaining efforts, the dilemma of the 1907 Hague Convention (VII) on conversion of merchant ships to warships⁵⁸ is apparent and illustrates the Convention's possible supersession in practice.⁵⁹ (The United States is not a party to Hague VII.)⁶⁰

U.N. forces took the position that since fish was an important source of food for North Korea, including its armed forces, destruction of all fishing boats, inshore and offshore, was strategically necessary.⁶¹ Commander Fenrick has stated that

the anti-fishing campaign appears to have been an extension beyond previous practice. It must, however, be conceded that . . . contraband lists in World War II specified food as conditional contraband. . . . Although all the naval weapons were used, neither nuclear weapons nor submarines in the commerce destruction role were used during the conflict.⁶²

Although a naval blockade of the PRC was considered after the Chinese intervention in the Korean peninsula land campaign, those plan "folders stayed on the shelf." Throughout the conflict, "In the northern Sea of Japan the . . . Soviet Far Eastern Fleet maneuvered, undisturbed and undisturbing."⁶³ Later in the war, on September 27, 1952, U.N. Commander (and U.S. General) Mark W. Clark proclaimed a Sea Defense Zone (SDZ), "for . . . preventing attacks on the Korean Coast; securing the [U.N.] Command sea lanes of communications and preventing the introduction of contraband or entry of enemy agents into [the] Republic of Korea."⁶⁴ Paralleling the "Peace Line" proclaimed by ROK President Syngman Rhee earlier in 1952 to claim continental shelf and exclusive fishing rights for South Korea,⁶⁵ the Clark Line was rescinded August 25, 1953 as part of the armistice negotiations.⁶⁶ Although Professor O'Connell has asserted that the SDZ "was operationally successful because in the circumstances the law could be overlooked,"⁶⁷ his position, taken in 1975, was not correct in 1952 when the Clark Line was proclaimed, or today. As analyzed in the contexts of the 1982 Falklands/Malvinas war and the 1980-88 Tanker War, Parts II.F and II.G, such war zones are legal so long as they are limited in time and geographic scope proportional to the conflict. As sources for those conflicts illustrate, such

zones have a history of state practice going back to at least the Russo-Japanese War of 1904–05.⁶⁸ And to the extent that the Clark Line area coincided with the Security Council decisions authorizing defense of Korea, the SDZ was legal for that reason as well.⁶⁹ The geographic coincidence of the Rhee Line, which ran up to 200 miles off the ROK coasts and was primarily aimed at excluding fishermen from Japan, then emerging from postwar occupation,⁷⁰ illustrates a problem common to the postwar world of relatively limited naval warfare and the seaward extensions of claims of national sovereignty, such as the exclusive economic zone (EEZ), or the continental shelf.⁷¹ While it might be perfectly valid for a state to reasonably regulate fishing and other economic activity 50 miles off its coast, as North Korea has purported to do recently, that nation's geographically coincident 50-mile defense exclusion zone clearly is not proportional, in duration or area, relative to whatever threat(s) North Korea might perceive,⁷² and thus is illegal under international law.

The Korean conflict also saw the genesis of another source of law for naval warfare. When the USSR returned to the Security Council and its vetoes throttled further Council action on the war, the General Assembly passed the "Uniting for Peace" Resolution (UFP) with the backing of the United States.⁷³ UFP in effect construed the Assembly's largely non-binding authority under the U.N. Charter⁷⁴ to include recommendations to U.N. Members for further prosecution of the war. UFP was the legal vehicle for later Assembly-approved peacekeeping operations, most of which did not involve U.S. forces, and few of which involved naval units.⁷⁵ The UFP process has been employed in situations outside the arena of armed conflict, often to the chagrin of the United States. In theory at least, UFP remains as a possible source of claims to the control of naval warfare. Two important products of the UFP process include the 1970 General Assembly Resolution 2625, declaring principles of friendly relations and cooperation among states, and the 1974 Resolution 3314, defining aggression, both adopted by consensus.⁷⁶

(1) *The Civil War in China*

During the same time, the U.S. Seventh Fleet had begun the Taiwan Straits Patrol to prevent the PRC from invading Taiwan or the Republic of China from invading the mainland as a corollary to the Korean conflict,⁷⁷ rejecting USSR claims that this was an act of aggression and a blockade of Taiwan.⁷⁸ In 1953 the United States changed the Patrol to a defensive shield for Taiwan because of PRC entry into the Korean War.⁷⁹ Although no formal mutual defense treaty with Taiwan was ratified until 1954,⁸⁰ the United States had retained its posture as a World War II ally of Nationalist China before then.⁸¹ Thus U.S. naval forces could legitimately protect Taiwan's territorial integrity under a self-defense theory as long as Taiwan acquiesced in this form of limiting an ally's freedom of movement.

In 1949, the United Kingdom and the United States had protested the Republic of China's declared blockade of the China coast. Several U.S. and U.K. merchantmen were seized.⁸² The practice as to the United States stopped with advent of the Korean War and President Truman's statement directed toward the Taiwan government.⁸³ Seizures of Soviet bloc vessels by Taiwan government ships occurred in 1953-54, for which the United States disclaimed responsibility,⁸⁴ and U.K. ships also were molested up through 1953, for which Great Britain protested and declared that U.K. warships had been instructed "to afford protection to British ships on their lawful occasions on the high seas."⁸⁵ From 1950 through 1953, there were 90 incidents of Nationalist Chinese interference with international shipping destined for PRC ports. Two thirds of these incidents involved U.K.-flag vessels. These ships were detained in Taiwanese ports and their cargoes confiscated.⁸⁶ Nevertheless, James Cable has rated the Nationalists' operation "not very successful" from the standpoint of gunboat diplomacy.⁸⁷ At the same time, PRC warships were successfully employing gunboat diplomacy against Japanese fishing vessels; 158 were seized between 1950 and 1954 "before Japanese fishermen agreed to respect Chinese prohibited zones."⁸⁸ South Korea employed the same practice from 1953 through 1955. The 1958 PRC attack on the Quemoy and Matsu Islands close to the China mainland but held by the Taiwan government, prompted a U.S. response of 60 warships. "Smaller ships began escorting Nationalist convoys to the offshore islands. The PRC response was the issuance of a declaration extending China's territorial waters from 3 to 12 nautical miles, which applied to the coastal islands . . . and all other islands claimed as Chinese territory."⁸⁹ The United States, as a matter of policy, did not send its convoying warships into Quemoy/Matsu territorial waters, but it did not thus imply recognition of PRC claims to territorial seas around the islands.⁹⁰ During the 1950s PRC PT boats developed the tactic of concealing themselves in PRC fishing fleets and darting out of this cover to attack Nationalist ships.⁹¹ Both the U.S. tactic of convoying and the PRC use of fishing fleets to camouflage speedboats were later employed in the Tanker War.

The United States could convoy Nationalist vessels to the offshore islands, and the convoys, if they carried goods that did not contribute to the Nationalist warfighting/war-sustaining effort, enjoyed legal immunity from attack. Even if vessels did carry goods to support the Nationalists' efforts to respond to a civil war, the United States could legitimately convoy them. Until 1979, the United States recognized Taiwan as the legitimate government of all China and had a self-defense arrangement with Nationalist China dating from World War II.⁹² Thus the United States, as a matter of self-defense,⁹³ could have defended its escorting ships and any convoyed vessels from attack.

Small coastal fishing boats engaged in their trade are exempt from capture or attack. However, if the boats aided and abetted the speedboats by concealing

them or otherwise assisting in their belligerent acts, the fishing craft lost their immunity.⁹⁴ This issue was apparently never tested insofar as U.S. naval vessels were concerned, but several Nationalist vessels were hit, and there was response in kind.

(2) *Other Trends*

Writing just after the close of the Korean War, Professor Tucker confirmed the traditional rule that small coastal fishing and trade vessels, so long as they did not participate in the war effort, were exempt from capture and destruction,⁹⁵ as did *NWIP 10-2*,⁹⁶ the predecessor to *NWP 9A*. They followed the view of Oppenheim's current treatise, published in 1952.⁹⁷ All authorities agreed that coastal steamers or relatively large, deep-draft vessels were not within the exception.

Professors Oppenheim and Tucker, tracing the shift from the mid-eighteenth century, when the rule was that private enemy merchant ships might be captured, through the early twentieth century debate over capture, to the rule following World War II and the early Fifties, concluded that such vessels could not be captured, attacked and destroyed, with these exceptions:

- (1) A ship refused to stop when summoned to do so;
- (2) A ship actively resisted visit and search;
- (3) A ship sailed under convoy of military ships and/or aircraft;
- (4) A ship was armed with offensive weapons, and such have been used, were intended for use, against an enemy;
- (5) A ship was incorporated into or assisted the enemy's armed forces intelligence system; or
- (6) A ship acted as a naval or military auxiliary to enemy armed forces.

The merchantman's passengers, crew and papers were to be placed in safety if circumstances permitted, and the attacking ship was required to look for survivors and to protect them and the dead against ill treatment if the ship were sunk. If a merchantman desired to surrender, the attacking vessel could not refuse quarter.⁹⁸ *NWIP 10-2* approved exclusion zones, stating that "[w]ithin the immediate vicinity of his forces, a belligerent commanding officer may exercise control over the communications of any neutral vessel . . . whose presence might otherwise endanger the safety of his operations," and that "a belligerent may establish special restrictions . . . upon the activities of neutral vessels . . . and may prohibit altogether such vessels . . . from entering the area. Neutral vessels . . . [failing] to comply . . . expose themselves to the risk of being fired upon."⁹⁹

Professor Tucker, in whose Naval War College analysis appears the first edition of *NWIP 10-2*,¹⁰⁰ says that war zones directed against enemy merchantmen not integrated into the war effort, or presumably otherwise not exempted (as being unarmed), would not justify a shoot-on-sight policy.¹⁰¹ Tucker agreed with *NWIP 10-2* that practice allowed controlling neutral vessel movements, and that merchantmen carrying contraband were subject to seizure.¹⁰² Oppenheim stated that war zone declarations warning neutrals of entry only at their peril were illegal. However, “[a]s between the belligerents only, provided that the zone is enforced by the use of means . . . which comply with the laws of maritime warfare, . . . there can be no doubt of the lawfulness of the practice.”¹⁰³

Although negotiated during the Korean War, the four Geneva Conventions of 1949 did not come into effect for the United States until 1952. They are now generally effective worldwide.¹⁰⁴ The Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (GWSEA) is, in a sense, a misnomer, for its provisions apply, *inter alia*, to persons wounded, sick or shipwrecked who are “[m]embers of crews, including masters, pilots and apprentices, of the merchant marine . . . of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.”¹⁰⁵ An inference could be made that the negotiators would not have included all merchant seamen, including those aboard enemy merchant vessels, if they did not feel that all such ships were subject to attack under some circumstances, which had become the norm during World War II.¹⁰⁶ GWSEA also exempts small coastal rescue craft from attack.¹⁰⁷

The last phrase of article 13(5) of GWSEA – “who do not benefit by more favorable treatment under any other provisions of international law” – invites attention to the growing body of human rights norms, typically encased in treaty format, but perhaps applicable today as general practice of states.¹⁰⁸ The first of these was the Genocide Convention,¹⁰⁹ and there has been a veritable torrent of them since, some regional and some worldwide in application. To be sure, many human rights conventions contain “escape clauses” that render them largely inoperative during times of national emergency,¹¹⁰ e.g., armed conflict, but a future international tribunal might declare them articulative of a general customary standard, as the World Court did in the *Nicaragua Case*,¹¹¹ perhaps ignoring the escape clause limitation. In general, future wars at sea may be largely free of these constraints, owing to the targeting of ships, not people, but it would seem that a national command authority ordering a war of genocidal extermination at sea, or an individual commander that directs execution of a rescued crew with genocidal intent, would be as guilty of violating human rights norms as of violating the law of armed conflict. Existence of this body of human rights law at least creates the expectation that claims of such violations will be made in future armed conflicts at sea.¹¹²

The 1954 Hague Cultural Property Convention¹¹³ may also impact armed conflict at sea. The United States is not party to this convention, although about 80 nations are. Although the primary purpose of the Convention was protection of sites and immovable and moveable property on land as a response to the Nazis' looting of Europe during World War II,¹¹⁴ there are implications for naval warfare. If a belligerent that is party to the Convention decides to transport cultural property, that state must apply to the Commissioner General for Cultural Property appointed under the Convention, who consults with the Protecting Powers for each belligerent on measures for specifically protected transport and who appoints inspectors to determine that only cultural property is being shipped in accordance with approved measures. Parties to the Convention pledge to "refrain from any act of hostilities, directed against transport under special protection." The ship must display a special emblem, a pentagonal blue and white shield.¹¹⁵ In "urgent cases," particularly at the start of armed conflict, a belligerent may "As far as possible notif[y] . . . Parties," but the pentagonal shield may not be displayed unless other belligerents expressly grant immunity. Other belligerents must "take, so far as possible, the necessary precautions to avoid acts of hostility directed against [the transporting ship if it displays] the distinctive emblem."¹¹⁶ If either method is employed, the property and the carrying ship are immune from seizure, placing in prize, or capture.¹¹⁷ In effect, unless there is advance consent for emergency transfer, there would be a high risk of attack, even if there is a shield displayed or other notice given. The dilemma for the naval commander would be a decision whether the transporting vessel was employing a perfidious ruse or whether it was in fact carrying only cultural property. In any event, the Convention guarantees the right of visit and search of ships operating under both kinds of transport.¹¹⁸ The Convention also generally excepts from its operation cases of "imperative" "military necessity" for such time as that necessity continues.¹¹⁹ Immunity may also be withdrawn by a belligerent if its opponent violates the requirement that the cultural property not be employed for military purposes,¹²⁰ e.g., transporting valuable cultural property to pledge it for purchase of war material. If a Commissioner has been appointed, he or she must be notified of either kind of withdrawal from immunity.¹²¹

As in the case of the human rights conventions, nonratifying nations may find, after the fact, that the Convention articulates customary law norms,¹²² particularly if the state is party to a similar regional agreement such as the Roerich Pact,¹²³ which covers the same ground for certain Western Hemisphere nations, including the United States. At the least, there can be expectations of claims of violations of international law from Convention parties. The Convention applies among parties bound by it, even though a co-belligerent is not bound by it. A co-belligerent may declare its acceptance of the Convention for the conflict,

and all are then bound so long as the nonparty co-belligerent adheres to the Convention's terms.¹²⁴

B. Arab-Israeli Conflicts: 1948-57, 1967, 1973, 1982

On May 15, 1948, toward the opening of the first conflict, Egypt instituted shipping inspections at Alexandria, Port Said and Suez, the latter two being entry ports for the Suez Canal. A May 18 proclamation provided that "munitions or merchandise of any kind destined directly or indirectly to the institutions or persons residing in Palestine" might be confiscated in accordance with international law. (Israel had been proclaimed a state that day.)¹²⁵ On May 29 the U.N. Security Council called upon all governments to refrain from introducing fighting personnel, or importing or exporting war material into or to the area during a ceasefire.¹²⁶ A June 3 notice applied the May 18 proclamation to Israeli exports. On July 8 Egypt established a prize court.¹²⁷ Egypt further decreed search and seizure procedures, and published a contraband list, "including arms and armaments, chemicals, fuels, armed forces automobiles, and bullion," on February 6, 1950. On November 28, 1953, the list was expanded to include foodstuffs and "other commodities likely to strengthen the war potential" of Israel. The decree applied to vessels in Egyptian territorial waters or the Canal.¹²⁸

On November 14, 1948 Egypt detained the U.S.-flag S.S. *Flying Trader* on grounds that it was transporting war materials. *Trader's* cargo included 4000 bags of rice, an ingot of tin and 38 "trucks." The rice was released; the fate of the tin is unknown.¹²⁹ The Egyptian prize court later said the "trucks" were "in fact guns, etc. [, i.e.] . . . armored cars each capable of carrying a dozen soldiers." *Trader* had received the vehicles in Bombay; they were part of a consignment of 50 originally sent on *Trader's* sister ship, S.S. *Flying Arrow*, from the United States to Tel Aviv. Twelve vehicles were offloaded at Tel Aviv before the war began, but more could not be discharged because of attacks in this port. *Arrow* then proceeded to Bombay, India, where the 38 vehicles were transhipped to *Trader*, which sailed for New York via Genoa, Italy, a port allegedly "a principal base for contraband traffic destined for" Israel. Genoa was on the Egyptian blacklist of ports. *Trader* was stopped at Port Said. Two bills of lading for the vehicles were offered to the court, the original "to order" and a copy naming an individual. The vehicles were condemned as lawful prize.¹³⁰ Perhaps equally important was the prize court's ruling that the seizure was legal despite conclusion of a General Armistice Agreement between Egypt and Israel before the seizure.¹³¹ Although this aspect of the holding has been criticized,¹³² the *Trader* case is illustrative of the potential for legal approval of claims to commit "warlike" acts while there is a technical "peace."¹³³

The United States protested Egypt's oil tanker regulations requiring a ship to certify it was heading for a neutral port and to obtain an Egyptian certificate that the cargo was for local consumption in a neutral port in late 1950. The Egyptian

regulations also provided that if a tanker did not comply, it would be denied facilities. The protest “stated that these regulations would work undue hardship on normal shipping operations” and reserved the right to protest on legal grounds. Egypt responded by blacklisting vessels whose manifests showed they had carried to Israel “any material considered contraband by . . . Egypt.”¹³⁴

The United Kingdom, on the other hand, had “compromised the position” of straits passage (through the Straits of Tiran) to the Israeli port of Eilat by agreeing to contraband search at Adabiya or Suez, a “concession to belligerency . . . to prevent hostilities from spilling over on to the high seas, but the British agreement carried with it the implication of a recognition that Egypt had belligerent rights, and it claimed no reservation as to rights of passage through the straits.”¹³⁵ Although Egypt claimed the United States and Denmark had also acquiesced in such searches,¹³⁶ the record is less than clear but would indicate that the United States protested some, if not all, of the Egyptian procedures, and that probably Denmark did too.¹³⁷ Indeed, after an Egyptian corvette stopped, plundered and damaged a U.K. merchantman on July 1, 1951 in the Gulf of Aqaba as part of the attempted blockade of Israel, and British protests and Security Council discussion were unavailing, a British destroyer flotilla was sent to the Red Sea “to prevent further incidents of this kind.” On July 26, Egypt and Britain reached agreement on future procedures for U.K. ships. From late 1951 to March 1952 British warships – usually two cruisers – were employed to keep the Canal open when Egyptian labor was withdrawn and clearance was denied U.K. vessels. The cruisers provided a protected labor force to keep the Canal open until Egypt resumed operations.¹³⁸

After the Egyptian-Israeli Mixed Armistice Commission reported its belief that it did not have the right to ask Egypt to stop interfering with goods passage through the Canal,¹³⁹ the U.N. Security Council passed a resolution on September 1, 1951, finding that Egypt’s interference with neutral shipping’s passage was “an abuse of the right of visit, search and seizure” that could not be justified on the basis of self-defense and was a violation of freedom of the seas. The Council called upon Egypt to end the restrictions.¹⁴⁰ The resolution went unsupported,¹⁴¹ and the result was more seizures and protests.¹⁴² A second Council resolution was vetoed by the USSR in 1954.¹⁴³ Professor O’Connell has inquired whether the 1951 resolution applied to the Gulf of Aqaba.¹⁴⁴ After Egypt nationalized the Canal, Israel’s 1956 attack on Egypt, a ceasefire and establishment of the U.N. Emergency Force, the Canal was reopened under management of the Suez Canal Users’ Association with right of passage guaranteed.¹⁴⁵ From February – April 1957, U.S. destroyers had patrolled the Straits of Tiran to successfully prevent Egyptian interference with U.S. merchantmen bound for Israel. Other U.S. naval vessels evacuated U.S. citizens and “friendly nationals,” on a space-available basis, from Haifa and Alexandria.¹⁴⁶

Dr. von Heinegg has summarized the decisions of the Egyptian prize courts from 1949 through the Fifties:

... [T]he Egyptian prize court in its jurisdiction very often referred to the decisions of prize courts of the two World Wars. Whereas in a number of cases neutral cargo was released, the principle that a neutral flag covers enemy cargo was acknowledged only if the neutral did not cooperate with the enemy. Enemy destination was assumed in conformity with, *e.g.*, British prize jurisdiction of the two World Wars, black lists playing an important role. All goods labelled "Produce of Israel" were considered to be of enemy character. The notion of contraband was interpreted extensively comprising, *e.g.*, tea, coffee, onions, [and] spices.

The judgments of the Egyptian prize court bore a strong resemblance to the prize jurisdiction of the two World Wars. It is, however, remarkable that all ships and goods affected had been captured in Egyptian ports. Partly the goods had been unloaded before the outbreak of hostilities in 1948. In the . . . *Inge Toft* the court expressly indicated that Egypt did not exercise its rights on the high seas but restricted itself to territorial waters and ports. Even though the Security Council in September 1951 [had] characterized the Egyptian practice as an "abuse of the exercise of the right of visit, search and seizure Egypt more or less regularly maintained it until the conclusion of the peace treaty of 1979."¹⁴⁷

In 1949 an armistice to the first round of fighting had been declared, and it was in response to this that the Security Council in Resolution 95 had declared that Egypt had indulged in "an abuse of the right of visit, search and capture;" Egypt considered the armistice ended due to Israeli "aggressions," including a high seas attack on *Karim*, an Arab vessel.¹⁴⁸ The important point is that the precedent of seizing ships during an armistice was deemed legal by Egypt,¹⁴⁹ although denounced by the Security Council, when there was an alleged breach of the armistice. The Council had made no "decision" requiring U.N. Members to assist in ending the seizures, as it had during the Korean conflict.¹⁵⁰ The second point is that *Inge Toft* does not indicate that Egypt felt compelled, as a matter of international law, to limit its seizures to its territorial waters:

... The United Arab Republic does not exercise her rights of belligerency on the high seas, but limits herself to exercising them within the confines of her territory, ports and territorial waters. Article 10 of the [Constantinople] Convention of October 29, 1888 [governing use of the Suez Canal], gives Egypt the right to take all necessary measures for the maintenance of public order in time of peace and for her defence in time of war. It is natural that the requirements of such protection are left entirely to the United Arab Republic, just as are the requirements of legitimate self-defence. The policy of the economic boycott of Israel has been part of the public order of the United Arab Republic since 1948. To renounce this policy would be to compromise this public order in all the Arab and Islamic States.¹⁵¹

The case should not be read as lending support to the questionable view that belligerent naval operations, which may include seizure of merchantmen, can be conducted only near the belligerents' coasts.¹⁵²

Although Israel attempted to characterize the seizures as a blockade, and therefore violative of the 1888 Constantinople Convention's prohibition of such in the Canal, the Egyptian actions were not, technically, that form of interdiction. During the Security Council debate on the seizure, Egypt asserted in 1951 that they had been relatively few in number and were essential if the nation were to "survive."¹⁵³ This seems to be a vague reformulation of a claim of the right of anticipatory self-defense - *i.e.* seizure of war material before it could be used against Egypt - qualified by the principles of necessity and proportionality¹⁵⁴ that Egypt had asserted in earlier Security Council debates.¹⁵⁵ In any event, the Council condemned such actions in its September 1, 1951 resolution.¹⁵⁶

In the 1967 Six Day War, Egyptian submarines sank two innocent Greek freighters in the Mediterranean Sea, one off Alexandria and the other further west in the Mediterranean.¹⁵⁷ A sidebar aspect of this war was a U.K. statement that it would join with other nations to assure right of passage through the Straits of Tiran. A British carrier group and the U.S. Sixth Fleet were concentrated in the Eastern Mediterranean, but "[t]his threat of purposeful force . . . was not pursued and . . . did more harm than good to British and American interests." The *U.S.S. Liberty*, which was monitoring Israeli transmissions during the Egyptian phase of the war, was damaged in an attack by Israeli PT boats, for which compensation was paid to the United States by Israel for loss of life and injuries among the crew and for damage to *Liberty*, without admission of fault. *Liberty* was configured like a merchant cargo ship but flew the U.S. ensign, was painted haze grey like all U.S. warships in the Mediterranean Sea, and had traditional pendant numbers on the bow and stern. Israel had declared a very imprecise exclusion zone, warning all ships to keep away from "the coasts of Israel during darkness." As to what coasts were meant (*e.g.*, conquered territory also?) was less than clear. There was also an informal, private warning to the United States. As Commander Jacobsen has analyzed it, the public exclusion zone as a matter of law failed because of vagueness; in any event, the attack occurred in daylight (2 p.m.). The second, privately-warned zone was not legitimate either because it was not publicly announced in such a manner that *Liberty* would have been aware of the risk.¹⁵⁸ Although *Liberty* was a warship,¹⁵⁹ if she had been a merchantman, the same result would have obtained as to the legality of the attack so long as the ship was not engaged in work that assisted a belligerent, *e.g.*, gathering intelligence. The attack on the *Liberty* might be contrasted with the sinking of the Israeli destroyer *Eilat*, a warship of one of the belligerents, during a resumption of hostilities in October 1967. During the next month, the U.N. Security Council adopted Resolution 242 which "Affirm[ed] further . . . the necessity for guaranteeing freedom of navigation through

international waterways in the area,"¹⁶⁰ which undoubtedly meant the Suez Canal but may have included the Gulf of Aqaba.¹⁶¹

During the 1973 Yom Kippur War, international shipping was warned about entering the region of conflict, which first comprised Egyptian and Israeli territorial waters, but later further parts of the sea plus Egyptian, Libyan and Syrian ports. In October 1973 the Syrian navy captured and diverted a Greek liner, *Romantica*, but released her the next day after the Italian ambassador intervened. No further such incidents occurred, perhaps because of international protests, although Egypt regularly stopped, visited and searched neutral merchantmen. Third states' reactions varied: African nations unilaterally suspended or terminated diplomatic relations with Israel; Arab nations boycotted oil exports to Israel and the United States; Great Britain embargoed arms, largely affecting Israel; except for Portugal, other West European nations refused to allow use of their territories for supply or assistance to any belligerent, thereby cutting down the black-list potential of the 1948-57 war. Arab navies adopted the tactic of taking shelter beside merchant ships in their harbors after firing missiles at Israeli warships. Egypt declared a blockade in the Red Sea and attacked but missed an Israeli-bound tanker. In the Gulf of Suez, Egypt acted to blockade the Abu Rudiers-Eilat route used by Israeli-chartered tankers carrying oil from the Israeli-occupied Sinar fields to Eilat. In response to Egypt's blockade of the Straits of Bab el Mandeb, Israel counter-blockaded the area.¹⁶² The rationale of Egypt in the Bab el Mandeb operation was obscure:

blockade was maintained in the Straits of Bab el Mandeb. Whether this was conducted by units of the Egyptian navy or not was apparently deliberately obscured, perhaps because the Egyptian government had not made up its mind whether the appropriate concept was that of distant blockade of Israel as an enemy with whom Egypt was at war; or the exercise of belligerent rights in the territorial seas of an allied State engaged in a collective self-defence operation; or the right of a coastal State (in this case Southern Yemen) to close its territorial seas to enemy-destined traffic, even though the territorial seas lie within straits. Egypt's only official announcement on the subject referred to the 'legitimate right of the Republic of South Yemen', which also by decree unilaterally asserted sovereignty over the seaway. South Yemen, with only two ex-Russian submarine chasers, two minesweepers and a total naval complement of 200 men, was in no position to prevent the passage of ships in the face of any resistance, and it seems that units of the Egyptian navy did, in fact, fire warning shells, visit and search foreign ships and warn off those bound for Israel.

When the destroyer *U.S.S. Charles Francis Adams* intercepted the radio message of the *S.S. La Salle*, a U.S.-flag merchantman, that she was being fired on in the Straits, *Adams'* sailing was delayed by French authorities until such time as *La Salle* had turned back to Massawa, Ethiopia. A U.S. Seventh Fleet task force entered the Indian Ocean from the Pacific, and was believed to have orders to

protect American neutral traffic in the Straits. This ended the blockade, at least insofar as U.S.-flag shipping was concerned.¹⁶³ The naval war had no decisive influence on the final outcome of the conflict.¹⁶⁴ The 1979 Egypt-Israel peace treaty, ending the 1973 war, provided that Israeli ships, and cargoes coming to or from Israel, enjoyed free passage rights through the Suez Canal and its approaches on the basis of the Constantinople Convention,¹⁶⁵ which had internationalized the Canal. Israeli nationals, vessels and cargoes, as well as persons, vessels and cargoes going to or from Israel, would be given non-discriminatory treatment in use of the Canal. Egypt and Israel declared the Straits of Tiran and the Gulf of Aqaba "open to all nations for unimpeded and non-suspendable freedom of navigation and overflight." They also agreed to respect the other's right to these rights in the Straits and the Gulf.¹⁶⁶ A protocol recognized the rights of vessels of the parties to innocent passage through the other's territorial waters "in accordance with the rules of international law."¹⁶⁷

During the 1982 campaign in Lebanon, Israel imposed a naval blockade on the Lebanese coast to prevent weapons from reaching the Palestine Liberation Organization, then based in Lebanon.¹⁶⁸ Any ships or boats running guns to the PLO were subject to interdiction, capture and condemnation or destruction under the traditional rules of blockade. Weapons have always been considered absolute contraband.¹⁶⁹

(1) *Trends in the Arab-Israeli Conflicts*

The 1948, 1973 and 1982 conflicts saw the declaration of traditional close-in blockades, with the typical problems of visit, search and capture.¹⁷⁰ The eventual result of the 1979 Egypt-Israel peace treaty was recognition of Israel's right to use the Suez Canal, internationalized by the 1888 Constantinople Convention, a further limitation on the opportunity to visit, search and capture merchantmen.¹⁷¹

Various high seas attacks by Egypt on neutral freighters were clearly illegal under international law,¹⁷² as was the Israeli attack on the *Liberty*, a U.S. Navy warship marked as such.¹⁷³ The high seas attacks by Egypt on neutral merchantmen was an ominous portent of things to come in the Tanker War.

(2) *Other Trends*

During these conflicts the four 1958 law of the sea treaties were negotiated and have come into force.¹⁷⁴ All save the 1958 Fisheries and Conservation Convention have been accepted as restatements of customary law.¹⁷⁵

The 1958 High Seas Convention in particular has provisions that relate to this study. It declares that the high seas are "open to all nations, [and] no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under [the Convention] and by the other rules of international law," e.g., the law of armed conflict. Thus as between belligerents, the convention would be modified by the law of naval warfare. However, non-belligerents can claim rights under the Convention, except insofar as the

law of war affects them, e.g., exclusion zones. The Convention does state the rights of freedom of navigation and freedom of fishing, but these and others “recognized by the general principles of international law,” must be exercised by states “with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.”¹⁷⁶ The Territorial Sea Convention provided for a contiguous zone as part of the high seas to allow littoral states to police such an area for, e.g., smugglers, but the negotiators did not include any provisions for shoreside security zones.¹⁷⁷

All states have the right to sail ships under their flag, to fix conditions for granting nationality to ships, for registering ships, and for flying the flag. However, “there must exist a genuine link between the State and the ship,” e.g. effective jurisdiction and control of the flag state in administrative, technical and social matters over ships flying its flag.¹⁷⁸ The latter provision responded to the flag of convenience phenomenon.¹⁷⁹ Warships and vessels owned or operated by a state and “used only on non-commercial service” have complete immunity except for the flag state.¹⁸⁰ States must prevent oil pollution or the release of radioactive waste from ships.¹⁸¹ The 1958 Fisheries and Conservation Convention reaffirms the above-stated right to fish on the high seas, but adds that states must adopt or cooperate in adopting conservation measures for the seas’ living resources.¹⁸² The influential *Restatement (Second), Foreign Relations Law of the United States* adopted the genuine link theory in 1964;¹⁸³ it did not address directly the sovereignty and navigation issues.¹⁸⁴ Professor Wolfrum has interpreted the 1960 decision of the International Court of Justice concerning the membership of the Inter-Governmental Maritime Consultative Organization (IMCO, now IMO, the International Maritime Organization) to imply that only registration, and not the “genuine link” postscript to Article 5 of the High Seas Convention, governed for nationality of vessels.¹⁸⁵ He concludes that “the right of each State to establish its own conditions for the grant of its flag is not limited by international law. Consequently, no State may challenge or refuse to recognize the registration of ships by another State. Moreover, no State has the right to look behind a ship’s flag.”¹⁸⁶

Prominent treatise writers of the time generally approved the traditional rules applicable to enemy merchant ships. Professor McDougal and Florentino Feliciano in 1961 summarized the exceptions for protected vessels such as hospital ships and small coastal fishing boats, but that “in the practice of both sides in [World War II], merchantmen were in fact regarded as regular combatants and subjected to sinking at sight.”¹⁸⁷ Although one later commentator has said McDougal and Feliciano equate the law of war zones with the law of blockade¹⁸⁸ – as applied to neutrals – it is reasonably clear that McDougal and Feliciano would approve war zone treatment for enemy merchant ships,¹⁸⁹ the object of this study. Therefore, the legitimacy of attack on enemy merchantmen – subject to the usual protection and exclusions – would apply to war zone

situations too. McDougal and Feliciano also preserve the distinction between neutrals carrying contraband, which in their view would be subject to capture and condemnation of the goods.¹⁹⁰ There was apparently no analysis of the problem of war-sustaining cargo aboard neutral vessels.

C. John Colombos came to the same conclusions in 1967, noting 11 exceptions, among them protected vessels such as hospital ships, or small coastal fishing or trading boats when not used for military operations, stating that enemy character must be determined by the flag flown.¹⁹¹ Destruction of the enemy merchant ship required that all on board be placed in safety and that the ship's papers be removed and preserved. Since it was difficult under modern warfare conditions to accomplish this, "destruction must be treated as an exceptional measure." Colombos acknowledged, however, that *NWIP 10-2* and World War II practice by France, Great Britain, Italy and the United States permitted destruction in case of military necessity when the merchantman could not be captured and sent or escorted in for adjudication. Capture was seen as the normal modality for neutrals carrying contraband; there is no clear statement concerning attack and destruction of a contraband carrier, but if the merchantman was integrated into the war effort, World War II practice and *NWIP 10-2* would permit destruction. The capturing officer had the duty of taking all possible measures to provide for the safety of passengers, crew and ship's papers.¹⁹² Colombos also seemed to approve a measure of control over the high seas by belligerents for their own protection, provided they could control the area.¹⁹³

In 1968, Professor Mallison traced the history of the law of naval warfare on capture or destruction of enemy merchant vessels and approved the *NWIP 10-2* list,¹⁹⁴ but added:

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. 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 counter-reprisals so that a future general war could be conducted, thereafter, without regard to this article of the *Law of Naval Warfare*.

Professor Mallison also recognized the traditional list of vessels immune from capture or attack - e.g., hospital ships and coastal fishing or trading boats.¹⁹⁵ Although primarily concerned with attacks on neutrals in war zones, he declared that attacks on enemy merchantmen in declared war zones was and would be legal, subject to the usual exceptions, e.g., hospital ships, etc. The rule on neutral

ships integrated into the enemy war effort was that they should be treated like enemy merchant ships.¹⁹⁶

Writing in 1962, Professor McDougal and his associates noted that the law of naval warfare, conditioned by the norms of the U.N. Charter, was an exception to the general principles of freedom of navigation of the seas.¹⁹⁷ They severely criticized the genuine link theory of the 1958 High Seas Convention.¹⁹⁸

C. Other Merchant Ship Interdictions and Diversions, 1956-66

From 1956 through 1966, other incidents involving merchant ship interdiction occurred without conflict erupting on the high seas, although there was sometimes parallel fighting on land.

(1) *The Civil War in Algeria*

During the civil war in Algeria, the French navy sought to visit and search ships that were suspected of running war materials to the rebels in Algeria. France declared a 20 to 50 kilometer (11-28 mile) customs zone off Algeria for small craft.¹⁹⁹ High seas interceptions occurred off Algeria but also 45 miles off Casablanca, in the Atlantic Ocean, and in the English Channel, far from the high seas adjacent to Algeria. In 1956, 4775 vessels were visited; 1330 were searched; 192 were re-routed, *i.e.*, diverted; and 1 was arrested. Diversion was ordered if weather made boarding impossible, if the cargo's nature was such that a thorough at-sea search could not be conducted, or if cargo was arms, ammunition and explosives. Ships flying flags of a dozen nations were involved, and the flag states protested vigorously. France justified her actions on self-defense grounds.²⁰⁰ Although a large-scale operation, the French interdiction program did not seriously affect freedom of navigation, since those few ships whose cargoes were seized were clearly engaged in smuggling arms to Algeria.²⁰¹ Compensation was paid for some vessels wrongfully detained.²⁰² Although some arms were imported directly from the seas off the Algerian coast, others were brought in overland through Morocco, Tunisia or Libya. In some instances arms were sent to a third state, *e.g.*, Egypt or Libya, and then transported through another country, *e.g.*, Tunisia, and across the Algerian border. In some cases, states friendly to the rebels were buying vessels, vesting nominal ownership in third-country nationals, for the traffic. In other cases, bogus shipping documents were used. Some arms were smuggled in by fishermen.²⁰³

(2) *The Iceland-United Kingdom Cod War*

In 1958-59 British warships escorted and protected British trawlers fishing in waters claimed as territorial sea by Iceland. Great Britain eventually withdrew from the "Cod War," and the issue was resolved by diplomacy.²⁰⁴

(3) *The Cuban Quarantine*

In 1962 the United States, acting in concert with other Western Hemisphere states under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), imposed a maritime quarantine against Soviet introduction of missiles, components

and delivery systems, into Cuba. The action was claimed to be proper under Article 52 of the U.N. Charter, which allows interim security arrangements such as the Rio Treaty. The quarantine was undoubtedly legal under Article 52 of the Charter. The U.S. presidential proclamation establishing the quarantine, besides citing the Rio Treaty-based resolution, also relied on a U.S. Congressional resolution that recognized the threat. The U.S. proclamation was specific as to the type of cargoes to be halted, *e.g.*, missiles, bombs, bomber aircraft, warheads, and support equipment, "and any other classes of material hereafter designated by the Secretary of Defense [to] effectuate" the proclamation. The proclamation exempted other cargoes, *e.g.*, foodstuffs and petroleum, and declared neutral rights would be respected. No blockade was declared, and the proclamation limited use of force to situations where directions under the quarantine were disobeyed if reasonable efforts had been made to communicate directions to an interdicted vessel, "or in case of self-defense." (The Rio Treaty authorized "partial or complete interruption of economic relations or of . . . sea . . . communications; and use of armed force[.]" among other measures, thus paralleling the language of Articles 41 and 42 of the Charter.) Some commentators have seen the quarantine as a self-defense measure, pure and simple.²⁰⁵ Self-defense as a proper rationale for the quarantine after the *Nicaragua Case* has been questioned, although the possible limited precedential value of that case should be noted.²⁰⁶ Moreover, to the extent that action was taken under Article 52 of the Charter, as noted by the United States and others, the *Nicaragua Case*, which dealt with the parallel customary right of self-defense alongside Article 51, the case carries even less weight. Moreover, no one would question the right of individual and collective self-defense, *e.g.*, under customary law or Article 51 of the Charter, if a warship maintaining the quarantine had been attacked by, *e.g.*, a Soviet warship, while enforcing the quarantine or in other circumstances, *e.g.*, in the Pacific Ocean.

(4) *The Rhodesian Interdiction Operation*

In 1965-66, as part of the transition of governance from Southern Rhodesia to independent Zimbabwe, the U.N. Security Council passed a series of resolutions denouncing the white Rhodesian government as illegal, and calling upon all states to refrain from assisting the white minority regime and to institute an oil embargo, and upon the United Kingdom in particular to enforce such an embargo.²⁰⁷ *H.M.S. Berwick*, on patrol off Beira, a Mozambican port employed for offloading oil bound for Rhodesia, stopped and visited *S.S. Joanna*, an inbound Greek tanker, which refused to divert from Beira. Because the operative Council resolution spoke only in terms of embargo and not blockade or similar measures, *Berwick* had to let *Joanna* enter Beira. A later resolution specifically authorized such action, and the next blockade-runner, *Manuela*, was diverted after boarding. Oil companies and tanker owners began to supply lists of innocent tankers manifested for Beira, and except for one French tanker

(*Artois*) not on the list but in fact innocent, the system worked well. “[O]utsiders as possible blockade-runners . . . did not reappear.”²⁰⁸ When France protested *H.M.S. Minerva*’s signalling “Stop or I will fire,” and then shooting one round across *Artois*’ bow, the U.K. response was that *Minerva* was acting in accordance with Council Resolution 221.²⁰⁹ The Council also passed a series of decisions under Chapter VII of the Charter beginning in 1966 “which imposed” economic and other sanctions on Rhodesia; those were not terminated until 1979 when Zimbabwe majority rule was assured.²¹⁰

(5) *The Trends*

The seaward aspects of the Algerian civil war developed the concept of diversion of merchantmen to other ports, away from their destinations in rebel-held parts of Algeria, rather than the traditional visit, search and capture procedure. The customs zone idea was not new and roughly paralleled the exclusion zones under World War II and earlier practice. The high seas interdictions far from Algeria, justified by France on self-defense grounds, came close to the line of an international law violation, if they did not cross over into illegality. Under today’s standards of proportionality,²¹¹ and in view of contemporary protests, such actions were probably illegal, given the localized nature of the conflict.

The U.K. Cod War convoying continued the trend of legitimating peacetime convoying of a nation’s own vessels to protect them against assaults by others, a theme that had been restated during the civil war in China and later during the Tanker War of 1980-88.²¹²

The 1962 Cuban Crisis started another trend for maritime naval operations, use of a quarantine under Article 52 of the Charter, rather than employment of the more traditional declaration of blockade, which carries with it a connotation of war.²¹³ In reality, the Cuban quarantine continued the practice of the Algerian civil war of a proportional exclusion zone, but in an international confrontation situation as distinguished from the internal conflict circumstances of civil war.

The Rhodesian transition was the second example of use of the agency principle to effect control of merchant ship traffic by the U.N. Security Council, the first being Korea.²¹⁴ Employment of diversion instead of traditional visit, search and capture followed the Algerian civil war model, but this time in the context of a U.N.-approved action.

D. India-Pakistan: 1965, 1971

During the first of these wars, Pakistan seized 50 Indian cargoes on neutral ships and adjudicated them before a prize court. The cargoes consisted mainly of tea, with some manifests of coal and general cargo; the High Court of Dacca held that because the tea was “produce of Indian soil,” grown by Indian companies, it was lawful prize.²¹⁵ Pakistan had previously published lists of

absolute and conditional contraband; India responded with a list of absolute contraband. India asserted that because a formal state of war did not exist, Pakistan could not constitute a prize court. Pakistan responded that the maritime measures were a lawful exercise of the right of self-defense under the U.N. Charter.²¹⁶ India's ultimate response to the initial Pakistani seizure was impoundment of three Pakistani ships in Indian waters and ordering offloading of contraband before proceeding to Pakistan as "reprisals." When Pakistan continued to offload cargoes in neutral bottoms bound for India, India informed foreign shipping companies that no India-bound cargoes should be shipped in Pakistani-flag vessels and that neutral-flag vessels bound for either nation should stop first at an Indian port, despite a cease-fire in effect. If the cargo was not contraband, it would not be seized. Thirty-eight vessels complied; 16 did not. After the end of contraband control by both belligerents, they first agreed to permit U.S. aid vessels to land their cargoes. Eventually both states heeded the International Federation of Insurance's request for release of neutral vessels.²¹⁷ Late in 1966, the U.N. General Assembly belatedly called upon the belligerents to observe the rules of warfare.²¹⁸ Under the traditional view of Charter law, the resolution was nonbinding, although it was some evidence of the international community's views.²¹⁹

In the 1971 war, India successfully isolated East Pakistan (later Bangladesh) by "contraband control and blockade." After dark, neutral vessels were not allowed to approach the Pakistani coast closer than 75 miles. Besides ensuring safety of Indian vessels at sea through naval control and protection of shipping, the Indian Navy sought to capture or destroy Pakistani merchant vessels. More than 115 neutral ships were inspected, and India diverted neutral ships to Calcutta if they carried cargo of military significance, after India discovered that vessels' markings and names of many ships had been changed. Three Pakistani merchantmen were captured.²²⁰ A Liberian-registered ship and a Spanish vessel were also sunk; Professor O'Connell has asserted that "[t]he naval operations conducted by India against . . . Karachi and on the Bay of Bengal took no account of international law, which was . . . deliberately put to one side by the Indian naval staff." In these operations, two merchantmen were destroyed by surface-to-surface missiles from Indian patrol boats while the ships were at anchor in the Karachi roadstead, *i.e.*, in territorial waters. The neutral in-bound *Venus Challenger* was hit and sunk by a missile 26.5 miles off Karachi and was lost with all hands; a Pakistani destroyer 20 miles off Karachi also went down to a Styx missile attack that night; the cause was probably "[c]apricious behavior of the missiles and malfunction or inadequate operation of the guidance systems."²²¹ *Venus Challenger's* destruction on the high seas was a classic case of indiscriminate use of weapons. Significantly, a week later, but apparently before the Pakistanis discovered her wreck, the Bengal Chamber of Commerce published its 40-mile dusk-to-dawn warning.²²² Professor O'Connell was correct with respect to the

Venus Challenger, the Pakistani destroyer was fair game, however. On the other hand, the economic warfare aspects of the conflicts - visit, search, seizure, diversion, capture contraband and prize procedures - proceeded along traditional lines²²³ and thereby reinforced the traditional norms. The war was over in two weeks,²²⁴ thus ending the potential for a more significant trend in state practice on the issues.

E. Vietnam: 1962-73²²⁵

During the Vietnam conflict, North Vietnam employed small coastal fishing vessels as logistic craft to support its military operations²²⁶ in violation of the obligation to use these vessels, normally exempt from capture or destruction, for fishing only.²²⁷ The patrol areas developed for Operation Market Time, originally part of a 12-mile defensive sea area, eventually extended to over 30 miles off the South Vietnamese coast.²²⁸ The U.S. Joint Chiefs of Staff considered a blockade of North Vietnam in 1965 but took Commander-in-Chief, Pacific's advice against such because it would indicate the United States was performing a belligerent act.²²⁹ At the same time that the United States and South Vietnam (RVN) were intercepting southbound North Vietnamese supply boats, South Vietnamese were operating a Junk Force that was not part of its navy, also to prevent the very kinds of craft attempting to filter from the north. They performed other military tasks as well.²³⁰ In 1965 the Junk Force was integrated into the RVN Navy.²³¹ The patrols did not interfere with local fishing and trading boats, even though Vietnam was not party to Hague Convention XI.²³²

The United States used Military Sealift Command ships, U.S.-flag charters, and occasionally foreign-flag vessels to deliver war materials. Several of these ships were attacked, and two were sunk, due to attacks by the Viet Cong while the ships were in South Vietnamese internal waters, *i.e.*, during river transit. There seems to have been no discrimination between vessels carrying war material and civilian-oriented cargoes, *e.g.*, cement.²³³ The United States did give antisubmarine protection to valuable cargoes, *e.g.*, troop carriers.²³⁴ As it had done during the Korean War, the U.S. Navy evacuated refugees - over 300,000 of them, mostly civilians - from North to South Vietnam, and 721 French wounded, including prisoners of war, were taken aboard the hospital ship *U.S.S. Haven*, bound for Morocco and France.²³⁵ Soviet-flag vessels carrying war supplies to North Vietnam initially were not interdicted.²³⁶ In 1972 a mine quarantine program in North Vietnamese territorial waters sought to seal off North Vietnamese ports;²³⁷ its antecedent had been an attempted quarantine by South Vietnam of Communist seaborne supplies coming to the Viet Cong through the Gulf of Siam and the Mekong Delta.²³⁸ A RVN destroyer did succeed in sinking a North Vietnamese trawler, believed to be carrying ammunition, in 1972, however.²³⁹

(1) *Analysis of Trends*

Although the small-boat interdiction²⁴⁰ and the mine campaign have been justified,²⁴¹ there is no evidence of North Vietnam's justification of its antiship interdiction campaign. If an interdicting ship's wake overturned a junk, a GWSEA issue of the duty to stop and pick up survivors would have arisen, according to Professor O'Connell.²⁴² The civilian evacuations followed the same pattern as those of the Korean conflict, with at least media announcement of the process, and were justified under international law as a *de facto* cartel operation.²⁴³ The hospital ship was also protected from attack,²⁴⁴ even though the United States was not in an international armed conflict at the time.

(2) *Other Incidents of the Era*

Two incidents involving naval force and merchant-type vessels occurred after the United States withdrew from Vietnam.

On January 20-21, 1974, the PRC loaded 11 "warships" with 660 amphibious assault troops and took the disputed Paracel Islands in the South China Sea, fending off South Vietnamese naval gunfire with a superior naval force. Press reports indicated that the first PRC convoy, which was driven off by Vietnam, had been "fishermen" who had raised a PRC flag.²⁴⁵

The second was the *Mayaguez* incident, May 12-15, 1975. Cambodian naval forces fired on and seized *S.S. Mayaguez*, a U.S.-flag unarmed merchantman in the Gulf of Thailand, 7-8 miles off an island claimed by Cambodia and Thailand but 60 miles off the coast of the mainland. Cambodia claimed *Mayaguez* was on a spy mission in her territorial waters. The United States asserted that the vessel was on a regular run between Hong Kong and Thailand and in the usual shipping lanes. The United States issued a *Notice to Mariners*, warning of the danger and intimating other incidents. U.S. Marine and Navy units cooperated to rescue the 40-member U.S.-national crew and the ship from Koh Tang Island, 15 miles off Cambodia. After receiving small arms fire from Cambodian patrol boats and attempting to block *Mayaguez*' movement toward the mainland, U.S. carrier-based aircraft had fired on and sunk three boats and damaged others. Because of the "profoundly negative" attitude of Communist states toward the ICJ, no possibility was seen for Cambodia's submission to the World Court, and that avenue of redress was not followed.²⁴⁶

The convoy of "fishermen" aboard fishing craft was, of course, yet another example of misuse of a protected class of commercial ships. When these vessels were employed for the attack on the Paracels, they lost their protected status and could be treated like any warship.²⁴⁷ South Vietnam was legally justified in its attack. Moreover, one might question whether the vessels in question were local coastal craft, as contemplated by Hague Convention XI, since the Paracels are over 100 miles off the Asian mainland.

The Cambodian seizure of *Mayaguez* also violated international law. The Cambodians had full opportunity to search for espionage evidence after they

boarded, and no report of such has been found. It is true that ships may use transit passage to the high seas in sea lanes that are in territorial waters, but the passage must be innocent in nature. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state, and such nations may take steps to prevent passage which is not innocent, which may include temporary suspension if such is essential for the protection of the coastal state's security. In other respects, coastal states cannot hamper innocent passage.²⁴⁸ There was no showing of any danger to the security of Cambodia, nor was this a temporary suspension; it was an outright seizure. If the Cambodian action occurred outside territorial waters, in the contiguous zone as part of the high seas, there was no justification for stopping *Mayaguez*.²⁴⁹ It was appropriate, as a matter of international law, for the United States to respond proportionally to defend *Mayaguez* and to recover the crew and the ship. The incident illustrates the interplay of peacetime principles of maritime operations, today articulated in UNCLOS in addition to other treaties and customary law, and the law of armed conflict, *i.e.*, the principles of self-defense.

(3) *Other Trends*

Treaty regimes concluded during or following the Vietnam conflict have affected the law of naval warfare tangentially.

The 1971 Seabed Treaty's prohibitions on planting or placing nuclear weapons or other weapons of mass destruction on the ocean floor²⁵⁰ in effect declares that enemy merchant ships may not be attacked by devices of that type, in that if the placement is illegal, then use would also be illegal.²⁵¹ Similarly, the 1972 Bacteriological Convention's prohibition on development, production, stockpiling, acquiring or maintaining bacteriological agents or toxins²⁵² implicates their nonuse against enemy merchant ships.²⁵³ The 1972 Convention does not derogate from the 1925 Geneva Gas Protocol;²⁵⁴ in effect, it "perfects the prohibition on the use of biological and toxin weapons begun in the 1925 Protocol." Probably the 1972 Convention does not articulate customary law, but the 1925 Protocol does.²⁵⁵ "[T]here appears to be no role for biological ship-to-ship weapons"²⁵⁶ at present, but the analysis has been included for the sake of trends in future naval weapons development and the law to accompany it.

The 1977 Environmental Modification Convention parties have pledged "not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party." The range of the Convention includes the whole Earth.²⁵⁷ The Convention does not directly deal with the problem of an attack on a merchant vessel, being concerned with techniques that change the environment,²⁵⁸ but it would seem that a method of attack whose ultimate environmental effect might be construed as the impact desired, rather than the initial result on the object, would be within the scope

of the Convention. A torpedo attack on a tanker, which results in a large oil spill, the intent being to destroy the tanker, would not be denounced by the Convention. On the other hand, if the intent of the attack was to cause the spill so that enemy naval vessels' injection scoops, steam plant condensers or intakes to desalinization plants would become fouled, thereby causing engineering plant casualties and loss of movement capability, such action would be within the Convention if "widespread, long-lasting or severe" environmental effects also ensued.

Negotiated with the law of land warfare, land-based air war and naval bombardment of land in mind,²⁵⁹ the 1977 Protocol I to the 1949 Geneva Conventions explicitly declares as much in Article 49(3).²⁶⁰ Nevertheless, the Protocol has strong overtones for objects of attack and methods and means of warfare that may influence the law of naval warfare.²⁶¹ Some provisions explicitly refer to rules for naval warfare. The Protocol is not in force for the United States.

Protocol I, Article 52, declares that civilian objects, which are all objects that are not military objectives as defined in the Protocol, shall not be the object of attack or reprisal; attacks must be limited strictly to "military objectives. . . ." [M]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstance ruling at the time, offers a definite military advantage." If there is doubt as to whether an object, normally thought of as civilian - *e.g.*, "a place of worship, a house or other dwelling or a school" - is being used to effectively contribute to military action, the presumption is that it is not so used, according to Article 52.²⁶²

This provision deserves close scrutiny. Its examples of places of worship, houses and schools demonstrate that it is clearly directed toward land warfare. However, there are maritime counterparts (*e.g.*, passenger liners or cruise ships, houseboats, school ships or university research vessels). Is the phrase, "under the circumstances ruling at the time," appropriate for naval operations, given poor visibility and other identification conditions at sea, perhaps poor communications conditions among belligerents, and the present differences as to what is contraband? Should the presumption for civilian use in Article 52 be the same, or the reverse, perhaps coupled with a list of prohibited objects for which the presumption is as stated in Article 52 (*e.g.*, hospital ships, other protected vessels, and passenger liners or cruise ships), and further demarcations through exclusion or war zones?

Protocol I, Article 53 prohibits attacks on cultural objects, their use as part of the military effort, or the object of reprisals, without prejudice to the 1954 Hague Cultural Property Convention.²⁶³ For reasons noted in the *Introduction*, this aspect of the Protocol as customary law may have carryover effect for naval warfare, in that the Protocol reinforces other wartime treaty or customary norms.²⁶⁴

Starvation of civilians as a warfare method is prohibited by Article 54(1). The remainder of the article would be largely inapplicable to sea warfare, except for the prohibition on attacks, destruction, removal or rendering useless of foodstuffs “indispensable to the survival of the civilian population,” regardless of motive. The foregoing prohibition is inapplicable if foodstuffs are solely for armed forces use or in direct support of military action. In no event can such actions leave the civil population without adequate food or water, such as to cause its starvation or forced movement.²⁶⁵ This aspect of Article 54 has obvious overtones for naval warfare in the context of what is and what is not contraband, and the issue of relief ships in general.

Echoing the 1977 Environmental Modification Convention,²⁶⁶ Article 55(1) of Protocol I declares:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.²⁶⁷

The same analysis for the Convention would appear to fit the Protocol.²⁶⁸ Article 56,²⁶⁹ denouncing attacks on dams, dikes or nuclear electric generating stations whose destruction would unleash “dangerous forces,” is similar in theme but would seem to have little or no relevance to war at sea, unless a future treaty would denounce similar attacks on nuclear-powered merchant vessels or other bulk cargo ships whose burthen when released due to attack would unleash “dangerous forces.” There are few if any nuclear-powered nonmilitary vessels in service today, even if one counts certain icebreakers as such, but liquid natural gas tankers might fall into this category. Article 56 also provides that parties to a conflict must try to avoid locating military objectives near works or installations that could loose dangerous forces. While this would seem to have no relevance for naval warfare, a parallel might be belligerents’ sending ships with dangerous-force potential to sea; they would be required to be kept away from legitimate military objectives, *e.g.*, a military convoy, if a Protocol I analogue came into effect.

The Protocol’s precautionary measures chapter includes a specific provision for naval warfare:

In the conduct of military operations at sea . . . , each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

Article 57 also has general precautions to be observed for other attacks:

150 Targeting Enemy Merchant Shipping

(a) Those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) [A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) [E]ffective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

Last, the Article provides that if a choice is possible between several military objectives for a similar military advantage, the commander must choose the objective that should cause the least danger to civilian lives and objects.²⁷⁰ Articles 57(2)(a)(iii) and 57(2)(b), together with Article 51(5)(b), thus represent the first attempt at codification of the principle of proportionality,²⁷¹ *i.e.*, that the means of attack must not be such that incidental loss of civilian life, civilian injuries, or damage to civilian property, or a combination, cannot be excessive relative to the military advantage sought to be gained.

Article 58 adds that belligerents must try to remove civilians or civilian objects from the vicinity of military objectives, avoid locating military objectives within or near densely populated areas, and take precautions to protect civil populations, individual civilians and civilian objects under their control against dangers of military operations.²⁷² While all but the first-quoted clause of Articles 57 and 58 apply to land warfare, certain implications may be seen to flow from the other provisions for war at sea. One obvious parallel is the principle for planning, deciding, cancelling and suspending attacks. The warning rule, if applied to naval warfare, would seem to contradict the customary rule of no warning for attack on enemy merchant ships if such ship is armed, is in an armed convoy, assists the enemy's intelligence system, acts as a naval auxiliary, or is integrated into the enemy's war-fighting/war-sustaining effort and the warning would subject an

attacking warship to imminent danger. (The customary rule requires – in the absence of these factors – that the enemy ship’s passengers, crew and papers be placed in a position of safety before attack, but all this is subsumed under “warning.”)²⁷³ The Article 57(c) principle would be congruent with naval warfare norms if the “circumstances do not permit” exception clause would apply to situations where the merchantman is armed, etc., on the theory that such situations would subject the attacker to imminent danger. “Circumstances do not permit” might easily include submarine attacks because of the nature of the modern submarine and its vulnerability on the surface. The same would also apply to aircraft attacking an armed enemy merchantman.

The Article 58 requirement of removing civilians and civilian objects, if removal be equated with placing in safety, would appear to be at variance with the customary norm. Protocol principles for choosing the military objective least damaging to civilian interests and for taking other necessary precautions to protect the civil population, etc., invite parallels for naval warfare. Article 58’s requirement for locating military objectives away from densely-populated areas, if applied to naval warfare, would raise problems for siting naval bases in forward areas. There are relatively few decent natural harbors, etc., today that do not already have a port city nearby.

The Protocol also bans indiscriminate attacks, which are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

The Protocol gives two examples of indiscriminate attacks: (1) use of a large weapon that destroys several separate discrete military targets at once when there are intervening civilian areas or civilian objects; (2) an attack that can be expected to cause excessive loss of civilians or civilian objects in relation to the “concrete and direct military advantage anticipated.”²⁷⁴ Naval warfare analogies might be cruise missiles employed in a scenario where neutral merchant ships close aboard a target might be hit instead of the target (it being assumed no warnings to the merchantmen were given), or use of shipkilling weapons directed against a fleeing vessel suspected of violating protected status (*e.g.*, a passenger ship suspected of carrying troops) when under the circumstances a partially disabling shot would serve to stop the errant vessel. In other words, as the *Basic Rules* of the Protocol put it, parties do not have unlimited choice of methods or means

of warfare; weapons, projectiles and materials and methods of warfare that cause superfluous injury or unnecessary suffering are prohibited.²⁷⁵

Four years after signature of Protocol I, the 1981 Conventional Weapons Convention²⁷⁶ was signed, with three protocols elaborating upon prohibited weaponry. It too is not in force for the United States.

Protocol I of the Convention denounces use of weapons whose primary effect is bodily injury by fragments undetectable by x-rays.²⁷⁷ Although usually applicable to land warfare, the Protocol would deny use of such antipersonnel weapons in attacks on enemy merchant ships.

Protocol III defines incendiary weapons or munitions as devices whose primary purpose is to burn persons or objects. Munitions with incidental incendiary effects, such as white phosphorus illumination shells, or munitions combined with penetration, blast or fragmentation effects, such as armor-piercing shells, where the incendiary effect is not specifically designed to cause burn injuries, are excluded from the prohibition. Protocol III forbids incendiary attacks on the civilian population, civilians or civilian objects; or on a military objective within a concentration of civilians, if airborne weapon delivery is contemplated. If other than airborne delivery is contemplated, incendiary attacks may be used if there is clear separation between the military objective and civilian concentrations and precautions are taken to minimize collateral damage.²⁷⁸

Protocol III should have little impact on war at sea, because incendiary weapons as defined in Protocol III are seldom used at sea; a rare example is the napalm attack on the *U.S.S. Liberty*. Protocol III would not have applied to the assault on the *Liberty*, which was a U.S. warship with only service people aboard.²⁷⁹ However, the Protocol would apply to attacks on merchantmen crewed by civilians if they are not part of the war effort. Protocol III is concerned with the effect of incendiary weapons on civilians and civilian objects, and unless enemy merchant ships could be classified as civilian objects, Protocol III would not apply to the vessel. Unless the prohibitions against incendiary attack when the military objective (the ship) is surrounded by civilians could be construed to include the military objective surrounding civilians (the usual relationship of crew aboard a vessel), Protocol III would not apply to the merchant crew, if it be assumed that they would be classified as civilians, which is unlikely.²⁸⁰

Protocol II of the Conventional Weapons Convention covers mine warfare and booby-traps but is limited to land warfare.²⁸¹ Several provisions might be cited for analogous treatment for naval warfare, however. The Protocol bans indiscriminate use of mines; mines in civilian-concentrated areas unless close to a military objective or warnings are given civilians; remotely delivered mines unless used in a military objective area or an area with military objectives and locations are recorded or a neutralizing device is used, and advance warning is given civilians "unless circumstances do not permit" such. Belligerents must record minefield locations. If a U.N. peacekeeping force is employed,

belligerents must, if requested by the U.N. commander, remove or render harmless all mines, protect the force from effects of mines, and supply information on minefields. If a U.N. fact-finding mission is involved, belligerents must protect the mission from mines or supply minefield information if protection is not feasible.²⁸² The same analysis with respect to indiscriminate use and civilian concentrations and incendiary weapons applies to Protocol II. The provisions governing remotely-delivered mines would have impact on enemy merchant ships; they could only be used in a military objective area or an area with military objectives, *e.g.*, enemy merchantmen, *e.g.*, a war zone or exclusion zone, and then only if locations are recorded or neutralizing devices are used, and if civilians (*e.g.*, neutral merchant ships) are warned. Given the relatively temporary nature of zones and the availability of neutralizing devices – as much to protect one’s own forces from accidents – adaptation of Protocol II’s principles to maritime warfare would seem to pose few problems.

F. Falklands/Malvinas: 1982

The legality of the British attack on the fishing trawler *Narwal* during this conflict has been noted by *NWP 9A*. *Narwal* had an Argentine naval officer aboard and had been used for intelligence-gathering. (*Narwal*, as an oceangoing trawler, arguably might also be said to have been outside the exception because of her size, 1400 tons).²⁸³

Both belligerents attacked merchant vessels employed in the enemy’s war-fighting or war-sustaining effort; there is no recorded protest. The United Kingdom employed over 50 STUFT (Ships Taken Up From Trade) vessels, privately owned ships, ranging in size from the liner *Queen Elizabeth II* to the cable ship *Iris*, that were requisitioned from their owners. The containership *Atlantic Conveyor*, lost to Exocet attack, was among the casualties of war. These vessels should be distinguished from Royal Fleet Auxiliary (RFA) ships such as *Sir Galahad*, also lost, and RFA tankers similar in function to requisitioned tankers. Argentina apparently used both STUFT-type ships and naval auxiliaries.²⁸⁴ The United Kingdom published the location of its hospital ships as operating in a “Red Cross box,” and Argentina respected this neutral zone. There is nothing in GWSEA requiring or approving such, and there appears to be no custom – apart from the cartel ship analogy – to permit such.²⁸⁵ Such a neutral zone may be established for land warfare,²⁸⁶ and demonstrates the possibility of adaptation of land war norms for conflict at sea.

On April 7, 1982 the United Kingdom declared a 200-mile Maritime Exclusion Zone (MEZ), to be effective April 12, for all Argentine shipping around the Falklands/Malvinas. On April 23 the United Kingdom established a Defensive Sea Area (DSA) or “defensive bubble” around its task force, warning that approach by Argentine civil or military aircraft, warships or naval auxiliaries would be dealt with “appropriately.” On May 1, when fighting started in the

Falklands/Malvinas, the MEZ was changed to a Total Exclusion Zone (TEZ) for all ships supplying the Argentine war effort; MEZ coverage was extended on May 7 to all sea areas more than 12 miles off the Argentine coast. Argentina had declared a 200-mile defense zone (DZ) off its coast and around the Falklands/Malvinas on April 13, after having protested the British action. MEZ enforcement capability came on the day of its enforcement.²⁸⁷ Presumably Argentina could have enforced the DZ if it had chosen to do so, although after the cruiser *General Belgrano's* sinking, Argentine naval forces, except for naval aviation and possibly submarines, did not figure in the war. On May 11 Argentina declared all waters of the South Atlantic Ocean a war zone, threatening to attack any British vessel therein. Apparently the only neutral ship attacked by the Argentines in the war zone was the *Hercules*, a Liberian-flag tanker in ballast that was owned by United States interests. Although the Soviet Union belatedly protested the lawfulness of the British TEZ, it apparently did not object to the Argentine DZ, and did observe the U.K. TEZ.²⁸⁸ The United States had published warnings to U.S. vessels and vessels beneficially owned by U.S. interests like *Hercules* two days before she was hit.²⁸⁹ On July 12, active hostilities in the Falklands/Malvinas ended, but the United Kingdom continued the TEZ and economic sanctions. Ten days later, the TEZ was lifted, but the United Kingdom warned Argentina to keep military ships and aircraft away from the islands, declaring a 150-mile Protection Zone.²⁹⁰ The TEZ had been relatively successful, although Argentina succeeded in airlifting supplies in until the last days of the war. Apparently Argentine sealift efforts failed.²⁹¹

(1) *Appraisal*

Commander Fenrick proposed an analysis in 1986 for legality of the exclusion zone in the context of the Falklands/Malvinas War and the then ongoing Tanker War in the Persian Gulf:

If belligerents use exclusion zones, they should publicly declare the existence, location, and duration of the zones, what is excluded from the zone, and the sanctions likely to be imposed on ships or aircraft entering the zone without permission, and also provide enough lead time before the zone comes into effect to allow ships to clear the area. As with blockades, "paper" zones are insufficient. Belligerents declaring zones should deploy sufficient forces to the zone to make it "effective," that is, to expose ships or aircraft entering the zone to a significant probability of encountering submarines, ships, or aircraft engaged in enforcing the zone. All militarily practicable efforts should be made to employ minimum sanctions, such as seizure instead of attack on sight. Similarly, all militarily practicable measures should be taken to ensure proper target identification and to ensure that only legitimate military objectives, such as military aircraft, warships, and ships incorporated into the belligerent war effort, are attacked. The emphasis on what is militarily practicable is important. Sometimes the minimum practicable sanction will be attack on sight; sometimes ships or aircraft that are not legitimate military objectives will be attacked because of errors in target identification. There

must be a proportional and demonstrable nexus between the zone and the self-defence requirements of the state establishing the zone.²⁹²

He asserted, correctly, that Argentina's 200-mile zone around the Falklands/Malvinas "was probably adequate and . . . its declaration that the entire South Atlantic was a war zone was disproportionate to its defense requirements and would affect shipping unconnected with the conflict."²⁹³ Thus the U.S. Court of Appeals was correct in assessing liability against Argentina for loss of the *Hercules*, a decision reversed by the Supreme Court of the United States on sovereign immunity grounds.²⁹⁴ Commander Fenrick also says that the 200-mile British TEZ, although seemingly "an arbitrary interference with the freedom of navigation of . . . ships of non-parties to the conflict," was a reasonable temporary appropriation of a limited area of the high seas away from major shipping routes for self-defense purposes to prevent non-party clandestine participation in the conflict. The appropriation was accompanied by adequate notice, did not result in any casualties to the ships or aircraft of non-parties, and was terminated after a brief period on July 22, once the British consolidated their position in the Falklands. The British TEZ was, in the circumstances, compatible with the law of naval warfare for general wars and with limited warfare trends.²⁹⁵ Professor Goldie concurs with the Court of Appeals' and Commander Fenrick's views.²⁹⁶

War zones as to enemy merchantmen are clearly legitimate so long as they are proportional to the military effort.²⁹⁷ Professor Goldie and Admiral Miller have made the important point that such zones may be justified, even if illegal in terms of size, duration, etc., if such zones are legitimate reprisals to illegal acts of adversaries, *e.g.*, the U.S. Pacific Ocean war zone during World War II and the allied Atlantic war zones during both World Wars. Even if a zone is legal in terms of proportionality, etc., such a lawful zone does not justify violation of principles of humanitarian law, *e.g.*, shooting survivors in the water.²⁹⁸ The conflict also saw development of the U.K. view of self-defense in the Charter era.²⁹⁹

Besides the development of the law of exclusion zones, the war saw application of traditional principles applicable to capture or attacks on merchant shipping. The exception to the rule against capture or destruction of coastal fishing vessel was illustrated in the *Narwal* capture. The trawler had been used for intelligence-gathering and was probably too large to be considered a coaster. The U.K. action was similar to trends during the Korean War, the Chinese civil war, Vietnam, and the Paracel Islands campaign.³⁰⁰ Use of merchantmen to carry warfighting/war-sustaining cargoes made such ships liable to attack, and these vessels became targets as legitimate as the RFA ships. This repeated a trend from previous conflicts.³⁰¹ On the other hand, exempted vessels, *e.g.*, hospital ships, continued to carry the protections they have always enjoyed.³⁰² And the attack on *Hercules*, a neutral-flag merchantmen, was illegal under prior practice.³⁰³

(2) Other Trends

On December 10, 1982, the U.N. Convention on the Law of the Sea (UNCLOS) was signed. Repeating the U.N. Charter Article 2(4) pledges of refraining from any threat or use of force against the territorial integrity or political independence of any state, "or in any manner inconsistent with the principles of international law embodied in the Charter of the United Nations," UNCLOS declares that the high seas shall be used only for peaceful purposes.³⁰⁴ While UNCLOS thus does not apply to armed conflict situations, consideration of some of its terms remains important for two reasons: UNCLOS continues to apply to some relationships between belligerents and nonbelligerents, and some UNCLOS concepts may be urged for law of naval warfare rules. Although UNCLOS cannot be analyzed in detail,³⁰⁵ certain provisions may be mentioned briefly. Its terms raise a number of potential issues for war at sea. UNCLOS is not yet in force and the United States did not sign the treaty, but many of its provisions have been accepted by the United States as a restatement of state practice.³⁰⁶

The high seas are open to all states, as delimited by UNCLOS; freedom of navigation is guaranteed.³⁰⁷ "No state may validly purport to subject any part of the high seas to its sovereignty." The 1958 High Seas Convention has similar terms.³⁰⁸ How should these claims be reconciled with a belligerent's proclamation of a MEZ or a TEZ? Every state has the right to sail ships flying its flag on the high seas and may set conditions for granting nationality to its ships, for ship registration, and for the right to fly its flag. As with the 1958 High Seas Convention, there "must exist a genuine link between the State and the ship."³⁰⁹ The recent draft U.N. Ship Registration Convention would elaborate on the UNCLOS genuine link principles.³¹⁰ Will or should these provisions impact the "flag only" rule? Professor Wolfrum has stated that they do not.³¹¹ UNCLOS also provides for the right of approach and visit, for pirates, slavers and narcotics trafficking, except for warships and vessels "used only on government non-commercial service," which have complete immunity.³¹² These provisions, in terms of procedures and immunities, appear congruent with the principles of naval warfare except, of course, the right of belligerents to attack and destroy enemy warships and naval auxiliaries, and the conditional right to attack enemy merchant ships. Other UNCLOS provisions declare the right to fish on the high seas subject to other treaty obligations, rights of coastal states, and the obligation to conserve high seas resources.³¹³ There are also requirements for preserving and protecting the marine environment.³¹⁴ These parallel principles of the 1977 Environmental Modification Convention and Protocol I,³¹⁵ and these UNCLOS principles might be invoked by neutrals.³¹⁶

The response to all these questions, which might arise in the context of nonbelligerent states' claims, is met by UNCLOS Article 87(1), which subjects high seas usage to "conditions laid down by this Convention [UNCLOS] and

by other rules of international law,”³¹⁷ *i.e.*, the rules of armed conflict at sea, among other norms; there is a parallel provision in the 1958 High Seas Convention.³¹⁸ To the extent that UNCLOS incorporates by reference other treaties,³¹⁹ UNCLOS is subject to the treaty law of naval warfare, *e.g.*, the 1907 Hague Convention IX regarding capture during naval war.³²⁰ Thus, UNCLOS stands on the same footing as the 1958 High Seas Convention; it is a treaty for those party to it – and important naval powers like the United States are not – with important exceptions to it.³²¹ To the extent that UNCLOS Article 87(1) represents a customary norm – and about 30 years of practice under the analogous provision of the High Seas Convention would seem to have ripened the treaty rule into a customary norm – the result is the same for nations not party to UNCLOS, such as the United States. The provision, in Article 88 of UNCLOS, that the high seas shall be reserved for peaceful purposes,³²² must be read as subject to the Article 87(1) limitation. This is congruent with UNCLOS Article 301, “Peaceful uses of the seas,” which provides:

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.³²³

Thus the law of the sea and naval warfare stands on the same footing as the law of land warfare and the U.N. Charter. States are subject to the Charter, including rights of self-defense under Article 51 and perhaps under customary law. UNCLOS governs uses of the sea, subject to other rules of international law, *i.e.*, the law of naval warfare.³²⁴

Appearing in 1982, Professor O’Connell’s *International Law of the Sea* traced the evolution of the rules evolving from World War II, and the traditional list of exceptions from attack, *e.g.*, fishing boats, hospital ships, etc.³²⁵ O’Connell notes the military necessity principle, distinguishing between situations where overt activity (*e.g.*, killing survivors of a sinking) would be illegal, and passive action (*e.g.*, failure to pick up survivors of a sinking because of legitimate fear of being attacked by the enemy), which would be legal. He believes that “like other mediating rules, ‘military necessity’ does not annul the principle [of humanity], and must be strictly construed and applied if it is not to do so.”³²⁶ He seems to take no clear position beyond World War II practice on the issue of sinking armed enemy merchant vessels, that submarines were exempted from the duties imposed on surface raiders.³²⁷ While restating the traditional rule that a ship’s “enemy character is indicated by the flag . . . it is entitled to fly [t]hat is now to be read with the modern rules for attributing nationality to ships[.]” *i.e.*, apparently with the genuine link theory,³²⁸ discussed and criticized earlier in the peacetime law of the sea context.³²⁹ As long as an exclusion zone has been

publicized and neutral shipping is not put unduly at risk, O'Connell would justify an exclusion zone as a reasonable means of self-defense.³³⁰

G. *The Iran-Iraq War, 1980-88*³³¹

When Iraq invaded Iran on September 22, 1980, Iran declared Persian Gulf waters up to 40 miles off her coasts a war zone (officially titled an "exclusion zone"), announced new shipping lanes through the Strait of Hormuz, prohibited all transportation of materials to Iraqi ports, and warned of retaliations if Persian Gulf nations gave Iraq facilities.³³² Iraq responded in early October, declaring that the Persian Gulf north of 29°30'N was a "prohibited war zone." This was the area for the Tanker War until March 1984.³³³ Iranian bomb attacks closed Iraq's oil terminals and blocked all of Iraq's commercial ports at the start of the war, thus forcing Iraq to use pipelines to non-Iraqi ports to send out oil or accept war-sustaining goods through other means, *i.e.*, nearby neutral ports.³³⁴ "Whether classified as absolute or conditional contraband, oil and the armaments which its sale or barter on international markets [brought], were absolutely essential to the war efforts of the Persian Gulf belligerents." Neither side declared contraband lists, nor were high seas blockades instituted, although the Iranian exclusion zone, covering the Shatt al-Arab littoral, was in effect a blockade of Iraq's small coastline.³³⁵ No prize courts were established.³³⁶ Iran did patrol the Gulf in 1981, interrogating ships thought to be carrying contraband. A Kuwaiti survey ship and a Danish freighter were seized on suspicion of contraband, but both vessels were let go. Iraq protested seizure of the Danish ship as a flagrant violation of international law. Iran was careful, however, to avoid provoking its neighbors or major Western powers, being dependent on trans-shipments from the United Arab Emirates and food imports through the Gulf.³³⁷ The Danish vessel, the *Elsa Cat*, had been taken in the Strait of Hormuz; Iran declared that its navy "guarantee[d] the security of all ships in the Strait . . . but will not allow Iraq or anybody else to abuse this wartime situation to carry war materials for Iraq."³³⁸

In September 1980, the United States, after pledging "strict neutrality," had declared that it intended to do what was necessary, including naval action, to keep open the Strait of Hormuz. By October 15, at least 60 Australian, French, U.K. and U.S. warships were in the Indian Ocean to protect the Strait oil route; there were 29 Soviet vessels in the area.³³⁹ The U.N. Security Council passed Resolution 479, calling for cessation of hostilities, also in September 1980.³⁴⁰

In late 1981, President Reagan reaffirmed and expanded the Carter Doctrine to include a U.S. interest in dealing with any threat to Saudi Arabia and a readiness to keep the Strait of Hormuz open if Iran tried to stop shipping there. The international aspect of this U.S. critical defense zone (CDZ) was undoubtedly lawful in its premise of defense from external aggression and the open nature of its communication.³⁴¹ Moreover, the CDZ was definite in its boundaries and

proportional to the interest protected, *i.e.*, the flow of Gulf oil to the West and to Japan. (Saudi Arabia produces about 20 percent of the Earth's oil consumption.)

By early 1982, Iraq could only export oil through the trans-Turkey pipeline; Syria closed the Iraqi pipeline to the Mediterranean.³⁴² On January 14, of that year, Iraq issued a warning to international shipping "to keep clear of the *western* part of the Gulf as any ships traveling in that area would be treated the same way as three vessels which Iraq claimed to have sunk on Jan[uary] 11 as they were leaving the Iranian port of Bandar Khomeni." On March 10, it was reported that Iraq had mined the channel linking this port and the port of Bandar Mashahr with the open sea. An Iranian tanker had been lost in February, probably due to mines.³⁴³

On August 12, 1982, Iraq announced its Gulf Maritime Exclusion Zone (GMEZ) and two days later warned foreign shipping to stay clear of Iranian waters in the upper Gulf, including waters around Kharg Island, from which Iran was exporting up to 2 million barrels of petroleum a day to finance the war effort. On August 29, Iran responded, declaring it would protect foreign shipping, begin escorting foreign shipping, and deployed ships with surface-to-air missiles at Kharg. Iran began giving naval protection to shuttle convoys of Iranian-flag and neutral flag merchantmen that lifted oil from Iran's northern Gulf ports to those farther down the shore for world export. Iraq conducted air strikes against these convoys throughout 1982, 1983 and 1984.³⁴⁴ When Iraq bombed Iran's Nowruz oil offshore installations 40 miles west of Kharg Island in March 1983, a large oil slick resulted. Although early reports that the slick had equalled the area of Belgium were later discounted, it was big enough to threaten desalination plants in Bahrain, Qatar and Saudi Arabia before strong winds blew it offshore and partially dispersed it. Fish imports into the UAE were stopped because they were oil-contaminated. Iraq rejected Iran's request for a partial truce so that oil cappers could try to stop the 2,000 to 5,000 barrels per day flow.³⁴⁵ Because of the Iraqi attacks on Gulf oil shipping, the London-based War Risks Rating Committee raised the rates for marine cargo insurance in 1982 and 1984.³⁴⁶

Early in 1982, Iraq bombed the Nowruz offshore oilfield installations, causing an oil slick in the Gulf; previously Iraq had bombed Iran's Kharg Island installations. An Iranian convoy of neutral flag tankers was hit by Iraqi aircraft. Throughout 1983 and early 1984, Iranian Navy-escorted convoys were hit.³⁴⁷ In September 1982 the Arab Summit urged an end to the war and compliance with the Security Council resolutions.³⁴⁸ In 1983 and 1984, the Council again called for a ceasefire, condemning the Iranian attacks, and affirming the right to free navigation and commerce in the Gulf.³⁴⁹ By now the United States had established its Central Command;³⁵⁰ France, Great Britain and the USSR were also maintaining a presence in the Indian Ocean.³⁵¹ The USSR and other nations proposed a U.N. naval force to patrol the Gulf.³⁵² The United States announced

new self-defense measures for its warships in Notices to Mariners and Notices to Airmen in January 1984; the measures were justified on self-defense grounds when Iran protested.³⁵³

In 1984, the GMEZ was extended to 50 miles around Kharg Island; the war was moving down the Gulf. Tankers were hit at Kharg. Iraq attacked neutral-flag vessels by aircraft and mining outside the GMEZ. Iran attacked neutral flag tankers on the high seas and in Saudi territorial waters; some were in ballast, some were destined for or headed from Saudi ports, and others were carrying Kuwaiti crude. Although there was a U.N.-sponsored ceasefire from June 1984 to March 1985, the attacks continued episodically. In May 1985 Iran again began attacking tankers bound to or from Saudi Arabia and Kuwait. In June and September 1985, the Iranian Navy intercepted and detained two Kuwaiti ships; in September Iran's visit and search procedures, looking for Iraq-bound strategic materials, were stepped up. Ships stopped included Chinese, Danish, German, Kuwaiti, U.K. and U.S.-flag merchantmen. Some vessels bound for the United Arab Emirates were diverted by Iran to Bandar Abbas. A French warship began the precedent of defense of French-flag merchant ships in October. It positioned itself between the French merchantman *Ville d'Angers* and an Iranian warship, warning the latter that it would use force if the Iranian tried to intercept *Ville d'Angers*. (French rules of engagement declared that French warships would fire on forces refusing to break off attacks on neutral merchantmen under attack; the result had been a drop in attacks near French men-of-war.) Nevertheless, France announced that its navy would not convoy French tankers. In April 1986, a U.S. destroyer similarly had warned an Iranian warship off what may have been a planned boarding of the *S.S. President McKinley*, a U.S.-flag merchantman. By April 1987, Iran had searched 1200 ships over the previous 18 months and had confiscated 30 cargoes. It was becoming clear that although Iran could not close the Strait by military action, it might succeed in scaring off enough shipping to make a difference. Iran began to shuttle oil, which it sold to finance the war, down the coast from Kharg Island to the Sirri oil terminal.³⁵⁴ Despite the action of the U.S. destroyer, the United States had recognized that "there is a basis in international law for ship searches by belligerents" in March 1986.³⁵⁵ The United Kingdom had stated in January 1986 that a right of visit and search was an aspect of self-defense under Article 51 of the U.N. Charter.³⁵⁶ The Netherlands similarly recognized a right of visit and search, but only as to ships proceeding to and from belligerents' ports.³⁵⁷ Only in 1987 did Iran enact legislation concerning prize law. By that time the GCC states - e.g., Kuwait and Saudi Arabia - had been regarded as having "unbelligerent" status.³⁵⁸

In 1982, U.N. Security Council Resolutions 514 and 522 called for an end to the war. Resolution 540 (1983) approved "the right of free navigation and commerce in international waters, call[ed] upon all States to respect this right and also call[ed] upon the belligerents to cease . . . hostilities in . . . the Gulf,

including all sea-lanes, navigable waterways . . . and to respect the integrity of the other littoral States. . . ." Resolution 552 of June 1, 1984 repeated the call for "the right of free navigation," specifically condemning recent (*i.e.*, Iranian) attacks on commercial ships en route to and from states not party to the conflict.³⁵⁹

In the summer of 1984, mines detonated in the Gulf of Suez and the Strait of Bab el Mandeb, damaging several ships. Although Iran along with Libya was accused of laying the mines, Iran denied the charges, and it is thought that the Libyan cargo ship *Ghat* laid them. Egypt exercised its rights under the Constantinople Convention³⁶⁰ to inspect all shipping, and a half dozen nations' navies cooperated in locating and destroying the mines, clearly illegally laid under international law.³⁶¹

One more Security Council resolution called for a ceasefire in late 1986.³⁶² In August Iraq bombed Iran's Sirri terminal for the first time; the war was moving further down the Gulf toward the Strait of Hormuz. A British-registered, Hong Kong-owned tanker was badly damaged at Sirri. Iran's Lavan and Larak terminals were then hit. In November Iran hit the United Arab Emirates' Abu al-Bakoush oil installations.³⁶³ In September 1986, Iran had fired on, stopped and searched the Soviet merchant ship *Pyotr Emtsov*, bound for Kuwait with arms ultimately destined for Iraq. The USSR protested the incident. Both belligerents continued to attack merchantmen in the Gulf, regardless of cargo or destination. The USSR sent a *Krivak*-class frigate to escort four Soviet vessels carrying arms to Iraq from the Straits of Hormuz to Kuwait, signalling to the belligerents that the USSR would protect Soviet-flag ships. The *Kitty Hawk* carrier battle group deployed off Oman in the Indian Ocean, the United Kingdom and France increased their ship activity, and the U.K. Indian Ocean (*i.e.*, *Armilla*) squadron began to spend half its time in the Gulf.³⁶⁴ The U.K. position on the Gulf shifted in 1986, however, from statements of British "neutrality" in the "war" to U.K. "impartiality" in "armed conflict," partly to attempt to ensure that the law of blockade would not be applied to the detriment of British shipping.³⁶⁵

Besides traditional seaborne boardings, Iran began using helicopters for visit and search.³⁶⁶ Some merchantmen began to carry chaff canisters to confuse incoming missiles, while others were being repainted dull, non-reflective gray for the same reason. Although most merchant ships remained unarmed, a U.S. helicopter reported coming under missile fire from a Greek ship. Iran reportedly completed testing Chinese antiship Silkworm missiles, and the United States again expressed concern over keeping the Strait of Hormuz open. Press reports said that the Iranian Air Force had established a suicide plane squadron to attack merchant shipping like the Japanese kamikazi flights of World War II.³⁶⁷ Clearly the Gulf was becoming a more dangerous place as all actors prepared new tactics and new technologies. In May 1987, Kuwait and the United States began negotiations leading to transfer of 11 tankers from the Kuwaiti to the U.S. flag.

An Iranian patrol boat fired on and damaged another Soviet merchantman, the *Ivan Koroteav*. The United States and Kuwait completed reflagging arrangements, having preempted the USSR, which had to settle for chartering three of its tankers to Kuwait; the charters were renewed into 1988.³⁶⁸ Although assailed in some quarters, the U.S. re-flagging comported with international law.³⁶⁹ In mid-May, one of the USSR tankers hit a mine, said by the Soviets to have been placed by Iran. A day later, on May 17, U.S.S. *Stark* was hit by Iraqi fighter-launched Exocet missiles.³⁷⁰ The United States began revising its Rules of Engagement for possible interactions between U.S. and Iraq's forces and, incidentally, anyone else displaying hostile intent or committing hostile acts. U.S. forces in the Gulf of Oman and the Persian Gulf were augmented.

The President ordered a higher state of alert for U.S. naval forces in the area and warned the belligerents that U.S. warships would fire if their aircraft approached U.S. vessels in a manner indicating hostile intent, unless they provided adequate notification of their intentions.

The warning was published to the international community through the issuance of a Notice to Mariners and a similar Notice to Airmen, warning ships and aircraft that U.S. Navy vessels in the Persian Gulf, Strait of Hormuz, Gulf of Oman, and North Arabian Sea were taking additional defensive precautions in response to the *Stark* attack and the continuing terrorist threat in the region. The Notice to Mariners requested ships and other vessels to establish radio contact with U.S. forces on prescribed international radio frequencies and to identify themselves and state their intentions as soon as they were detected. It advised that, in order to avoid inadvertent confrontation, ships and craft, including military vessels, might be requested to change course to remain well clear of U.S. naval vessels. The notice warned that failing to respond to requests for identification and intentions, or to warnings or a request to remain clear, and operating in a threatening manner could place the ship or craft at risk by U.S. defensive measures. It also advised that illumination of U.S. naval vessels with weapons fire control radar would be viewed with "suspicion" and could result in immediate defensive reaction. Finally, it stressed the U.S. forces would remain mindful of navigational considerations of ships and craft in their immediate vicinity, especially when operating in confined waters.

With a few exceptions, the Notice to Mariners and the Notice to Airmen [were] successful in reducing the risk of an inadvertent confrontation with other ships and aircraft. The notices [struck] a reasonable balance between high seas freedom of navigation and overflight and the inherent right of self-defense in protecting U.S. naval vessels from a belligerent or terrorist attack.³⁷¹

In July, the United States began convoying re-flagged tankers. The United States announced that its actions were consistent with international law, which recognized the right of a neutral to escort and protect ships flying its flag which did not carry contraband. The United States added that its ships would not be

carrying oil from Iraq and that neither Iran nor Iraq would thus have any basis for taking hostile actions against U.S. warships or the vessels they protected. If a Gulf belligerent attempted to conduct visit and search of a U.S.-flag vessel under protection of a U.S. man-of-war, the U.S. would examine the ship's cargo and would certify absence of contraband, thereby paralleling the rules of the unratified 1909 London Declaration. In August the re-flagged S.S. *Bridgeton* hit a mine; the U.S. Navy began providing mine protection.³⁷² On September 21, 1987, the U.S. Navy caught the *Iran Ajr* laying mines in the shipping lanes and sank it, arguing that this was done in self-defense.³⁷³

The U.K. position on the war was different from that of France or the United States:

Britain [did] not, on the whole, [refer] to the traditional law of war and neutrality at sea. Instead, it [had] couched its pronouncements in terms of freedom of navigation and the law of self-defense, based on Article 51 of the U.N. Charter. So enthusiastic [was] the British Government about basing its statements on this provision that the General Council of British Shipping (GCBS), which distributes guidance notes to its members, actually [reproduced] the text of Article 51 to be passed on to masters of British merchant ships entering the Gulf. Emphasis on Article 51 rather than the traditional law [was] particularly apparent in certain statements concerning visit and search. When the British merchant ship *Barber Perseus* was stopped by Iranians in January 1986 and forced into an Iranian port, the British Government explained its position in this way.

The United Kingdom upholds the general principle of freedom of navigation on the high seas. However, under Article 51 of the United Nations Charter, a State, such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self defense to stop and search a foreign merchant ship on the high seas, if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicions prove to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay.

The general advice given by the Foreign Office and reproduced in the GCBS guidance notes of advice [was] that even if a ship [was] not carrying any contraband, it [was] usually better to submit to visit and search by the Iranian Navy and to point out to the Iranian officer conducting the search that if his suspicions [proved] to be unfounded and unreasonable, then the ship's owners [would] have a right to compensation.

The United Kingdom [had] protested against Iran's detention of ships on several occasions, not so much for exercising the right to visit and search per se, but for the delays that have occurred and, in some cases, on occasions where the Foreign Office believed an exercise of visit and search could not have been occasioned reasonably by suspicions of a ship carrying prohibited goods. Nevertheless, unlike

the French and U.S. Governments, the British Government [had] made no attempt to say that its warships would certify whether ships were carrying prohibited goods, and British warships [had] not intervened to prevent the exercise of visit and search. Nor [had] British pronouncements referred to the exercise of belligerent rights by Iran. They [had] been couched instead in terms of reference to Article 51.³⁷⁴

The Armilla Patrol began “accompanying” U.K. shipping - *i.e.*, those vessels of U.K. registry or registered in a U.K. colony or dependent territory (*e.g.*, Hong Kong), but not Commonwealth-registered ships - (*e.g.*, Singapore) - and flag of convenience vessels whose majority ownership is British or in a British colony or dependence-as far north as Bahrain. U.K. protection did not extend to ships crewed by British mariners or to ships with no connection to the United Kingdom, as France and the United States were later prepared to do. The U.K. rules of engagement adhered to Britain’s view that U.N. Charter, Article 51, governed any U.K. response: “The rules of engagement [were] intended to avoid escalation, although the varied nature of potential threat and the possibility of surprise attack are recognized and the inherent right of self-defence of Royal Navy ships or British merchant vessels under their protection, is not circumscribed or prejudiced.” The result would have posed “interesting questions” as to whether a U.K. warship could have defended U.K. merchantmen, as defined above, or British-crewed ships. One “practical solution” might be that an attack on the merchant vessel “might reasonably be perceived as an attack on the warship as well. In that situation, the warship [would] be able to defend itself and in doing so defend the merchant vessel accompanying it.”³⁷⁵

All commentators seem to have agreed on the illegality of Iran’s use of unanchored mines, particularly in shipping lanes. The same is true for mines laid in the Red Sea in 1984. While a state may mine a defense area along its coast with due notice of the minefield, employment of drifting mines is not lawful.³⁷⁶

By mid-1987, Iran had attacked nearly 100 ships of 30 nationalities, using aircraft, helicopters, small boats and warships as platforms. Iraq had attacked over 200 vessels, mostly those owned or chartered by Iran.³⁷⁷ In late May 1987, the USSR had sent three minesweepers to join its two frigates that had been on patrol in the Gulf since 1986.³⁷⁸ The June Venice Economic Summit of major Western powers and Japan “agree[d] that new and concerted international efforts [were] urgently required to bring the Iran-Iraq war to an end.” Besides calling upon the belligerents to end the war and supporting the U.N., the Summit “reaffirmed that the principle of freedom of navigation in the Gulf is of paramount importance for us and for others and must be upheld. The free flow of oil and other traffic through the Strait . . . must continue unimpeded.” The Summit pledged to consult on ways to pursue these important goals effectively.³⁷⁹ On July 20, the Security Council, calling for a cease-fire, “deplor[ed] . . . the . . . attacks on neutral shipping . . . , the violation of international

humanitarian law and other laws of armed conflict,” demanded that Iran and Iraq “discontinue all military actions on land, at sea and in air.” The Council called on other nations “to exercise the utmost restraint and to refrain from any act which [might] lead to further escalation and widening of the conflict[.]”³⁸⁰ In August Great Britain and France agreed to send minesweepers to the Gulf, and by September Italian, Belgian and Netherlands ships were on the way.³⁸¹

In October 1987, the United States responded to an Iranian Silkworm missile attack on a U.S. re-flagged tanker, *S.S. Sea Isle City*, in Kuwaiti waters by destroying offshore oil rigs used as an Iranian gunboat base. The United States justified its attack on self-defense grounds, while others argued it was a “carefully calculated reprisal,” bringing the United States in on Iraq’s side.³⁸² The U.S. strike was stated to be in specific response to the Iranian attack on *Sea Isle City*; any connection with the Iranian attack on the *S.S. Sungari*, which had occurred the day before *Sea Isle City* was hit, was avoided. Although *Sungari* was beneficially U.S.-owned, it flew the Liberian flag.³⁸³ This established some precedent, at least for that stage of the war, that the United States did not consider open registry ships, even if owned by U.S. interests, to have enough U.S. connection to merit protection. That view changed as the war deepened.³⁸⁴ In any event, in the destruction of the rigs, the U.S. response followed Charter era criteria for self-defense: it was proportional, in that only the source of the attacks – the host platforms – was destroyed and it was necessary, to remove a continued threat to neutral shipping. It was not a reprisal situation.³⁸⁵ A second incident came the next month.

In November 1987, a U.S. Navy frigate fired on a small boat that approached an American tanker. The boat did not fire at the tanker but ignored warning shots and closed to within 500 yards. The boat turned out to be an unarmed Arab fishing boat, not an Iranian patrol boat. The boat was hit and one person on board was killed. The incident occurred between the coast of the United Arab Emirates and Abu Musa Island, a small island from which Iranian speedboats had carried out raids on Gulf shipping. The United States again relied on the inherent right of self-defense under international law as the basis for its actions.³⁸⁶

Fishing boats, if employed as such, are exempt from capture and destruction.³⁸⁷ This was not the issue here; it was a case of mistaken identity under suspicious circumstances. The U.S. plea of self-defense was justified, particularly in view of the warning shots that no one could ignore.³⁸⁸

In November, the Arab League Extraordinary Summit Conference “expressed anxiety at the continuation of the war and voiced . . . indignation at [Iran’s] intransigence, provocations and threats to the Arab Gulf States.” The Summit “condemned Iran’s . . . procrastination in accepting . . . Resolution 598 . . . [and] called on Iran to accept the Resolution and implement it *in toto*. . .” The international community was asked to “shoulder its responsibilities, exert

effective international efforts and adopt measures adequate to make [Iran] respond to the calls for peace.” Iraq’s acceptance of Resolution 598 and its positive response to peace initiatives were appreciated. The Summit confirmed support for Iran’s defense of its territory and “legitimate rights” and declared solidarity with Kuwait and Saudi Arabia.³⁸⁹ That same month Iran adopted, apparently for the first time, what amounted to a declaration of contraband:

On November 17, 1987, Iran adopted a law according to which all goods belonging to states at war with Iran were liable to capture and condemnation. Goods belonging to neutral states or to neutral or enemy nationals were liable to capture if they fell into certain categories. The first of these categories concerned goods the transport of which to enemy territory was prohibited altogether. The second concerned goods destined, directly or indirectly, for enemy territory, if they effectively contributed to sustain the enemy’s war effort.³⁹⁰

This did not of course cover the circumstances of destruction, without warning, of neutral merchantmen, or indeed of destruction of enemy merchant ships.

In December 1987, a U.S. warship helped rescue a Cypriot crew after an Iranian gunboat attack set their tanker ablaze, one of many such attacks in the renewed war in the Gulf. Tanker captains began tailing convoys or simulating them during night steaming.³⁹¹ On April 14, 1988, U.S.S. *Samuel B. Roberts* hit a mine in a field laid in international waters. In response the United States attacked Iranian oil platforms that had been supporting attacks on neutral shipping on April 18. Four days later Iranian naval units attacked U.S. naval vessels, which destroyed or damaged most of the attackers.³⁹² By this time five European NATO allies – Belgium, Britain, France, Italy and the Netherlands – had sent more than 40 warships to the Gulf for escort and mine suppression duty.³⁹³ The United States began extending protection to neutral ships in distress, if those vessels were outside war/exclusion zones, were not carrying contraband, and were not resisting legitimate visit and search by a Persian Gulf belligerent, on April 29.³⁹⁴ This action also comported with international law.³⁹⁵ In May, Iraqi aircraft hit Iran’s Larak oil terminal in the Strait of Hormuz; *Seawise Giant*, Liberian-registered and the world’s largest supertanker, was among five ships hit.³⁹⁶ In July 1988, a week after the Airbus incident of July 3, U.S. ship-based helicopters attacked Iranian gunboats that had set afire a Panamanian-registered tanker owned by Japanese interests.³⁹⁷

On the diplomatic front, Saudi Arabia had broken diplomatic relations with Iran in April 1988. In June the second Arab League Extraordinary Summit reaffirmed its 1987 communique on the war.³⁹⁸ By mid-June, however, Great Britain and France had restored diplomatic relations with Iran. Saudi Arabia announced a \$12-\$30 billion arms deal with Great Britain, which included 6 to 8 minesweepers. Iran announced acceptance of U.N. Security Council Resolution

598 on July 18, and the U.N. Secretary-General announced a ceasefire effective August 20, 1988.³⁹⁹

The United States announced the end of escorted convoy operations in the Gulf in October 1988.⁴⁰⁰ In January 1989, "de-flagging" procedures for reverting the tankers to the Kuwaiti ensign began.⁴⁰¹ By that time, the Western naval presence in the Gulf had been reduced sharply.⁴⁰²

(1) *Appraisal*

Commander Fenrick has summarized the Tanker War:

The Iran-Iraq conflict was a major war, not a small war. For the only time since World War II, deliberate and sustained operations were carried out against merchant ships. As a general statement, prior to March 1984, Iraq attacked all vessels in a proclaimed exclusion zone at the northern end of the Gulf. From March 1984 until the end of the conflict, Iraq switched the focus of its anti-shiping campaign in an effort to attack the weak link in Iran's war economy and to arouse world interest in the conflict. Iraq directed most of its attacks against tankers, most of them neutral and unconvoyed, sailing to or from Kharg Island, the very heavily defended main Iranian oil terminal, located towards the northern end of the Persian Gulf. All the Iraqi attacks were delivered by shore-based aircraft and almost all involved the use of air launched missiles. Iraq appears to have devoted minimal effort to obtaining visual identification of the target before missile launch, with the result that accidents, such as the Iraqi attack on the USS Stark, did occur. Iran does not appear to have begun attacking commercial shipping until Iraq commenced its anti-tanker campaign in 1984. Since there was no sea traffic with Iraq, Iran attacked neutral merchant shipping destined to and from neutral ports in the Gulf, presumably in an effort to persuade Iraq's financial backers, the other Gulf states, to dissuade Iraq from its campaign against the Kharg Island tankers. Iran's attacks on merchant shipping were less numerous than those of Iraq and, in general, less costly in lives and property damage because they were conducted with rockets instead of missiles. In addition, it is understood that Iran devoted more effort to target identification than did Iraq. On the other hand, Iran did not conduct its attacks in declared exclusion zones and some of its attacks were carried out in neutral territorial waters.⁴⁰³

The result was the largest loss of merchant ships and merchant seamen's lives since World War II:

Throughout the eight year course of the Gulf War, Iran and Iraq [had] attacked more than 400 commercial vessels, almost all of which were neutral State flagships. Over 200 merchant seamen [had] lost their lives because of these attacks. In material terms, the attacks [had] resulted in excess of 40 million dead weight tons of damaged shipping. Thirty-one of the attacked merchants were sunk, and another 50 declared total losses. For 1987 alone, the strikes against commercial shipping numbered 178, with a resulting death toll of 108. In relative terms, by the end of 1987, write-off losses in the Gulf War stood at nearly half the tonnage of merchant shipping sent to the bottom in World War II. In all, ships flying the

flags of more than 30 different countries, including each of the permanent members of the United Nations Security Council, [had] been subjected to attacks.

Only about one or two percent of the ship voyages in the Gulf involved attacks, however.⁴⁰⁴ Nevertheless, in terms of percentage of losses due to maritime casualties worldwide, the statistics were “staggering.” During 1982, the first year of the Tanker War, 47 percent of all Liberian-flag tonnage losses due to maritime casualty occurred in the Gulf. In 1986, the figure was 99 percent; in 1987, more than 90 percent, and the final percentages may have gone higher due to late declaration of constructive total losses. (Most of the Gulf tanker traffic flew flags of convenience, and a third were owned by U.S. nationals, with another substantial portion under charter to U.S. nationals.) Insured losses by marine underwriters were heavy, reaching \$30 million in one month, with resulting tremendous increases in war risk premiums. If there were

any good things [that could] be said of this conflict, they [were] that the Gulf War [became] the principal factor in reducing the overtonnaging of the world oil tanker fleet and in aiding a recovery of the tanker market, and second, that tremendous advances in marine firefighting equipment and techniques [were] directly attributable to recent experience in the Gulf.

To a government expert, “this [was] too thin a silver lining to justify the cloud.”⁴⁰⁵ Iran attacked ships of more 32 national flags, while Iraqi attacks mostly concentrated on vessels flagged or chartered by Iran. Iraq concentrated on attacking ships within the Iranian war zone, while Iran attacked vessels mostly in the lower Gulf, outside its or Iraq’s zones. Iraq tended to shoot first and identify later, while Iran conducted careful vessel reconnaissance and specific vessel identification. Iraq used aircraft for all its attacks, while Iran employed conventional aircraft, helicopters and surface warships or small boats, the latter manned by Revolutionary Guard forces.⁴⁰⁶ Iraq was never able to produce a major interruption in Iran’s oil exports to finance the war. The Tanker War was the most important part of the fighting at sea.⁴⁰⁷

Writing in 1986, before the war had ended, Commander Fenrick noted that “It [was] futile to discuss exclusion zones used in this conflict utilizing presumed limited war standards, as both belligerents probably [had] gone beyond the standards hitherto considered permissible in general war.” Because it was debatable that unconvoyed neutral tankers could have been considered as part of Iran’s war effort, Commander Fenrick asserted that “Iraqi practice in using exclusion zones touche[d] the outer limits of legal acceptability and may well [have] overstep[ped] the boundary.” Iran’s conduct in attacking neutral ships outside the declared war zones and occasionally in neutral waters “was so flagrantly contrary to the laws of maritime warfare that nothing can be said in defence of it.”

Even if one concedes that the other Gulf states [were] providing financial support to Iraq, it does not appear possible to consider the neutral ships engaged in traffic with these states to be incorporated into the Iraqi war effort. Iran's desire to take action to force Iraq to refrain from attacking the Kharg Island tanker traffic [did] not legitimize its actions. It is somewhat surprising that the actions of Iran and Iraq in the Persian Gulf [did] not generate a stronger, or at least more vociferous, response on the part of other states. It is presumed the relative lack of response is owing to the desire of the superpowers to avoid conflict with each other in a sensitive area, and to the facts that there is a tanker surplus and an oil glut, that the tankers attacked usually belong[ed] to flag of convenience states, and that the loss of life [had] been relatively limited.⁴⁰⁸

Another author believes that the Iranian war zone, being more "defensive" in nature, was valid under international law.⁴⁰⁹ Professor Goldie's excellent analysis would say, however, that both sides' zones were disproportionate and therefore illegal.⁴¹⁰ Professor Dinstein, while granting that war zones have been grafted onto the law of maritime warfare, would say that "the so-called exclusion zones [were] not proper war zones," because they were not mined or regularly patrolled, and there were no safe sea lanes for regulated neutral shipping.⁴¹¹ While it is true that neither belligerent had traditional naval forces sufficient to conduct routine patrols, he does not account for the air surveillance.

Neither Iran nor Iraq published contraband lists. Nevertheless, it is clear that both nations considered petroleum exports critical to financing the war.⁴¹² The war was also a "total war" insofar as the adversaries were concerned,⁴¹³ and a major conflict insofar as global standards can measure it.⁴¹⁴ The result is that Iraq was justified in attacking enemy (*i.e.*, Iranian) merchant ships, if loaded with war-fighting/war-sustaining cargoes (*e.g.*, oil) outbound from Iranian ports.⁴¹⁵ Iraq was also justified in attacking neutral merchantmen convoyed by Iranian warships,⁴¹⁶ particularly if those ships carried war-fighting/war-sustaining cargoes. Neutral vessels carrying such cargo for the Iranian war effort and steaming alone were likewise subject to attack by Iraq.⁴¹⁷ It has been argued that Iraqi attacks on merchantmen within the Iranian exclusion zone were not indiscriminate:

Can the Iraqi air attacks on merchant shipping be labeled as indiscriminate because they do not identify the targets visually before launching missiles? I believe not. First, the Iranian exclusion zone . . . made the Iraqi Air Force's target identification easier. Iraqi Air Force pilots apparently assume[d] that any large radar return from a ship located within the Iranian exclusion zone must be a tanker carrying, or destined to carry, Iranian oil. And second, there . . . [was] no evidence that any protected vessels . . . [were] found within the Iranian exclusion zone.⁴¹⁸

Fortuitously, Iraq pumped most of its oil to sell and sustain its war effort through pipelines to Syria, Saudi Arabia and Turkey and thence to the outside world, or financed its war effort through Saudi Arabia and Kuwait. (Whether Kuwait and

Saudi Arabia had arms-length bargains with Iraq, or acted out of fear of their powerful neighbor, or otherwise, is less than clear.) The result was that Kuwait, and to a lesser extent Saudi Arabia, were selling oil and turning over some of the proceeds to Iraq as loans.⁴¹⁹ Clearly the cash or its equivalent to Iraq could have been seized as part of its war effort, but equally clearly the oil, sold to neutrals and carried in neutral tankers, could not be attacked. Thus, the Iranian attacks on neutral merchantmen were illegal; “[a]n attack upon a neutral merchant ship known to be engaged in inter-neutral trade [in this war, e.g., between Kuwait and an oil-consumer nation] [was,] therefore, a violation of law.”⁴²⁰ Moreover, warships of neutral nations may convoy such neutral merchantmen.⁴²¹ Thus the United States was legally justified in convoying the re-flagged tankers, and indeed other neutral nations’ merchantmen. U.S. convoying carried with it the right of self-defense,⁴²² and thus the U.S. responses (e.g., shooting back) were legally justified if they satisfied the criteria of proportionality, which was clearly the case. This was a continuation of trends in other conflicts of the era.⁴²³ The conflict included interactions with merchant ships in coastal states’ EEZs; since the EEZ is part of the high seas, such interactions (e.g., visit and search, etc.) were as legitimate as if the situation occurred on the high seas.⁴²⁴

The result may seem anomalous, in that Iraq received a net benefit from the operation of the law of neutrality. Its war effort could be financed, albeit indirectly, by neutral tanker traffic carrying Kuwaiti and Saudi oil for sale on world markets, while Iran could be condemned for its attacks on such vessels while suffering legally-justified attacks on its tankers, and the tankers of other neutrals carrying Iranian crude. Nevertheless, this is the result. As Professor Tucker put it most aptly, “[t]he fact that the exercise made of these neutral rights thereby places one of the belligerent at a disadvantage with respect to its opponent does not provide the disadvantaged belligerent with a lawful basis for claiming that it has been made the object of discriminatory measures.”⁴²⁵

(2) Other Trends

Several major research efforts appeared as the Tanker War ended: Professor Levie’s *Code of International Armed Conflict* (1986); the *Restatement (Third), Foreign Relations Law of the United States* (1988), *NWP 9A* (1989), and roundtables under the general aegis of the International Institute of Humanitarian Law (IIHL), 1987 to date.⁴²⁶ Professor Ronzitti edited *The Law of Naval Warfare* (1988), in connection with the IIHL meetings; it includes a general introductory analysis, commentaries on treaties and other documents (e.g., the *1913 Oxford Manual*) and the texts of treaties and other documents; references to these have been made throughout other parts of this article. What follows is an analysis of how the *Code*, the *Restatement (Third)*, *NWP 9A*, and the ongoing work of the IIHL apply to the issue of targeting enemy merchant ships.

a. *The Levie Code*. Professor Levie's *Code* restates the existing treaty and documents-based principles. However, "[t]his *Code* does *not* include rules of the customary international law of war which have never been formally stated in an international document of some nature." He notes that many customary norms – e.g., the practice of states – have been "codified" in binding international agreements, e.g., the 1907 Hague Conventions; have been codified in international agreements that have never been ratified, e.g., the 1909 London Naval Treaty; have been restated or expressed in other documents prepared by international organizations but not in treaty format; or certain treaties such as the 1972 Bacteriological Convention or Protocol I of 1977 that eventually will become law.⁴²⁷

Citing the 1930 London Naval Treaty and the 1936 London Proces-Verbal, he states the rule as to attacks on enemy merchant ships:

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, 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.

Professor Levie says that there is some evidence that these are the rules despite contrary Allied practice during World War II.⁴²⁸

This restrictive view of destruction of enemy merchantmen appears supported by his *Code* provisions on neutrals performing unneutral service. Vessels on one-shot service involving transport of enemy armed forces personnel, transmission of intelligence to the enemy, or persons who directly assist enemy operations, are subject to condemnation as though carrying contraband.⁴²⁹ On the other hand, a neutral vessel will be condemned "and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel" if she

- (a) "takes a direct part in hostilities;"
- (b) "is under the orders or control of an agent placed on board by the enemy Government;"
- (c) "is in the exclusive employment of the enemy Government; "[or]

(d) “is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.”

Thus a permanently dedicated vessel may be subject to more severe sanctions – “the same treatment as . . . if she were an enemy merchant vessel” – which may mean capture and condemnation. These principles are stated to be customary law, based on the 1909 London Declaration.⁴³⁰ Whether action against such ships includes destruction, and under what circumstances, is less than clear, such being up to “pure” state practice in the absence of treaty or other document.⁴³¹ Thus his *Code* does not necessarily stand for the proposition that enemy merchant vessels are not subject to destruction in appropriate circumstances. Whether those circumstances would include not placing passengers, crew and papers in safety in event of surface or sub-surface attack is debatable, in view of the 1930 London Treaty and the 1936 Proces-Verbal.⁴³²

The *Code* recognizes the traditional exceptions prohibiting attacks on small coastal fishing or trading boats engaged as such, hospital ships, etc., and vessels carrying cultural property for which due notification has been given.⁴³³ Relying on Protocol I and the 1977 Environmental Modification Convention, Professor Levie states a rule of a general prohibition on methods or means of warfare “intended, or [which] may be expected, to cause widespread, long-term and severe damage to the natural environment.”⁴³⁴

b. The Restatement (Third), Foreign Relations. The *Restatement (Third)*, aside from noting the rule that war-coerced treaties are void and suggesting that hostilities might be a basis for ending or withdrawing from an agreement under fundamental change of circumstances principles,⁴³⁵ does not directly address the enemy merchantman attack problem. However, the *Restatement* does repeat the principles of the 1958 High Seas Convention, UNCLOS, the U.N. Ship Registration Convention and the *Restatement (Second)* with respect to the “genuine link” concept and duties of flag states to exercise effective authority and control over vessels.⁴³⁶ The traditional rules for freedom of the high seas are repeated but subject to a “reasonable regard to the interests of other states in their exercise of the freedom of the high seas.” Conspicuously absent is the qualifier, in UNCLOS Article 87(1), that high seas freedoms are subject to “other rules of international law.”⁴³⁷ The *Restatement* does acknowledge the right of warship high seas transit and asserts that use of warships for aggressive purposes would violate U.N. Charter norms. The right of self-defense is available on the high seas, but these principles are tucked away in the *Comments and Reporters’ Notes*.⁴³⁸ The departure from UNCLOS Article 87(1) would render the *Restatement* less helpful in analyzing the relationship of the law of naval warfare to UNCLOS, but in a roundabout way, through citation of the Charter principles, the *Restatement* would seem to achieve the same result if it is considered that the law of naval warfare, in its treaty aspects, is subject to the Charter,⁴³⁹ and that

other principles, *e.g.*, those derived from custom, are viable in the context of the Charter.⁴⁴⁰ The *Restatement (Third)* cites the 1977 Environmental Modification Convention among many other treaties in finding a duty of states, “to the extent practicable under the circumstances,” to protect the natural environment, with state liability for violations.⁴⁴¹ The 1949 Geneva Conventions and other law of armed conflict principles are not cited in the *Restatement’s* human rights provisions, and, although the major treaties are listed and analyzed,⁴⁴² scant attention is paid the public emergency clauses.⁴⁴³ *Restatement* § 702 says:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or the slave trade
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.

These are stated to be customary norms in the *Comment*,⁴⁴⁴ and (a) through (f) have *jus cogens* quality, such that a treaty - *e.g.*, the public emergency clauses - cannot override them, according to the *Restatement Reporters*.⁴⁴⁵ This differs from the express language of the human rights convention, to which many nations are parties (but not the United States, except for its relatively recent ratification of the Genocide Convention.⁴⁴⁶) Since law of armed conflict treaties, with one exception, are not cited in the *Restatement*,⁴⁴⁷ the usefulness of the *Restatement*, except for its general analytical framework, *e.g.*, on sources of law, treaties, etc., is less than useful for armed conflict scenarios.

Given the relative paucity of treatment of law of armed conflict issues in the *Restatement*, the impact of the genuine link theory for ships and the claims for environmental protection and human rights in the armed conflict scenario remains improbable. However, the ready availability of the *Restatement* with its black-letter format, its prestigious authorship, and the similarity of treatment for some peace-oriented issues, *e.g.*, the environment, may provoke a spillover effect into the law of naval warfare. Professor O’Connell, for example, would seem to attempt to read the genuine link theory into prize law or private international

law (*i.e.*, conflict of laws) involving capture of belligerent merchantmen.⁴⁴⁸ Nevertheless, the rule that nationality of a ship for purposes of visit and search or capture, etc. of an enemy merchant vessel depends on its flag, and the flag alone, remains well-established. The traditional rule was given additional support in the practice of the United States and Kuwait in re-flagging the tankers during the 1980-88 war.⁴⁴⁹ However, the genuine link argument is liable to be raised in future merchant ship visit and search, capture, diversion or destruction situations. Genuine link may be a useful concept for the calm of a prize or criminal case courtroom in the context of conflicts principles, but it is not a helpful concept for the naval commander attempting to observe international law at sea while defending the ship and protecting national interests.

c. NWP 9A. In 1989, *NWP 9A's* annotated supplement appeared. Separate provisions state the rules for surface, submarine and air attacks. For surface attack, enemy merchant ships may be attacked with or without warning if the merchantman:

- (1) actively resists visit and search or capture;
- (2) persistently refuses to stop upon being duly summoned to do so;
- (3) sails under convoy of enemy warships or military aircraft;
- (4) is armed;
- (5) is incorporated into, or assists in any way, the enemy's armed forces intelligence system;
- (6) acts in any capacity as a naval or military auxiliary to enemy armed forces; or
- (7) is integrated into the enemy's war-fighting or war-sustaining effort and compliance with the 1936 Proces-Verbal to the 1930 London Protocol would, under circumstances of the specific encounter subject the warship to imminent danger or would otherwise preclude mission accomplishment.

Paragraph (4) does not distinguish between defensive and offensive armament, a previous distinction, because "[i]n the light of modern weapons, it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively against an enemy or merely defensively." Paragraph (7) is new and was:

added to cope with the circumstance [of a ship] carrying militarily important cargo that is not a naval or military auxiliary and to reflect the actual practice of nations, at least in general wars. Although the term 'war-sustaining' is not subject to precise

definition, “effort” that indirectly but effectively supports and sustains the belligerent’s war-fighting capability properly falls within the scope of the term.

The traditional rules applicable to surrenders and post-attack search and rescue of the shipwrecked, etc., continue to apply,⁴⁵⁰ and all of these provisions are premised on three fundamental principles of the law of armed conflict:

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.
2. It is prohibited to launch attacks against the civilian population as such.
3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.

These legal principles governing targeting generally parallel the military principles of the objective, mass and economy of force. The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary (and wasteful) collateral destruction must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering must be prevented. The law of naval targeting, therefore, requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war.

Only combatants and other military objectives may be attacked. Military objectives are those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations including the security of the attacking force.⁴⁵¹

NWP 9A adds that neutral vessels acquire enemy character when operating directly under enemy control, orders, charter, employment, or direction, or when such vessels resist an attempt to establish identity, including visit and search.⁴⁵² Thus, as noted earlier, *NWP 9A* would appear to approve of Iraqi attacks on ships carrying oil outbound to sustain the Iranian war effort.⁴⁵³ The self-defense aspects of United States responses is less clear.⁴⁵⁴ The traditional list of forbidden targets – hospital ships, coastal fishing and trading boats engaged as such, etc. – follows, with the addition of civilian passenger liners at sea, unless they are being used for military purposes or refuse to respond to a warship’s directions. The inevitable civilian deaths in such a sinking “would be clearly disproportionate to whatever military advantage that might be gained” from their destruction.⁴⁵⁵

Submarines may attack the same categories of enemy merchantmen, although the seven-point list has been compressed to four, and military exigencies and

the practicalities of submarine configurations are said to excuse more readily prior warning or the duty to recover shipwrecked, etc.⁴⁵⁶ The same rules for forbidden targets apply to submarines.⁴⁵⁷

Aircraft may attack under the same circumstances as surface warships and submarines; the same forbidden target rules apply, and the same humanitarian rules for surrender and survivors, etc., apply equally to aircraft, although the practicalities of capacity to accept surrender or really help survivors may be limited.⁴⁵⁸

Vessels operating under enemy charter possess enemy character, according to *NWP 9A*;⁴⁵⁹ there is no examination (or refutation) of the "genuine link" problems.⁴⁶⁰ *NWP 9A* adds that

There is no settled practice . . . regarding the conditions under which the transfer of enemy merchant vessels . . . to a neutral flag may be made. . . . However, it is generally recognized that, at the very least all such transfers must result in the complete divestiture of enemy transfer and control. . . . [A naval commander] is entitled to seize any vessel transferred from an enemy to a neutral flag when such transfer has been made either immediately prior to, or during, hostilities.⁴⁶¹

Thus *NWP 9A* would approve as legal the Kuwaiti-U.S. re-flagging procedures during the Tanker War.⁴⁶²

NWP 9A approves as legal a temporary exclusion zone, although neutrals cannot be denied access.⁴⁶³ Although noting restrictions on chemical, biological and nuclear weapons,⁴⁶⁴ except as to collateral damage, *NWP 9A* does not appear to include environmental damage in the calculus of attack, and protective symbols used in the 1954 Hague Cultural Property Convention and 1977 Protocol I are supplied for informational purposes only. (As noted earlier, the United States is not a party to either treaty.)⁴⁶⁵ And although protections for the civil population are clearly discussed, including situations where the United States supports positions in Protocol I,⁴⁶⁶ the potential for claims of human rights violations is not considered.

NWP 9A also recites the traditional customary rules for neutral commerce, noting the difficulty in distinguishing between absolute and conditional contraband, the presumption for enemy destination, exemptions from contraband, and aircert/clearcert/navicert procedures.⁴⁶⁷ Visit and search rules, "similar" to those for nonbelligerent visit and search, e.g., for drug interdiction, are set forth in full.⁴⁶⁸ Principles for capture and destruction of neutral vessels and aircraft take the traditional U.S. view, which includes forcible measures (i.e., possible destruction) of aircraft or ships resisting proper capture and destruction of prizes where the ship cannot be taken into port for adjudication or properly released, distinguishing between prizes and ships sent to port for visit and search.⁴⁶⁹ The customary blockade rules are recited,⁴⁷⁰ as are the norms for personnel aboard neutral platforms and those interned by neutral governments.⁴⁷¹

In summary, then, *NWP 9A* does an excellent job of presenting the law related to attacks on enemy merchant ships. Query, however, whether a future revision might combine the three recitations for surface, sub-surface and air attacks, since the lists of permitted targets and the list of forbidden targets are the same, the only differences being the circumstances of warning and post-attack procedures. Query also whether the whole list approach might be scrapped in favor of a general warning and navicert system plus use of temporary exclusion and war zones. On the other hand, a naval commander may not wish to disclose his presence, which is implicit in an exclusion zone warning. Moreover, in an all-ocean long war, exclusion zones may not be feasible as a matter of law in practice. Depending on development of the law of nonbelligerent interdiction as well as principles for merchant ship interdiction during armed conflict, the same methodologies for each procedure should be devised, to minimize confusion and simplify command and training problems. This, of course, is a function of law development and practice and not a suggestion for revision of *NWP 9A*, which reflects the law. Last, *NWP 9A* and other manuals should reflect the potential for U.N. Security Council action, which occurred in 1950 during the Korean conflict, again in 1965 with respect to Rhodesia,⁴⁷² and tangentially in other situations.

d. The IIHL and Other Initiatives. Beginning with the Preliminary Round Table of Experts on International Humanitarian Law, held in 1987 at San Remo, Italy, the International Institute of Humanitarian Law (IIHL) has sponsored a series of conferences at which participants might express views on law of naval warfare issues.⁴⁷³ There has been discussion of the possibility of a draft treaty on the subject, but later IIHL conversations have considered preparing a "Restatement" approach analogous to the American Law Institute's series of *Restatements of the Law* in the United States, of which the most relevant for this analysis have been the *Restatements (Second)* and *(Third), Foreign Relations of the United States*.⁴⁷⁴ The IIHL, founded in 1970, has a primary goal of promoting the application, development and dissemination of international humanitarian law as well as promoting human rights. Experts, from governments appearing in private capacities, from the academic community, and from the private sector have been invited to these conferences. A 1987 meeting resulted in an outline of basic principles of humanitarian law and outlined areas needing discussion in light of these principles. The 1988 meeting adopted a plan of action envisaging a series of further annual meetings to draft part of the *Restatement*-style document to serve "as a guide to accepted standards with possibly some compromise solutions where necessary."⁴⁷⁵ The last of the annual meetings was to be held in 1992. Thus far only the 1987 meeting papers and proceedings,⁴⁷⁶ the preparatory work for the 1988 meeting,⁴⁷⁷ and the principal papers and commentaries for the 1989 and 1990 meetings have been published.⁴⁷⁸ Besides the IIHL initiative, other groups of scholars have considered the subject, notably at the annual meetings

of the American Society of International Law,⁴⁷⁹ at Syracuse University, and at the Naval War College,⁴⁸⁰ the latter of which sponsored the papers in this volume. Participants in the Syracuse and Naval War College meetings were for the most part members of the U.S. Planning Group, an informal association of U.S. academicians interested in the subject.⁴⁸¹ Although three of the IIHL roundtables and publication of the predecessor volume in the War College *International Law Studies* series⁴⁸² have occurred after the convening of the Naval War College symposium that resulted in publication of this book, it is appropriate to consider the principal papers presented to the IIHL experts insofar as they relate to the subject.

The *Restatement* approach of the IIHL has been criticized as a “precipitous move” to formulation of rules by a codification accomplished by private individuals who are not state representatives. “The term restatement causes confusion when the participants in the process are identified helter-skelter as academics or representatives of governments. . . . [T]here is a great need to identify state practice, but [there should be] restraint on the rush to codify.”⁴⁸³ Despite these objections, the IIHL project is nearing completion, although its final product had not been published by press time for this volume. Drafts of its work have been circulated, but these cannot be assessed because they are subject to revision. Despite the criticisms of and limitations on the IIHL and other studies, the result will contribute, albeit perhaps at a secondary level,⁴⁸⁴ to the law of naval warfare.

(1) *The 1987 IIHL Meeting at San Remo*

In 1987, the IIHL

Round Table identified the most difficult areas in the law of naval warfare today as first, when armed force could be used at sea, including the concepts of self-defense, necessity, and proportionality, and second, neutrality and belligerent rights at sea. The group then decided to focus on humanitarian issues and reaffirmed in a resolution the basic principles applicable to all kinds of war, namely, that the choice of means of warfare is not unlimited, that there must be a balance between military and humanitarian considerations, and that victims of war and the rights of neutrals must be respected.⁴⁸⁵

The 1987 meeting at San Remo, Italy, had for its preparatory work *The Law of Naval Warfare*.⁴⁸⁶ Although only a published version of the preparatory essays, and therefore only a secondary source for international law,⁴⁸⁷ the book may gain considerable importance because it republishes international agreements and other documents, *e.g.*, the 1913 *Oxford Manual of Naval Warfare*, together with commentaries by scholars on each document. For that reason, the conclusions of the commentators on the law of naval warfare affecting the targeting of merchant vessels are worth summarizing. Except for regional agreements⁴⁸⁸ and an introductory essay, *The Law of Naval Warfare* takes a chronological course,

beginning with the 1856 Declaration of Paris.⁴⁸⁹ Not all agreements affecting the law of naval warfare, *e.g.* the 1958 law of the sea conventions, are analyzed,⁴⁹⁰ and some that only tangentially impact it, *e.g.*, Protocol I to the Geneva Convention of 1949, are included. Nevertheless, *The Law of Naval Warfare* is overall a useful book.

Professor Ronzitti's introductory essay asserts that the conflicts between 1945 and 1990, analyzed in this chapter, have had a tendency to be fought close to the belligerents' coasts and "even to their territorial waters. However, [he said] it is difficult to say whether this practice is dictated by a legal conviction to do so or by consideration of advantage, as, [*e.g.*,] when belligerents have limited naval capability."⁴⁹¹ When the records of Korea and the Gulf War are added to the situations cited, *e.g.*, the 1971 India-Pakistan war and the 1980-88 Tanker War, it is clear that state practice confirms the right of belligerents to conduct naval operations far from home (*e.g.*, the United Kingdom and the United States in Korea, both belligerents in the India-Pakistan war, many nations in the Tanker War and the Gulf War) on the high seas as well as in the territorial sea. Ronzitti also questions the legality of the 1982 United Kingdom TEZ around the Falklands as violating the U.N. Charter, Article 51, while not mentioning the Argentine War Zone of the entire South Atlantic Ocean. Whether his view is correct is debatable.⁴⁹²

Professor Guttry sees the 1907 Hague Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities as being somewhat useful today in the protection of private property at sea, citing state practice since its signature.⁴⁹³ Professor Venturini observes problems with practice since 1907 for the strict terms of Hague Convention (VII) Relating to the Conversion of Merchant Ships into Warships, concluding that "it might be argued that State practice shows a tendency to the recognition of the combatant status of any merchant vessel integrated for all practical purpose[s] into a belligerent navy." Whether Professor Venturini would agree with the United States view, stated in *NWP 9A*, depends on how the phrase "integrated for all practical purpose[s]" is interpreted.⁴⁹⁴ Professor Levie's analysis of Hague Convention (VIII) Relating to the Laying of Automatic Submarine Contact Mines notes that the rule against laying unanchored contact mines and the requirements of notice and for removal of mines remain valid law, but that these principles' applicability to other types of mines could be disputed.⁴⁹⁵ Professor Shearer's analysis of Hague Convention (XI) Relating to Capture in Naval War restates the customary rules flowing from that treaty.⁴⁹⁶

Professor Schindler's commentary on Hague Convention (XIII) Regarding Rights and Duties of Neutral Powers in Naval War begins with the important point that since the founding of the United Nations:

If the Security Council of the United Nations decides on military or non-military enforcement measures according to Articles 39 ff. of the Charter, member States which are bound by such a decision have to deviate from the duties of neutrality. Their position can be described as one of qualified neutrality or non-belligerency.

Neutrality in its strict sense, however, remains possible under the Charter if the Security Council is not in a position to take any binding decision or if it takes such a decision but does not call upon a particular State to take part in the enforcement measures. Neutrality also remains untouched if the Security Council decides on enforcement measures when there is only a threat to the peace but no armed conflict, as it did in 1966 against South Rhodesia and in 1977 against South Africa. The law of neutrality applies only in case of armed conflict. Up to now the Security Council has never been able to decide on enforcement measures in case of an armed conflict. Members of the United Nations therefore have never since 1945 been prevented from remaining neutral and applying the law of neutrality.⁴⁹⁷

He concludes that in the Charter era nations may either come to the aid of a victim of aggression under the self-defense principles of Article 51 of the Charter, remain neutral, or adopt an intermediate position of "nonbelligerency," *i.e.*, assisting the victim by other than military means. States cannot aid the aggressor nation.⁴⁹⁸ The result is that the old law of neutrality can be divided into two sets of rules: those applying to all states not party to a conflict, including neutrals; and those applying particularly to neutrals only. The rights of neutrals, as well as the duty to tolerate certain belligerent measures, belong to all nations not party to the conflict, while the duties of abstention, prevention and impartiality apply only to neutrals in the strictest sense.⁴⁹⁹ He concludes that with certain minor exceptions, *e.g.*, the impact of UNCLOS on warship passage through neutral territorial waters, the 1907 Convention provisions are part of the customary law.⁵⁰⁰

Professor Kalshoven's careful analysis of the 1909 Declaration of London states that customary rules prevail today, but that subsequent treaty norms confirm that "neutral vessels should not be destroyed without cause."⁵⁰¹ The analysis of Professors Nwogugu and Goldie on the 1930 agreements involving submarine warfare are helpful recitations of practice that followed on them.⁵⁰² Professor Prott's analysis of the 1954 Hague Cultural Property Convention notes the gaps for modern naval warfare, given the discovery of underwater archaeological discoveries and wrecks and the problems of the text, *e.g.*, the military necessity exception included at U.S. and U.K. instance (neither of which are parties to the treaty), and that the subject may have lost its immediacy.⁵⁰³ The rule for sunken military aircraft or warships - *i.e.*, that title to them remains in the flag state⁵⁰⁴ - is not mentioned, nor is there a citation to the Roerich Pact, a Western Hemisphere treaty on the same subject,⁵⁰⁵ the 1970 convention on prohibition of the transport, etc., of illicitly-taken cultural property,⁵⁰⁶ or the 1972 convention concerning the protection of the world cultural and natural heritage,⁵⁰⁷ all of which may have naval warfare implications. Professor Bothe's careful analysis of 1977 Protocol I to the Geneva Conventions of 1949 notes the general exemption of air and naval warfare from the Protocol's terms while dismissing those parts that do apply.⁵⁰⁸ Unfortunately, there is little discussion of general customary rules embedded in Protocol I and the possible impact of such customs, thus

strengthened by repetition in the Protocol for land campaigns, on war at sea. The United States is not a party to the Protocol, and has indicated it will not ratify it.

Two regional treaties are also analyzed. The commentator for the 1928 Havana Convention on Maritime Neutrality, to which the United States is a party, notes that the Convention repeats, and thereby strengthens, the rules of Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, being based on World War I experience.⁵⁰⁹ Professor Bring, commenting on the 1938 Stockholm Declaration Regarding Similar Rules of Neutrality, observes that not all Nordic states would observe them today (Denmark and Norway being NATO members, for example), but that the rules reaffirm in the relevant Hague Convention principles and customary law but today do not establish a specific regional or Nordic approach to the law of neutrality.⁵¹⁰

If it be taken as a handbook for its subject, *The Law of Naval Warfare* represents a reasonably complete but not exhaustive collection of relevant agreements and documents. There are gaps, as suggested above,⁵¹¹ and later editions will doubtless correct these. The commentaries accompanying the documents must be employed with care; they are but a secondary source of law, although sometimes an important (or the only additional) source for study of a problem.

At the 1987 San Remo roundtable, Professor Ronzitti found the United Kingdom's TEZ around the Falklands/Malvinas⁵¹² "difficult to reconcile" with the concept of neutrality, insofar as nonbelligerent merchant ships are concerned.⁵¹³ Both Professor Levie, writing for the conference, and Commander Fenrick's earlier article, left open the issue of the TEZ and enemy merchant vessels.⁵¹⁴ Professor Ronzitti also tentatively concluded that:

the practice shows a tendency to confine naval operations to areas close to the coast of belligerents, and even today, their territorial waters. However, it is difficult to say whether this practice is dictated by a legal conviction regarding the coastline or by considerations of opportunity, as for instance, when belligerents have limited naval capability.⁵¹⁵

Participants subsequently questioned whether enough practice had developed to support a customary norm,⁵¹⁶ and whether a war zone was unlawful when applied to neutrals.⁵¹⁷

Professor Lowe, in another paper prepared for the San Remo conference, spoke of war zones in the UNCLOS Exclusive Economic Zone (EEZ) context:

The precedents in the Gulf and South Atlantic suggest that the establishment on the high seas during hostilities of war zones of reasonable size (having regard to the scale of the conflict, the range and type of weapons employed, and the number and distribution of ships and other facilities to be protected, and also the interests of other users of the seas in that area) is acceptable to the international community, as is the declaration that unauthorized ships in the zone may be presumed to

threaten combatant ships and facilities therein and are accordingly liable to attack. The latter provision obviates the need to settle the question of the right to exclude foreign vessels from the zone.

He also concluded that neutral states had the right to forbid hostile military activities in adjacent sea areas “out to such a distance as affords them reasonable protection from the consequences of hostilities.” The weight of practice does not support the view that military uses can be made of the entire EEZ. “The high seas should be regarded as free for all military activities, including those mentioned.” Coastal states may restrict such uses on the bases of necessity and proportionality. He concluded by suggesting that “any ship, regardless of its nationality, . . . under the command, control or direction of combatant military authorities should be assimilated to the status of a warship for the purposes of the foregoing rules.”⁵¹⁸

Professor Robertson stated that modern naval warfare had made the 1907 Hague Convention IX, relating to naval bombardment,⁵¹⁹ obsolete before its entry into force, and noted the general rule of proportionality in Protocol I⁵²⁰ and the advent of modern over-the-horizon weapons. He asked whether the rules for attack should be a seaborne version of Protocol I’s proportionality principle or perhaps weapon-specific rules.⁵²¹ The latter approach, he thought, would be very difficult.⁵²² The ensuing discussion recognized the problem of long-range weapons, the difficulty of discrimination for certain weapons platforms, and the general need to adhere to general rules of military necessity, military objective and proportionality, perhaps on the model of the rules of air warfare, while excluding certain vessels from attack, *e.g.*, hospital ships and passenger liners.⁵²³

Professor Levie stated that Protocol I did not apply to war at sea and inquired whether exclusion zones were a legal method of warfare and whether such zones should be limited in scope, and whether state practice had crystallized enough to declare them legitimate.⁵²⁴ Commander Fenrick stated that persuasive arguments for their legality could be made, and that common rules for aircraft and submarine should be developed.⁵²⁵ The ensuing discussion also raised issues of environmental damage resulting from combat at sea.⁵²⁶

The San Remo conference closed with papers on protected vessels, the ensuing discussion noting the “neutral zone” for hospital ships established by the United Kingdom,⁵²⁷ rules of engagement and their relationship to armed conflict,⁵²⁸ and reprisals.⁵²⁹

The *General Report* of the San Remo conference stated:

The Group of Experts:

Recalls that the principles and rules of international humanitarian law apply impartially to international armed conflicts irrespective of the legality of the initial resort to force or the justification given for any such conflict.

Recognizes the relevance of the principles of international law applicable in armed conflict to armed conflict at sea, in particular:

1) Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. The employment of weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering is prohibited.

2) Parties to a conflict shall at all times distinguish between civilian objects and military objectives. Attack shall be directed solely against military objectives.

3) Parties to a conflict shall ensure that in cases not covered by explicit legal provisions, those involved in an armed conflict remain under the protection and the rule of the principles of the law of nations, as they result from the law of humanity and the dictates of the public conscience.

4) The rules on the conduct of hostilities are subject to the fundamental principle of the need to balance military and humanitarian requirements.

5) Persons hors de combat and/or shipwrecked are entitled to respect for their lives and their physical and moral integrity.

Stresses that parties involved in an armed conflict at sea shall respect the rights of States not involved in the conflict,

Notes that new technologies and methods of naval warfare, new developments in the law of armed conflict and in the law of the sea and the increased possibilities of grave harm to the environment as a result of armed conflict at sea, require study in the light of the principles recognized above,

Notes the various studies and recommendations on the law of armed conflict at sea by the United Nations and the International Conferences of the Red Cross and Red Crescent,

Urges the dissemination of the results of ICRC's and competent international organizations' work on the technical identification of protected vessels at sea,

Decides:

1) To study the means of applying the above-mentioned principles to the regulation of armed conflict at sea. The following should be taken into consideration, in particular:

- new technologies, for instance, sea mines and long-range weapons;

184 Targeting Enemy Merchant Shipping

- means of warfare at sea, for instance, the use of “exclusion zones”, ruses of war, and submarine warfare;
- the use of maritime areas, for instance, neutralized zones, cartel ships, identification of protected vessels and aircrafts;
- humanitarian considerations, for instance, neutralized zones, cartel ships, identification of protected vessels and aircrafts;
- scope of application of the law of armed conflicts at sea, for instance, low-intensity operations;
- enforcement of the law of armed conflict at sea, for instance, reprisals, prosecutions of war crimes, fact-finding;
- armed conflict at sea adversely affecting the environment;
- the needs of shipping of States which are not taking part in the conflict.

2) To study and develop more effective means to secure the practical implementation of the law of armed conflict at sea on a national level, for instance, means of instruction to military personnel, including rules of engagement. . . .⁵³⁰

The *Report* is but a secondary source, or evidence of law,⁵³¹ but its themes laid out the topics for subsequent IIHL meetings.

(2) *The Madrid Meeting*

At a meeting of the IIHL group in Madrid, Spain, in 1988:

it was decided that in future meetings the group's efforts should be focused on identifying areas of agreement on what the law is, as meetings hitherto had principally highlighted areas of disagreement. The participants at the Madrid meeting adopted a plan of action that envisioned a series of yearly meetings of experts on the law of naval warfare from around the world, including in particular military lawyers. Each meeting would operate as a working group to identify common areas of agreement and articulate those rules in a document that would be similar to a “restatement” of the law of naval warfare.⁵³²

The first of the working groups met in Bochum, Federal Republic of Germany, the next year.

(3) *The Bochum Roundtable*

At the 1989 Bochum roundtable, Commander Fenrick's paper, *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*,⁵³³ i.e., objects such as merchantmen that may be legitimately attacked, was presented. After reviewing trends in the law, the influence of the 1977 Protocol I⁵³⁴ to the

Geneva Conventions of 1949, and current preparations of military manuals, Commander Fenrick concluded:

If one accepts the most permissive provisions in the manuals referred to above as a starting point, then, on one view, enemy merchant vessels may be attacked and destroyed when they:

- a) engage in acts of war on behalf of the enemy such as laying mines, minesweeping, cutting undersea cables, visiting neutral merchant ships or attacking merchant ships on one's own side,
- b) act as a de facto auxiliary to an enemy's armed forces by, for example, carrying troops or acting as a replenishment vessel,
- c) are incorporated into, or assist in any way, the intelligence system of the enemy's armed forces,
- d) are armed,
- e) actively resist visit and search or capture,
- f) refuse to stop upon being duly summoned,
- g) sail under convoy of enemy warships or military aircraft, or
- h) are integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of specific encounter, subject the attacker to imminent danger or otherwise not be feasible.

Further, neutral merchant ships could be attacked and destroyed for the reasons specified under heads (a), (b), (c), (e), (f) and (g) above. It is clear that head (d) is not an adequate reason in and of itself for attacking a neutral merchant vessel. The key question which remains, however, is: should neutral merchant ships be subject to attack for the reasons specified in head (h)? Is there a valid legal reason why neutral merchant ships should be immune from attack when they are employed on tasks functionally indistinguishable from those where enemy merchant vessels are subject to attack? If neutral merchant ships which are incorporated into the enemy's war fighting/war sustaining effort are not, for that reason alone, subject to attack then most of the attacks directed by Iraq against neutral tankers travelling to and from Iran during the Tanker War were unlawful. It is not essential that international law, to be valid, should always be compatible with state practice. If, however, the law of naval warfare is to have an impact on the conduct of warfare, there should be a crude congruence between law and practice so that it is marginal, extreme conduct which is condemned, not activities which are routine operations of war.⁵³⁵

The analysis does not answer the reciprocal question of Iranian attacks on vessels proceeding to and from neutral Kuwaiti or Saudi ports, which would *a fortiori* be illegal, or the sub-issue of Iraqi attacks on vessels proceeding in ballast or with cargoes that would not be considered part of an opponent's warfighting/war-sustaining effort. Ultimately, the Bochum conference found, according to Dr. van Hegelsom:

. . . [T]he general principles of military objective and of distinction, as codified in the First Additional Protocol to the Geneva Conventions (Additional Protocol I) are valid in the naval environment. The experts identified the obligation to distinguish at all times between civilians and combatants and between civilian objects and military objectives and the obligation to limit attacks strictly to military objectives.⁵³⁶

As noted above, the precise formulation of the rules is still in draft form.

Additional IIHL conferences on the law of naval warfare have been held since the Newport conference that is the subject of this book.⁵³⁷

(4) *Appraisal of the IIHL Process*

The discussions of the IIHL conferences have been entirely unofficial; military and diplomatic officers have attended in a private capacity, along with academic and International Committee of the Red Cross representatives. All the proposals have been subject to revision by the conferees, and there has been feedback revision in future meetings. Nevertheless, these discussions point toward possible development of a "restatement" of rules, perhaps similar to Professor Levie's *Code*, entirely unofficial, and therefore only a secondary source of law,⁵³⁸ or perhaps evidence of primary sources of law - custom, treaties and general principles - under the *Restatement (Third)* view.⁵³⁹ As noted above, there has been opposition to this approach.⁵⁴⁰ Whether the IIHL conferences' results, in restatement form or otherwise, will have an impact on national manuals on the law of armed conflict like *NWP 9A*, in citations of scholars, or in state practice, remains for the future. To the extent that the IIHL work-product is congruent with existing and developing custom and general principles or international agreements and their interpretations, those primary sources will be reinforced. To the extent that the IIHL rules are cited in court decisions or the product of researchers, or perhaps incorporated in resolutions of international organizations such as the ICRC or the U.N. General Assembly,⁵⁴¹ they will remain in the huddle of secondary sources or evidences of primary sources. (If the U.N. Security Council picks up the IIHL rules as binding norms, they will be elevated to primary status.⁵⁴²) Where the IIHL principles state only progressive development of the law, *e.g.*, rules concerning attacks on liners that are not part of the customary or conventional rules,⁵⁴³ their influence will be the least. Even if the IIHL process has no direct impact on the law, it will have had the beneficial

function of raising issues and stimulating debate, and thereby bring broader attention to bear on the law of naval warfare.⁵⁴⁴

III. Summary and Conclusions

Although there have been at least ten naval conflicts that have involved enemy merchant shipping or neutral vessels that have acquired enemy character between 1945 and 1990, the change in the practice of states has been relatively incremental since World War II. The rule book has been thrown out the porthole on occasions, *e.g.*, during the 1971 India-Pakistan and the Tanker Wars, but not enough to establish a new rule or that there are no rules. One of the difficulties in surveying the period has been lack of hard evidence, due to security classifications⁵⁴⁵ and the fact that governments do not publish diplomatic papers for many years after the event, and then only selectively. Thus this chapter's *Discussion* and the resulting *Summary* may be lacking in critical details that could alter a view of state practice radically. The reason for this caveat lies in the way international law looks at state practice, or custom. Not only must there be a sustained practice, but it must be accepted as law by nations affected, under the majority view.⁵⁴⁶ Whether one or two claims would be enough to support a trend may be doubtful to some; in almost all recent cases *opinion juris* – acceptance of the practice as law – the record may be meager. The exceptions may be the Falklands/Malvinas War (1982) and the Tanker War (1980–88), but even here the picture may be less than complete.

The Korean conflict would seem to have stretched to the line the rule that small coastal fishing vessels when plying their trade are not subject to capture or attack,⁵⁴⁷ but the attacks might be justified under another theory generally – but not universally – approved today, *i.e.*, destruction of vessels as part of the enemy's war-sustaining effect.⁵⁴⁸ Pretty clearly the small fishing boats and coastal traders carrying weapons during the Vietnam War were part of the North Vietnam war effort, and attacks were justified.⁵⁴⁹ The United Kingdom's attack on *Narwal* was justified on one officially-stated ground, *Narwal's* supporting Argentine intelligence, but attack might have been also vindicated because *Narwal* was a 1600-ton trawler and obviously not a coastal boat.⁵⁵⁰

Hospital ships – another forbidden target – were respected during the Falklands/Malvinas War through the medium of the "Red Cross box" neutral zone – a new wrinkle, borrowed from the law of land warfare.⁵⁵¹

The record is mixed on belligerents' attacks on traditional oceangoing ships steaming alone. During the Arab-Israeli conflicts, there were attacks on neutral vessels and an Israel-bound tanker, and an Egyptian-declared blockade of tankers coming from Eilat.⁵⁵² Whether the Israel-bound tanker was carrying war-sustaining petroleum (probably it was) or whether Sinai oil was helping finance the Israeli war effort is not clear from the research. During the 1971 India-Pakistan

conflict, India instituted naval control of shipping, which would have subjected those vessels to Pakistani attack if the Indian vessels were convoyed or were involved in the war effort. India declared a blockade of what was then East Pakistan (now Bangladesh), and captured Pakistani merchantmen. Whether these were supporting the enemy war effort and therefore subject to capture or were wrongfully seized is less than clear; one commentator has asserted that India ignored the rules.⁵⁵³

During the Vietnam conflict the United States published notice of its mining North Vietnamese harbors, thus warning all ships, in accordance with international law, whether they would have been classified as enemy merchantmen on war service or neutrals performing unneutral service. This might be compared with the illegal use of mines in the Red Sea and Persian Gulf. U.S.-flag merchant vessels were the subject of shoreside attacks, with no evidence that warnings were given. Two were sunk, one loaded with cement. There is no evidence of a claim by North Vietnam of the cement hauler's being on war service.⁵⁵⁴ Both RFA and STUFT ships were attacked during the Falklands/Malvinas War while on war-sustaining missions, and there is no evidence of protests.⁵⁵⁵ Under established principles, both classes of vessels were legitimate targets.

During the Tanker War, Iraq attacked enemy merchant ships, and was legally entitled to do so, when these vessels carried Iranian petroleum that would be sold or bartered to support the war effort.⁵⁵⁶ Neutral-flag tankers carrying belligerents' petroleum, the sale of which would support the war effort, were also subject to attack when convoyed by Iranian warships.⁵⁵⁷ (If a belligerent chose to attack, and was subjected to necessary, proportional defensive responses, those responses were also consonant with international law.) On the other hand, neutral vessels carrying neutral goods were not subject to attack, and attacks by Iran or Iraq on foreign-flag ships of this nature were clearly illegal under international law, whether convoyed by neutral nation warships or steaming alone.⁵⁵⁸ Neutral nations could respond proportionally in self-defense to such attacks, whether the response came from convoying warships, warships in the area, or by other means of self-defense.⁵⁵⁹

Blockades in the traditional sense were declared in several of the conflicts (Korea, 1950; India-Pakistan, 1971; Arab-Israel, 1973; Iran-Iraq, 1980; Lebanon, 1982),⁵⁶⁰ and the traditional rules seem to have been applied, despite the contentions of some that the rules had become functionally obsolete.⁵⁶¹ Quarantine - in which merchantmen supplying an adversary are stopped and diverted in a nonwar context - was an innovation. This practice was first developed in the Algerian civil war under a self-defense rationale, and was employed by the United States during the 1962 Cuban missile crisis, by the United Kingdom in the Rhodesian interdiction operation with U.N. Security Council approval, and by the United States in mining operations in North Vietnamese territorial waters and South Vietnam in the South China Sea.⁵⁶²

Some have questioned the legal validity of such operations when the claim has been based on self-defense in the wake of the 1986 *Nicaragua Case*,⁵⁶³ but there has been no authoritative guidance on the issue beyond state practice to the contrary and the Security Council's decisions in the case of Rhodesia. Under the circumstances, a conditional conclusion is that such quarantines are legal under a self-defense theory, so long as they are necessary and proportional in response and otherwise conform to international norms - *e.g.*, a quarantine cannot obstruct freedom of navigation of third-nation warships, nor can it bar a hospital ship from a port.

The period 1945-90 also witnessed a re-emphasis on the exclusion zone used perhaps in the Korean War,⁵⁶⁴ and certainly in the Falklands/Malvinas War,⁵⁶⁵ and the Tanker War.⁵⁶⁶ The principle that has emerged is that such zones are legal, so long as they are published and reasonable in area and duration, *i.e.*, that they obey the general principles of necessity and proportionality.⁵⁶⁷ Wartime reprisals may permit a wider zone.⁵⁶⁸

Besides the developing rules from practice, however, decision makers must consider the impact of treaty law clearly applicable to naval warfare.⁵⁶⁹ Two post-World War II examples are the GWSEA prohibition on attacks on small coastal rescue craft,⁵⁷⁰ and the 1977 Environmental Modification Convention.⁵⁷¹ New general principles of law,⁵⁷² perhaps analogized from emerging human rights norms,⁵⁷³ may further complicate the picture.

Then there is the problem of "radiations" from other bodies of law that may affect the rules of practice in maritime warfare. One recent example is the "Red Cross box" concept in the Falklands/Malvinas War, a procedure borrowed from the law of land warfare by the United Kingdom and respected by Argentina.⁵⁷⁴ That was a good idea, but consider commentators' attempts to incorporate the UNCLOS "genuine link" concept into the rule that enemy character is determined by the flag flown,⁵⁷⁵ or attempts to incorporate 1977 Protocol I wholesale into the law of naval warfare.⁵⁷⁶ Both appear to be erroneous conceptions of the current state of the law, but these analyses point the way for attempts at possible inclusion of concepts, in whole or in part, from these and other sources in future considerations of law of naval warfare issues: as established practice human rights;⁵⁷⁷ the 1954 Hague Cultural Property Convention, not in force for the United States but with potential overtones for legitimization of state practice;⁵⁷⁸ the High Seas Convention and UNCLOS;⁵⁷⁹ the 1977 Protocol I additional to the 1949 Geneva Conventions;⁵⁸⁰ the 1981 Conventional Weapons Convention;⁵⁸¹ and resolutions of the U.N. Security Council or other international organizations.⁵⁸²

Throughout the 1945-1990 period, commentators assessed the subject matter of this paper. These sources, and indeed the new military manuals such as *NWP 9A*, have their place in the analysis, either as secondary sources⁵⁸³ or as expositors of state practice to date. It is for this reason that they have been included too, and

must be considered along with state practice, treaties, general principles of law, and other sources.

In sum, the place of state practice in the law of naval warfare is much more complicated today than before advent of the U.N. Charter in 1945. Perhaps it is for this reason that the IIHL and others have begun a series of roundtables to attempt to “restate” the law of naval warfare.⁵⁸⁴ Whether this is a wise methodology, and whether the results will be acceptable to states, is not clear today because of the ongoing nature of the project. What is fairly certain is that more than state practice will be considered in its deliberations, and should be considered by national decisionmakers assessing law of naval warfare issues related to projected or ongoing situations.

There has been discussion of a general treaty on the law of naval warfare.⁵⁹⁵ A treaty offers certain advantages:

- (1) If congruent with custom, the rule is strengthened;⁵⁸⁶
- (2) Treaties may be the preferred source for some states;⁵⁸⁷
- (3) Custom can be elusive in content, relying on the happenstance practice of states during a naval war, and the particulars of a particular practice may be sealed in archives for decades;
- (4) State practice for wartime rules during armed conflict can be an awfully expensive way to write law;
- (5) For naval decision makers, there is the advantage of a “black letter” format, e.g., the 1949 Geneva Conventions’ provisions;
- (6) Training in the subject can be simpler; the black letter format of treaties lends itself to easier learning.

These propositions could be countered:

- (1) Inconsistent custom can eventually obliterate an outmoded treaty;⁵⁸⁸
- (2) If a treaty is tied to current technology, it may be out of date before the ink is dry,⁵⁸⁹ and the problems of arguing by analogy or under the principle *inclusio unius exclusio* may arise;
- (3) Custom has the advantage of adapting to new situations that cannot now be contemplated;⁵⁹⁰
- (4) Treaties are always subject to reservations or understandings by the signatories, which can result in as much confusion as to the state of the law as in the case of custom, an example being Soviet bloc and other reservations to the 1949 Geneva Conventions;⁵⁹¹
- (5) If issues over which there is sharp disagreement arise during the treaty negotiation process, the result can be protracted negotiations, a breakup of the negotiations with no treaty resulting, states may refuse to sign, as in the case of U.S. refusal to sign UNCLOS, states may decline to ratify the agreement, as in

the case of the United States and SALT II, or a treaty that reflects the lowest common denominator on the subject may result, which accomplishes little;

(6) The internal ratification process for many nations can result in outright rejection of the treaty, considerable delays, further reservations by the legislative body (*e.g.*, the Senate under the U.S. Constitution), or lack of legislative support for implementing statutes;⁵⁹²

(7) Carefully-written "black letter" rules for custom can be incorporated into military manuals, to be employed by decisionmakers or in an instructional setting.⁵⁹³ Indeed, it has been necessary to condense the detail of treaties such as the 1949 Geneva Conventions to make them more understandable for users;⁵⁹⁴ thus a treaty can suffer from ambiguity of words, even as custom carries a risk of ambiguity of rules.

With the demise of the Soviet Union and a resulting unipolar world with the United States as the only true military superpower, the inclination to engage in multilateral agreement negotiations may be decreasing. State practice may be the rising modality for determining international law.⁵⁹⁵ The continued trends in fragmentation of nations - Czechoslovakia, the USSR and Yugoslavia being the most recent examples - would suggest that the babble of claims and counterclaims⁵⁹⁶ as to what is the law, or should be the law, further militates against beginning the treaty process now.⁵⁹⁷ Yet this very process of disintegration and the resultant relative weakness of nations to counter threats from within and without argues for establishment of some norms to guide what may be the beginning of a new season of conflict. For now, the patchwork of traditional custom and general principles, treaties perhaps modified by practice or interpretation, and the often-conflicting urgings of scholars and groups such as the IIHL, plus the modifications in state practice that have characterized naval conflicts since World War II, will be the principal guide to naval powers as they confront relatively new bodies of law pressing from the periphery. The latter include the U.N. Charter, UNCLOS, the 1977 Protocols, and the law of human rights. The result may be the dawn of a new world order or a fresh descent into international chaos.

Notes

*Professor of Law, Wake Forest University; Charles H. Stockton Professor of International Law, U.S. Naval War College, Newport, R.I. Parts of this chapter may be incorporated in the author's Yale Law School J.S.D. dissertation and are his views and not necessarily those of the U.S. Navy or the U.S. Government. The author expresses thanks to Professor Thomas W. Steele, Wake Forest University law librarian, and his staff; and to Professor Robert E. Schnare, Jr., Director of the Naval War College Library, and his staff, for assistance in compiling sources.

1. International agreements may evidence custom, or state practice, even though states are not formal parties to the agreement through the ratification process. Natalino Ronzitti, *The Crisis of the Traditional Law*

192 Targeting Enemy Merchant Shipping

Regulating International Armed Conflicts at Sea and the Need for its Revision, in *The Law of Naval Warfare* 1, 2 (N. Ronzitti ed. 1988); George Walker, *The Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, 37 *Nav. L. Rev.* 1, 10-12 (1988), citing, *inter alia*, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 14, 31-38, 91-135 [hereinafter *Nicaragua Case*]; *North Sea Continental Shelf* (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 4, 28-29, 36-45; *The Paquete Habana*, 175 U.S. 677 (1900); *Restatement (Third), Foreign Relations Law of the United States*, Part III, *Introductory Note*, para. 4 (1988); Richard R. Baxter, *Treaties and Custom*, 129 *Recueil des Cours* 25, 36 (1970).

2. U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Pub. No. E.83.V.5 (1983) [hereinafter UNCLoS]. Many UNCLoS provisions restate customary law. See, e.g., *Restatement (Third)*, *supra* note 1, Part V, *Introductory Note*, para. 5, and *Joint Statement by the United States and the USSR Concerning Uniform Interpretation of Rules of International Law Governing Innocent Passage*, Sept. 23, 1989, para. 1., 28 *Int'l Legal Mat'ls* 1444, 1445 (1989).

3. Ian Brownlie, *Principles of Public International Law* 5-6 (4th ed. 1990).

4. U.S. Department of the Navy, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (NWP 9) (Rev. A)/FMFM 1-10, [hereinafter NWP 9A], *Preface*, at 1 n.2 (1989).

5. Compare I.C.J. Statute, art. 38(1)(c), 38(1)(d), (general principles of law recognized by civilized nations a primary source, highly qualified scholars' and judicial opinions as subsidiary means for determining the law) with *Restatement (Third)*, *supra* note 1, §§ 102(2), 103(2) (general principles common to major legal systems are a subsidiary source; judgments and opinions of national and international tribunals, judgments and opinions of international arbitral tribunals, scholars' writings, and "pronouncements by states that undertake to state a rule of international law [e.g., resolutions of international organizations], when such pronouncements are not seriously challenged by other states)." The *Restatement (Third)* formula draws on the Statute, which is binding on litigation before the World Court. Cf. *id.* § 102, reporters' note 1.

6. See, e.g., the use of scholars' writings in *The Paquete Habana*, 175 U.S. 677 (1900).

7. NWP 9A, *supra* note 4, para. 7.4, notes that such ships may be subject to visit and search, but not to capture or destruction, by belligerents.

8. *Id.* paras. 8.2, 8.2.1.

9. Cf. *id.* para. 7.5.1.

10. *Id.* para. 8.2.3. As will be seen *infra* in Parts II.E-II.F, vessels such as coastal fishing craft may lose their protected status if they engaged in combat operations, e.g., by gathering intelligence or by transporting war material or troops.

11. Leland M. Goodrich et al., *Charter of the United Nations* 25-26 (3d ed. 1969). 2 Daniel P. O'Connell, *The International Law of the Sea* 1094 (Ivan A. Shearer ed., 1982) [hereinafter 2 Daniel P. O'Connell] declares that "The outlawing of the resort to force in the . . . Charter has profoundly affected the law of war at sea."

12. U.N. Charter, art. 51, says that the right continues "until the . . . Council has taken measures necessary to maintain international peace and security." Hence, to the extent the Council would fail to act, perhaps because of a veto or less than super-majority vote under *id.* art. 27, or to the extent that the scope of a Council decision under *id.* arts. 25, 48 does not cover a situation that might involve self-defense, Members are free to exercise that right. An example from any of the situations discussed *infra* in this chapter would be the circumstance of a submarine attack on, or display of hostile intent to, a warship steaming far away from the geographic zone of a conflict controlled by a Council action. Alternatively, a state whose freedom of action is totally regulated by Council action regarding a localized conflict (the classic case that might have involved such being the 1982 Falklands/Malvinas conflict, Part II. F *infra*) would not have denied those states the right to take self-defense measures in other contexts. For example, if there had been an attack or a threat of attack on Great Britain's home islands by a third power (or by Argentina for that matter), the United Kingdom could have responded proportionally in self-defense.

13. *Id.*, arts. 33-38. For further analysis, see Leland M. Goodrich et al., *supra* note 11, ch. 6.

14. U.N. Charter, arts. 39-51.

15. Leland M. Goodrich et al., *supra* note 11, at 333.

16. U.N. Charter, arts. 25, 48-49. If a party to a successful suit in the International Court of Justice cannot get compliance from the losing state, the Council also has authority to recommend, or decide on, measures to give effect to the judgment. *Id.*, art. 94(2).

17. NWP 9A, *supra* note 4, paras. 4.3.2 - 4.3.2.1, citing, *inter alia*, the *Caroline Case*, 2 John B. Moore, *Digest of International Law* 409-14 (1906). See also *infra* note 24 and accompanying text.

18. NWP 9A, *supra* note 4, para. 4.3.2, at 4-11 - 4-12, citing the Cuban Missile Crisis of 1962, analyzed *infra* at Part II.C.3; see also Derek W. Bowett, *Self-Defence in International Law* 187-93 (1958); Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order* 232-41 (1961); Julius Stone, *Aggression and World Order* 44 (1958); David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1991 *Duke J. Comp. & Int'l L.* 57, 65-84, 122; W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 *Yale J. Int'l L.* 279 (1955); Oscar Schachter, *The Right of States*

to Use Armed Force, 82 Mich. L. Rev. 1620, 1634 (1984); Claud H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Recueil des Cours 451, 496-99 (1952); cf. Horace B. Robertson, Jr., *Contemporary International Law: Relevant to Today's World?*, 45 Nav. War Coll. Rev. 89, 101 (No. 3, 1992).

19. Ian Brownlie, *International Law and the Use of Force by States* 112-13, 264-75 (1963); Yoram Dinstein, *War, Aggression and Self-Defence* 86, 174-75 (1988); Louis Henkin, *How Nations Behave* 140-45 (2d ed. 1979). Daniel P. O'Connell, *The Influence of Law on Sea Power* 83 (1979) [hereinafter Daniel P. O'Connell]; Vaughan Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in Horace B. Robertson, Jr., *The Law of Naval Operations* 109, 127-30 (1991), referring, *inter alia*, to Nicaragua Case, *supra* note 1, at 92-94, 109-11. See also Christopher Greenwood, *The Effects of the United Nations Charter on the Law of Naval Warfare* 10-12 (1991), rapporteur's manuscript presented to the Round Table of Experts on International Humanitarian Law Applicable to Armed Conflict at Sea, Bergen, Norway, Sept. 20-24, 1991; Christopher Greenwood, *Remarks, in Panel, Neutrality, The Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, 1988 Proc. Am. Soc'y Int'l L. 158, 159-61 (1990), noting this was the U.K. view during the 1980-88 Tanker War; Rainier Lagoni, *Remarks, in id.* 161, 162. James J. McHugh, *Forcible Self-Help in International Law*, 25 Nav. War Coll. Rev. 61 (No. 2, 1972) analyzes both sides of this and related issues.

20. UNCLOS, *supra* note 2, arts. 91, 92; Convention on the High Seas, Apr. 29, 1958, arts. 5, 6, 13 U.S.T. 2312, 2315, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 84, 86 [hereinafter 1958 High Seas Convention]; Restatement (Third), *supra* note 1, § 501. See also *infra* notes 304-30 and accompanying text.

21. Yoram Dinstein, *supra* note 19, at 184; see also the U.N. General Assembly's "Definition of Aggression" Resolution, U.N.G.A. Res. 3314, 29 U.N. GAOR Supp. No. 19, U.N. Doc. A/9619 & Corr. 1 (1974), reprinted in 69 Am. J. Int'l L. 480 (1975), the latter of which omits article 3(d) of the Resolution, most critical for this study:

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

* * * * *

(d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State;

Compare Definition of Aggression, art. 3, reprinted in 69 A. J. Int'l L. at 482, with, e.g., the version in Julius Stone, *Conflict Through Consensus* 186, 188 (1977), or the draft version reprinted in 13 Int'l Legal Mat'ls 321, 324 (1974). The ICJ cited the Resolution, art. 3(g), in the Nicaragua Case, *supra* note 1, 1986 I.C.J. at 103-04, and did:

not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

The decision is only a secondary source of law and carries no precedential weight. I.C.J. statute, arts. 38(1), 59. It may be significant that the Security Council has not taken the bait of the Resolution, preamble, para. 4, in citing the Resolution in any of the situations, 1974-90, analyzed in this study, although some, e.g., Falklands/Malvinas, *infra* part II-F, were clear cases of aggression as defined in the Resolution. Most authorities question whether the Resolution is a codification of custom in all respects. For example, Bengt Broms, chair of the U.N. Committee that produced the Resolution, made no such assertion in *The Definition of Aggression*, 154 Recueil Des Cours 299, 385-88 (1978). Yoram Dinstein, *supra* note 19, at 124, cites no authority for the proposition that the whole Resolution restates customary law. For a trenchant analysis of the Resolution, see, e.g., Julius Stone, *supra* ch. 9.

194 Targeting Enemy Merchant Shipping

22. George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 39 Nav. War Coll. Rev. 69-70 (1986).

23. Horace B. Robertson, Jr., *supra* note 18, citing Yoram Dinstein, *supra* note 19, at 179.

24. NWP 9A, *supra* note 4, para. 4.3.2.1, citing George Bunn, *supra* note 22, at 70; R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l L. 82, 89 (1938), which with NWP 9A cite the Caroline Case; letter of U.S. Secretary of State Daniel Webster to U.K. Ambassador Lord Alexander B. Ashburton, Aug. 6, 1842, 2 John B. Moore, *Digest of International Law* 411-12 (1906); letter of Secretary Webster to U.K. Minister Henry S. Fox, Apr. 24, 1841, in 1 K. Shewmaker, *The Papers of Daniel Webster: Diplomatic Papers* 58, 67 (1983). Vaughan Lowe, *supra* note 19, at 128, notes that the Nicaragua Case, *supra* note 1, at 93, specifically excluded consideration of anticipatory self-defense, and that states are likely to place greater reliance on that doctrine in the future.

25. W. Michael Reisman, *Critical Defense Zones and International Law: The Reagan Codicil*, 76 Am. J. Int'l L. 589 (1982).

26. North Atlantic Treaty, Apr. 4, 1949, art. 6, 63 Stat. 2241, 2244, T.I.A.S. No. 1964, 34 U.N.T.S. 243, 246, as modified by Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, Oct. 17, 1951, 3 U.S.T. 43, 44, T.I.A.S. No. 2390, 126 U.N.T.S. 350.

27. W. Michael Reisman, *supra* note 25, at 589, cites the Monroe Doctrine as an example.

28. Oscar Schachter, *International Law in Theory and Practice*, 178 Recueil des Cours 9, 169 (1982).

29. See Ian Brownlie, *supra* note 19, at 281, citing many sources; Derek W. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 Am. J. Int'l L. 1 (1972); Claud H.M. Waldock, *supra* note 18, at 492-94.

30. Julius Stone, *supra* note 18, at 43, 94-98; Yoram Dinstein, *supra* note 19, at 207. As in the case of his "interception" theory for self-defense, see *supra* notes 23-24 and accompanying text, Professor Dinstein seems to be very close to the majority view when he says "armed reprisals are prohibited unless they qualify as . . . self defense under [U.N. Charter,] Article 51." Yoram Dinstein, *supra* at 203.

31. NWP 9A, *supra* note 4, para. 6.23.

32. Case Concerning Air Service Agreement Between France and the United States (Fr. v. U.S.), 18 U.N. Rep. Int'l Arb. Awards 417, 443-46 (1978). The U.S. and other nations' orders in early August 1990, freezing Iraqi and Kuwaiti assets before the U.N. Security Council acted, were valid economic reprisals. George K. Walker, *The Crisis Over Kuwait, August 1990-February 1991*, 1991 Duke J. Comp. & Int'l L. 25, 43.

33. Oscar Schachter, *supra* note 28, at 169, 185-87; Claud H.M. Waldock, *supra* note 18, at 458.

34. Philip C. Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 Am. J. Int'l L. 98 (1954); Myres S. McDougal, *Peace and War: Factual Continuum with Multiple Legal Consequences*, 49 *id.* 63 (1955). NWP 9A, *supra* note 4, fig. SF5-1, *Spectrum of Conflict*, is an excellent illustration of this point.

35. See *infra* notes 178-179, 183, 198, 308-13, 328-29, 374, 422, 441, 465 and accompanying text.

36. For a general discussion of the intricacies of private ownership interests in commercial shipping, see generally Grant Gilmore & Charles L. Black, *The Law of Admiralty*, chs. 2-4, 9, 11 (2d ed., 1975); Thomas J. Schoenbaum, *Admiralty and Maritime Law*, chs. 8-10, 18 (1987). The problems of containerized shipping and others confronting the dwindling U.S. merchant marine are examined in John A. McPhee, *Looking for a Ship* (1990).

37. See, e.g., Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(d) (1988) (definition of commercial activity).

38. London Declaration Concerning the Law of Naval War, Feb. 26, 1909, art. 57, in *The Law of Naval Warfare*, *supra* note 1, at 223, 250.

39. See *supra* note 34 and accompanying text.

40. Cf. NWP 9A, *supra* note 4, para. 7.5.

41. For analysis of these *jus ad bello* issues in the context of the Falklands/Malvinas War, see Alberto R. Coll, *Philosophical and Legal Dimensions of the Use of Force in the Falklands War*, in Alberto R. Coll & Anthony C. Arend, *The Falklands War: Lessons for Strategy, Diplomacy and International Law* 34 (1988).

42. S.C. Res. 82, U.N. Doc. S/RES/82 (1950); S.C. Res. 84, U.N. Doc. S/RES/84 (1950), reprinted in Karel C. Wellens, *Resolutions and Statements of the United Nations Security Council (1946-1989): A Thematic Guide* 252-54 (1990); see also Edwin C. Hoyt, *The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy-Making*, 55 Am. J. Int'l L. 45 (1961); Josef L. Kunz, *Legality of the Security Council Resolutions of June 25 and June 27, 1950*, 50 *id.* 137 (1951).

43. See U.N. SCOR Supp. (June - Aug. 1950) at 50, U.N. Doc. S/1580 (1980), reprinted in 10 Marjorie M. Whiteman, *Digest of International Law* 866-67. See also James A. Field, *History of United States Naval Operations: Korea* 42 (1962); Message of the U.S. Joint Chiefs of Staff to the Commander in Chief, Far East (General Douglas MacArthur), July 1, 1950, 7 U.S. Department of State, *Foreign Relations of the United States* 1950 (Korea) 271 (1976), authorizing the blockade by "such means and forces . . . to deny unauthorized ingress to and egress from the Korean coast . . . to suppress seaborne traffic to and from North Korea and to prevent movement by sea of forces and supplies for use in operations against South Korea. Care should be

taken to keep well clear of the coastal waters of Manchuria and USSR." Notices to governments and mariners were to be issued from Washington.

44. Malcom W. Cagle & Frank A. Manson, *The Sea War in Korea* 281-83 (1957); *see also id.* at 299-300, 304, 353-57, 370-73. James A. Field, *supra* note 43, at 54, reports at least one submarine incident early in the war. There were periodic periscope sighting claims later. *Id.* at 349, 395. *Id.* at 372 estimates that a submarine campaign would have been effective. Inshore blockading was an ROK responsibility. *Id.* at 58-59. *See id.* at 61, 126, 158, 444 for actions connected with the blockade. *Id.* at 187, 193, 358-59, 372, 444, 447 discusses USSR involvement with North Korean mining. If a Russian merchantman attempted to enter a blockaded port, the vessel would be stopped, and, if necessary, fired upon to enforce the blockade. If a Russian warship attempted to enter such a port, it would be allowed to enter and leave. If the warship escorted a Russian merchantman, and the two tried to enter a blockaded port, the merchant vessel would be stopped, but the warship would be allowed to proceed. If the warship tried to interfere with measures taken to stop the merchantmen, and fired on the blockading vessel, the latter would return fire in self-defense. Memorandum of Conversation by U. Alexis Johnson, Deputy Director of U.S. State Department Office of Northeast Asian Affairs, July 8, 1950, 7 Foreign Relations of the United States: 1950, at 332-33 (1976). As the Memorandum noted, this was "normal international practice." *See* London Declaration Concerning the Laws of Naval War, Feb. 26, 1909, arts. 5-6, 20, in *The Law of Naval Warfare*, *supra* note 1, at 223, 228, 232; NWP 9A, *supra* note 4, para. 7.7; *see also supra* notes 11-39 (self-defense and related issues).

45. George K. Walker, *supra* note 32, at 49-50.

46. *See infra* notes 207-08 and accompanying text.

47. *See infra* notes 73-76 and accompanying text.

48. *Compare supra* notes 43-44 with, e.g., NWP 9A, *supra* note 4, para. 7.7.2.

49. James A. Field, *supra* note 43, at 52; telegrams from John J. Muccio, U.S. ambassador in South Korea, to Secretary of State Dean Acheson, June 26, 1950, 7 Foreign Relations, *supra* note 44, at 168.

50. James A. Field, *supra* note 43, at 269, 273-74, 286, 291, 304, 312.

51. *See, e.g.*, NWP 9A, *supra* note 4, para. 8.2.3.

52. *See, e.g., id.* at 8-19 & n. 59.

53. James A. Field, *supra* note 43, at 58.

54. *Id.* at 372.

55. *Id.* at 71-74. Thirty SCAJAP ships; 13 MSTs vessels; 26 U.S.-chartered, U.S.-flag cargo ships; and 4 Japanese-flag merchantmen participated in the Inchon landing. *Id.* at 181. The Wonsan invasion involved 30 SCAJAP ships and "MSTs shipping as assigned," which included Japanese *marus*, i.e., merchantmen. *Id.* at 223, 240. SCAJAP and chartered Japanese vessels were employed in the Hungnam and other military evacuations, where civilians were also extracted. *Id.* at 291. For a summary of cargoes carried, *see id.* at 382-83.

56. *See supra* notes 49-51 and accompanying text.

57. NWP 9A, *supra* note 4, para. 8.2.2.2; *see also* U.S. Department of the Navy, *Law of Naval Warfare* (NWIP 10-2) para. 503(b)(3) (Change 6, 1955) [hereinafter NWIP 10-2].

58. Hague Convention (VII) Relating to the Conversion of Merchant Ships into Warships, Oct. 18, 1907, in *The Law of Naval Warfare*, *supra* note 1, at 111.

59. *See* Gabriella Venturini, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 120.

60. *See id.* at 122.

61. NWP 9A, *supra* note 4, para. 8.2.3 at 8-19, citing Malcolm W. Cagle & Frank A. Manson, *supra* note 44, at 296-97; *see also* Myres S. McDougal & Florentino P. Feliciano, *supra* note 18, at 594.

62. W.J. Fenrick, *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*, in 7 *Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht* 1, 17 (Wolff von Heinegg ed., 1991), introductory report presented to the Round-Table of Experts in International Humanitarian Law Applicable to the Armed Conflicts at Sea, Bochum, Germany, Nov. 10-14, 1989, *citing* Robert W. Tucker, *The Law of War and Neutrality at Sea*, 1955 *International Law Studies* 267 (1957). W.J. Fenrick, *supra*, is also published in an updated version in W.J. Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 1991 *Can. Y.B. Int'l L.* 238, 256. *See also infra* notes 431, 444-518 and accompanying text. Sally V. Mallison & W. Thomas Mallison, *Naval Targeting: Lawful Objects of Attack*, in Horace B. Robertson, Jr., *supra* note 19, at 241, 261, state that these captures violated Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907 [hereinafter Hague XI], art. 3, 36 Stat. 2396, 2408-09, T.S. No. 544, restating the rule of *The Paquete Habana*, 175 U.S. 677 (1900). *Fifth Report of U.N. Command Operations in Korea*, U.N. Doc. S/1834 (1950), *reprinted* in 23 *Dep't State Bull.* 603, 604 (1950) noted that many North Korean small craft were used to carry war material. In some cases the enemy had forced native fishing operations to its use. "[E]very effort [was] being made to confine destruction of small craft to those conducting military operations."

63. James A. Field, *supra* note 43, at 396. Pittman B. Potter, *Pacific Blockade or War?*, 47 *Am. J. Int'l L.* 273, 274 (1953) believed that such an action would be legitimate in the Charter era.

196 Targeting Enemy Merchant Shipping

64. Note from the Acting U.S. Representative to the U.N. Secretary-General, Mar. 11, 1954 [hereinafter Note], transmitting the Seventy-sixth Report of the U.N. Command in Accordance with the Security Council Resolution of 7 July 1950 (S/1588), U.N. Doc. No. S/3185 (1954), *reprinted in* 4 Marjorie M. Whiteman, *Digest of International Law* 1186 (1965).

65. Proclamation of ROK President Rhee, Jan. 18, 1952, *reprinted in id.* at 531-32; *see also id.* at 1184-86.

66. Note, *supra* note 64; *id.* at 1186.

67. Daniel P. O'Connell, *supra* note 19, at 167.

68. *See, e.g.*, 2 Daniel P. O'Connell, *supra* note 11, at 1109-10.

69. *See supra* note 42.

70. Douglas M. Johnston, *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries* 217 (1965).

71. Under UNCLOS, *supra* note 2, arts. 55-85, coastal states may assert rights to explore, exploit, conserve and manage natural resources of the exclusive economic zone (EEZ) and the continental shelf. Under UNCLOS, the EEZ may extend out to 200 nautical miles from territorial sea baselines, and the continental shelf extends outward to the same distance, with certain exceptions. There is a right of freedom of navigation in these waters. *See generally* NWP 9A, *supra* note 4, paras. 1.5.2, 1.6.

72. James R. Boma, *Troubled Waters Off the Land of the Morning Calm: A Job for the Fleet*, 42 *Nav. War Coll. Rev.* 33, 39-40, 42-43 (No. 2, 1989); Choun Ho Park, *The 50-Mile Military Boundary Zone of North Korea*, 72 *Am. J. Int'l L.* 866, 873-75 (1988).

73. G.A. Res. 377, U.N. Doc. A/1481 (1950), *reprinted in* 45 *Am. J. Int'l L. Supp.* 1 (1951).

74. *See* U.N. Charter, arts. 10-11, 14; Jorge Castenada, *Legal Effects of United Nations Resolutions* 81-116 (1969); Juraj Andrassy, *Uniting for Peace*, 50 *Am. J. Int'l L.* 563 (1956).

75. *See generally*, 1-4 Rosalyn Higgins, *United Nations Peacekeeping* (1970); United Nations, *The Blue Helmets: A Review of United Nations Peace-Keeping* (1985). One early example was the General Assembly's non-binding call for an embargo on war materials and petroleum shipped to the PRC in 1951. By the end of 1951, 40 Members and 6 non-Members had complied. Howard J. Taubenfeld, *International Actions and Neutrality*, 47 *Am. J. Int'l L.* 377, 393-94 (1953).

76. G.A. Res. 2625, *reprinted in* 9 *Int'l Legal Mat'l's* 1292 (1970); G.A. Res. 3314, *supra* note 21. Nations have also negotiated similar statements of regional importance, such as the nonbinding Helsinki Accords of 1975. *See* Conference on Security and Co-Operation in Europe, *Final Act*, Aug. 1, 1975, 73 *Dep't State Bull.* 323 (1975), 14 *Int'l Legal Mat'l's* 1292 (1975).

77. Statement of the President of the United States, June 27, 1950, 23 *Dep't St. Bull.* 5 (1950). James Cable, *Gunboat Diplomacy 1919-1979*, at 222 (2d ed., 1981) rates this operation as a "successful" use of gunboat diplomacy. Besides the Patrol, U.S. naval commanders warned their subordinates of the possibility of an attack "from across the Yellow Sea," a special antisubmarine patrol was established at Sasebo, Japan, there was an unconfirmed intelligence report that the USSR was planning an all-air attack on Japan, and on December 6 the U.S. Joint Chiefs of Staff "sent out a general alarm to American forces throughout the world." James A. Field, *supra* note 43, at 274. The United States also experimented with methodologies for intercepting a junk invasion fleet in 1951. *Id.* at 343-44.

78. Statement of John Foster Dulles, U.S. U.N. Representative, Nov. 27, 1950, 23 *Dep't St. Bull.* 990-91 (1950).

79. President's Message to Congress, Feb. 2, 1953, 28 *id.* 207, 209 (1953). *See also* 4 Marjorie M. Whiteman, *supra* note 64, at 533-34.

80. Mutual Defense Treaty, Dec. 2, 1954, China-U.S., 6 U.S.T. 433, T.I.A.S. No. 3178, 248 U.N.T.S. 213. The treaty was denounced by the United States and is no longer in effect. *See generally* Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979), *rev'd*, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 533 (1979).

81. *See, e.g.*, Agreement Relating to the Presence of U.S. Armed Forces in China, Aug. 29 & Sept. 3, 1947, China-U.S., 61 Stat. 3755, T.I.A.S. No. 1715, 9 U.N.T.S. 91; Mutual Defense Agreement, Jan. 30 & Feb. 9, 1951, 2 U.S.T. 1499, T.I.A.S. No. 2293, 132 U.N.T.S. 273; Mutual Security Agreement, Dec. 29, 1951 & Jan. 2, 1952, 3 *id.* 4543, T.I.A.S. No. 2604, 181 U.N.T.S. 161; Mutual Defense Assistance Agreement, Oct. 23 & Nov. 1, 1952, *id.* 5166, T.I.A.S. No. 2712, 184 U.N.T.S. 348.

82. 10 Marjorie M. Whiteman, *supra* note 43, at 876, *quoting* Note from Chinese Ministry of Foreign Affairs to U.S. Embassy, Canton, June 30, 1949; U.S. Dep't of State press release, Nov. 30, 1949; Note from Chinese Nationalist Government to U.S. Consul General, Taipei, Dec. 12, 1949; Note from U.S. Embassy, Canton, to Minister of Foreign Affairs of China, Dec. 19, 1949; Note from U.S. Charge d'Affaires to Chinese Foreign Minister, Mar. 13, 1950, 21 *Dep't St. Bull.* 34-35, 945 (1949), 22 *id.* 23-24, 406 (1950); Remarks of U.K. Foreign Minister Bevin to the House of Commons, 469 *Parl. Deb.*, H.C. (5th ser.) 2015 (1949).

83. Statement of the President of the United States, June 27, 1950, 23 *Dep't St. Bull.* 5 (1950).

84. *See generally*, 4 Marjorie M. Whiteman, *supra* note 64, at 538-41.

85. *Id.* at 541-42.

86. Bruce Swanson, *Eighth Voyage of the Dragon 186* (1982), citing *The Southeast China Coast Today*, Off. Nav. Intell. Rev. 59 (Feb. 1953).
87. James Cable, *supra* note 77, at 227.
88. *Id.* at 228, 230. See also 1 Edwin B. Hooper et al, *The United States Navy and the Vietnam Conflict* 357-59 (1976).
89. Bruce Swanson, *supra* note 86, at 213.
90. Ely Maurer, *Legal Problems Regarding Formosa and the Offshore Islands*, 39 Dep't St. Bull. 1005, 1011 (1958), quoted in 4 Marjorie M. Whiteman, *supra* note 64, at 407. See also James Cable, *supra* note 77, at 235.
91. Bruce Swanson, *supra* note 86, at 221.
92. See *supra* notes 79-80 and accompanying text.
93. See *supra* notes 11-39 and accompanying text.
94. Hague Convention (XI) on Restrictions with Regard to Capture in Naval War, Oct. 18, 1907 [hereinafter Hague XI], art. 3, 36 Stat. 2396, 2408-09, T.S. No. 544; *The Pacquete Habana*, 175 U.S. 677 (1900); NWP 9A, *supra* note 4, para. 8.2.3, at 8-19 & n. 60.
95. Robert W. Tucker, *supra* note 62, at 95-96.
96. NWIP 10-2, *supra* note 57, para. 503(c)(6), citing, inter alia, Hague XI, *supra* note 62. NWIP 10-2 continued as the U.S. Navy's manual for the law of naval warfare through a 1974 revision, *id.* at iii, and was the basis for the U.S. Air Force's 1976 view on the subject of exemptions from attack. U.S. Dep't of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*: AFP 110-31, para. 4-4(c) (1976) which did add, however, that "[t]he extent to which this traditional immunity of merchant vessels, still formally recognized, will be observed in practice in future conflicts will depend upon the nature of the conflict, its intensity, the parties to the conflict and various geographical, political and military factors," before quoting NWIP 10-2 *supra*, para. 503(b)(3).
97. 2 Lassa Oppenheim, *International Law* 477-78 (Hersh Lauterpacht ed., 1955).
98. 2 *id.* at 462-71, 531-32; Robert W. Tucker, *supra* note 62, at 57-72; see also NWIP 10-2, *supra* note 57, para. 503(a) (3), from which the list format was taken.
99. NWIP 10-2, *supra* note 57, paras. 430(b), 520(a).
100. Robert W. Tucker, *supra* note 62, at 359-422.
101. *Id.* at 299 n.39.
102. *Id.* at 276-77, 300, the latter citing NWIP 10-2, *supra* note 57, paras. 430(b), 520(a).
103. 2 Lassa Oppenheim, *supra* note 97, at 278-83, 682-84, 807, 814-19, 862-68.
104. According to *Ratifications and Accessions to the Geneva Convention and/or the Additional Protocol between 1.5.1991 and 29.2.1992*, Dissemination (No. 17, Apr. 1992), 168 nations had become party to the Convention by February 2, 1992.
105. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949 [hereinafter GWSEA], art. 13(5), 6 U.S.T. 3217, 3228, T.I.A.S. No. 3363, 75 U.N.T.S. 85, 94. The protection of article 27 was new with the Convention. 2 Jean S. Pictet, *The Geneva Conventions of 12 August 1949: Commentary* 171 (1960). Daniel P. O'Connell, *supra* note 19, at 9, notes that this would be an issue as to wakes overturning fishing boats during the Vietnam War. See *infra* notes 226-32, 240-42, and accompanying text.
106. Cf. NWP 9A, *supra* note 4, para. 8.2.2.2. On the other hand, general World War II arming of merchant ships and orders to resist was interpreted as taking part in hostilities, which made crews liable to prisoner of war status. 2 Daniel P. O'Connell, *supra* note 11, at 1117.
107. See *supra* note 1 and accompanying text.
108. GWSEA, *supra* note 105, art. 27, 6 U.S.T. 3236, T.I.A.S. No. 3363, 75 U.N.T.S. 102.
109. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, [hereinafter Genocide Convention], ___ U.S.T. ___, T.I.A.S. No. ___, 78 U.N.T.S. 277. For a general history of the antecedents to human rights law, see Louis Henkin, *supra* note 19, at 228-31.
110. E.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 4, 999 U.N.T.S. 171, 174. For a general analysis, see Restatement (Third), *supra* note 1, Part VII (1988), which lists agreements and discusses the potential for application of them through state practice. See generally Myres S. McDougal et al., *Human Rights and World Public Order* (1980) for further analysis. See also Rifo E. Hauser, *International Law and Basic Human Rights*, Nav. War Coll. Rev. 51 (June 1971) and Louis B. Sohn, *International Law and Basic Human Rights*, *id.* 52 (Mar. 1970), noting the possibility of application of these norms in the maritime context. In early 1992 the U.S. Senate Committee on Foreign Relations recommended advice and consent for the Covenant, subject to five reservations, five understandings, four declarations, and one proviso. Senate Comm. on Foreign Relations, *International Covenant on Civil and Political Rights*, S. Exec. Rep. No. 102-23, 102d Cong., 2d Sess. 1 (1992). On April 2, 1992, the U.S. Senate gave advice and consent to the Covenant, subject to the reservations, understandings, declarations and the proviso. 138 Cong. Rec. S 4781, S 4783-84 (1992). The ratification was deposited with the United Nations on June 8, 1992.
111. Nicaragua Case, *supra* note 1.

112. One early judicial application of general principles of humanity was the Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22, in which Albania was held liable for deaths of British navy people in 1947 when British warships, enforcing the right of freedom of navigation through the Strait of Corfu, were damaged or sunk by Albanian-laid mines in time of peace. Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541, was not applicable because no armed conflict existed. The Nicaragua Case, *supra* note 1, found similar liability in 1986. The late Judge Baxter once lamented the unnecessary dichotomy between human rights law and the humanitarian law of armed conflict. George K. Walker, *The Law of Armed Conflict Fought in a Comparative Criminal Law Context*, in 1 Touro J. Transnat'l L. 153 (1988). Future wars, and the laws and the inevitable claims resolution process flowing from them, may provide the confluence of these now-discrete bodies of law. On this point, see Gerard I.A.D. Draper, *Human Rights and the Law of War*, 12 Va. J. Int'l L. 326 (1972).

113. Convention for the Protection of Cultural Property in the Event of Armed Conflict (With Final Protocol) [hereinafter 1954 Hague Cultural Property Convention], May 14, 1954, 249 U.N.T.S. 215, 358. Although the United States signed but has not ratified the Convention, it is in force for the former USSR and over 70 nations, many of whom have also ratified the Protocol. The United States is a party to the Roerich Pact, Apr. 15, 1935, 49 Stat. 3260, T.S. No. 899, 167 L.N.T.S. 279, however. See NWP 9A, *supra* note 4, at 11-23, 11-24 for a list of parties.

114. Lyndel V. Prott, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 582.

115. 1954 Hague Cultural Property Convention, *supra* note 113, arts. 12, 16, Regulations, arts. 1-4, 6, 17, 249 U.N.T.S. 250, 252, 270-72, 284.

116. *Id.* art. 13, 249 U.N.T.S. 250.

117. *Id.* art. 14(1), 249 U.N.T.S. 252.

118. *Id.* art. 14(2), 249 U.N.T.S. 252. For further analysis, see Prott, *supra* note 114, at 585.

119. 1954 Hague Cultural Property Convention, *supra* note 113, arts. 4(2), 11(2), 249 U.N.T.S. 244, 250.

120. *Id.* arts. 9, 11(1), 249 U.N.T.S. 248.

121. *Id.* art. 11(3), 249 U.N.T.S. 250. See also Lyndel V. Prott, *supra* note 114, at 585, 586 for further analysis.

122. Over 70 nations have ratified the Convention, *supra* note 113, and the same points made at *supra* note 1 concerning a finding of customary law from the text of treaties apply, albeit with less vigor, since less than half the nations of the world have ratified the Convention. Over 70 states' ratifications do represent a very strong trend, however.

123. See *supra* note 113.

124. 1954 Hague Cultural Property Convention, *supra* note 113, arts. 18(2), 18(3), 249 U.N.T.S. 254-56.

125. 3 Marjorie M. Whiteman, *Digest of International Law* 1088 (1964), citing official Egyptian sources.

126. S.C. Res. 50, May 29, 1948, *reprinted* in Karel C. Wellens, *supra* note 42, at 421. The ceasefire had been invoked a week earlier. S.C. Res. 49, May 22, 1948, *in id.* 420. It continued in effect through 1957, with breaches by both sides, until armistice agreements were reached in 1957. Actions in breach of the armistice agreements also occurred. See S.C. Res. 54, July 15, 1948; S.C. Res. 56, Aug. 19, 1948; S.C. Res. 61, Nov. 4, 1948; S.C. Res. 62, Nov. 16, 1948; S.C. Res. 66, Dec. 29, 1948; S.C. Res. 73, Aug. 11, 1949; S.C. Res. 89, Nov. 17, 1950; S.C. Res. 92, May 8, 1951; S.C. Res. 93, May 18, 1951; S.C. Res. 95, Sept. 1, 1951; S.C. Res. 101, Nov. 24, 1953; S.C. Res. 106, Mar. 29, 1955; S.C. Res. 107, Mar. 30, 1955; S.C. Res. 108, Sept. 8, 1955; S.C. Res. 111, Jan. 19, 1956; S.C. Res. 113, Apr. 4, 1956; S.C. Res. 114, June 4, 1956; S.C. Res. 127, Jan. 22, 1958; S.C. Res. 162, Apr. 11, 1961; S.C. Res. 171, Apr. 9, 1962; S.C. Res. 228, Nov. 25, 1966, *reprinted in id.* 422-24.

127. 3 Marjorie M. Whiteman, *supra* note 125, at 1088.

128. *Id.* at 1089; Leo Gross, *Passage Through the Suez Canal of Israel-Bound Cargo and Israel Ships*, 51 Am. J. Int'l L. 530, 533-34 (1957). S.C. Res. 101, Nov. 24, 1953, *reprinted* in Karel C. Wellens, *supra* note 42, at 435-36, had condemned a retaliatory action by Israeli armed forces as a violation of the ceasefire approved by S.C. Res. 54, July 15, 1948, *reprinted in id.* at 422-23.

129. *The Flying Trader*, 17 I.L.R. 440-41 (Prize Ct. Alexandria, Egypt, 1950).

130. *Id.* at 440, 442-44, 447.

131. *Id.* at 446; see also *The Fjeld*, 17 I.L.R. 345, 347 (Prize Ct. Alexandria, Egypt, 1950).

132. Leo Gross, *supra* note 128, at 534-37, 543-52.

133. See *supra* note 34 and accompanying text.

134. 3 Marjorie M. Whiteman, *supra* note 125, at 1089, citing telegram of U.S. Department of State to the U.S. Embassy, Cairo, Aug. 7, 1950; dispatch of U.S. Embassy, Cairo, to U.S. Department of State, Sept. 2, 1950; see also Leo Gross, *supra* note 128, at 538.

135. Daniel P. O'Connell, *supra* note 19, at 112. See also 3 Marjorie M. Whiteman, *supra* note 125, at 1089-90, quoting remarks of Herbert Morrison, Secretary of State for Foreign Affairs to the U.K. House of Commons, Mar. 21, 1951, 485 Parl. Deb., H.C. (5th ser.) 2404 (1951).

136. Daniel P. O'Connell, *supra* note 19, at 112.
137. 3 Marjorie M. Whiteman, *supra* note 118, at 1090, 1095.
138. James Cable, *supra* note 77, at 228-29. British warships had sought, often unsuccessfully, to intercept immigrants to what became Israel in 1947, and three U.S. destroyers had the "impossible" task of assisting Count Folke Bernadotte in maintaining peace between Israelis and Arabs in 1948, but they did succeed in evacuating the U.N. team from Haifa in July 1948. *Id.* at 225-26.
139. See 3 Marjorie M. Whiteman, *supra* note 125, at 1090.
140. S.C. Res. 75, Sept. 1, 1951, *reprinted in* 3 Marjorie M. Whiteman, *supra* note 125, at 1091-92.
141. News conference remarks by Secretary of State Dulles, Feb. 5, 1957, 36 Dep't St. Bull. 306 (1957).
142. See generally 3 Marjorie M. Whiteman, *supra* note 125, at 1092-94; Leo Gross, *supra* note 128, at 538-40, 559.
143. 3 Marjorie M. Whiteman, *supra* note 125, at 1092; Gross, *supra* note 125, at 561.
144. Daniel P. O'Connell, *supra* note 19, at 112; see also Charles B. Selak, Jr., *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 Am. J. Int'l L. 660 (1958). The omission generated a spirited debate that spilled over into the negotiations for what became the 1958 law of the sea conventions, *infra* notes 174-82, as to whether the Gulf of Aqaba was part of the open seas for freedom of navigation. Although the Arab states argued that the Gulf was a closed sea, the prevailing view was that the Gulf was open to navigation by all states, including Israel, whose port of Eilat is at the northern end. See generally Charles B. Selak, Jr., *A Consideration of the Legal Status of the Gulf of Aqaba*, 52 Am. J. Int'l L. 660 (1958); Alexander Melamid, *Legal Status of the Gulf of Aqaba*, 53 *id.* 412 (1959); Leo Gross, *The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba*, *id.* 565 (1959).
145. See generally 3 Marjorie M. Whiteman, *supra* note 125, at 1097-1130. The Treaty of Constantinople, Oct. 22, 1888, arts. 1-7, *reprinted in* 3 John Basset Moore, *A Digest of International Law* 264-65 (1906), provides for use of the Canal in peace and war, to all shipping, including belligerents' warships. The Canal cannot be blockaded, belligerents' warships are limited in their visits and may not be stationed off the access ports, and belligerent warships must follow opponents through the Canal at 24-hour intervals. Charles B. Selak, Jr., *The Suez Canal Base Agreement of 1954*, 49 Am. J. Int'l L. 487, 488-91 (1955) describes how the Canal had been subject to an international regime, "although its status appear[ed] to fall short of neutralization, since the convention provides that it is open to warships, even in wartime." See also 3 James B. Moore, *supra* at 267, who says flatly that the Convention does not neutralize the Canal, a position with which other authors agree. Charles B. Selak, Jr., *supra* at 491 n. 21. The 1954 agreement was abrogated on January 1, 1957, but Egypt reaffirmed the terms of the Constantinople Convention April 24, 1957. Egyptian Presidential Decree Abrogating 1954 Agreement with the United Kingdom, Jan. 1, 1957, 51 Am. J. Int'l L. 672 (1957); Egyptian Declaration on the Suez Canal, Apr. 24, 1957, art. 1, *id.* at 673.
146. James Cable, *supra* note 77, at 233-38; 1 Edwin B. Hooper et al., *supra* note 88, at 351.
147. Wolff von Heinegg, *Visit, Search, Diversion and Capture: Conditions of Applicability* 28-29 (1991), report presented to the Round Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Bergen, Norway, Sept. 20-24, 1991. It is expected that the substance of this report will be published in the 1992 Canadian Yearbook of International Law. Wolff von Heinegg, *Visit, Search, Diversion and Capture in Naval Warfare: Part I, The Traditional Law*, 1991 Can. Y.B. Int'l L. 183, 329. Dr. von Heinegg cites, e.g., these cases for the propositions that follow them: The Zamalek, 6 Rev. Egypt. D. Int'l 212, 213 (Egypt Prize Ct. 1950), neutral cargo bound for neutral ports released; The Captain Manoli, 28 I.L.R. 661, 664 (Egypt Prize Ct. 1959), citing C. John Colombos, *A Treatise on The Law of Prize* 212-19 (4th ed. 1949), if neutral vessel is in the service of belligerents, it loses neutral status and therefore is considered an enemy ship on enemy service; The Arsia, 6 Rev. Egypt. D. Int'l 220, 224-25 (Egypt Prize Ct. 1949), enemy destination rules from U.K. practice followed, citing, e.g., The Marie Glaeser, 1914 P. 218, 238-39 (Adm., Prize Ct.); use of blacklists, *supra* note 129 and accompanying text, The Derwenthall, 6 Rev. Egypt. D. Int'l 218, 219 (Egypt Prize Ct. 1949); The Inge Toft, 31 I.L.R. 510 (United Arab Repub. Prize Ct. 1960), tracing effective Israeli ownership of charterer and consignees; The Hough de Vries, 17 *id.* 447 (Egypt Prize Ct. 1950), broad construction of contraband.
148. S.C. Res. 95, U.N. Doc. S/RES/95, *reprinted in* Karel C. Wellens, *supra* note 42, at 433-34; The Inge Toft, 31 I.L.R. at 512-15. Part of the *Toft* court's rationale was a finding in *Navios Corp. v. The Ulysses II*, 161 F. Supp. 932, 934-43 (D. Md. 1958), *aff'd per curiam*, 260 F.2d 959 (4th Cir. 1958), of the existence of a state of war, demonstrating how a decision in a private-party suit can have public-order ramifications when injected into prize court jurisprudence.
149. The Inge Toft, 31 I.L.R. at 512-15; The Lea Lott, 28 *id.* 652, 653-56 (United Arab Repub. Prize Ct. 1959), which approved a seizure without any mention of aggression and therefore breach of the armistice.
150. See *supra* note 45 and accompanying text.
151. The Inge Toft, 31 I.L.R. at 518.
152. Cf. Natalino Ronzitti, *supra* note 1, at 4-5.
153. Leo Gross, *supra* note 121, at 539-41.

200 Targeting Enemy Merchant Shipping

154. Compare *id.* with, e.g., NWP 9A, *supra* note 4, para. 4.3.2.
155. Leo Gross, *supra* note 128, at 552-54.
156. See *supra* note 140 and accompanying text. Similarly, the Council declared in 1956 that “[t]here should be free and open transit through the Canal without discrimination, overt or covert—this covers both political and technical aspects [and] . . . [t]he operation of the Canal should be insulated from the politics of any country[.]” S.C. Res. 118, U.N. Doc. S/Res/118 (1958), *reprinted in* Karel C. Wellens, *supra* note 42, at 22. This action was taken when Egypt nationalized the Suez Canal Company and the Canal’s freedom and security was threatened.
157. Chaim Herzog, *The War of Atonement: October, 1973*, at 263-64 (1975).
158. James Cable, *supra* note 77, at 244; James Ennes, *Assault on the Liberty* (1980); Walter L. Jacobsen, *A Juridical Examination of the Israeli Attack on the Liberty*, 36 *Nav. L. Rev.* 1 (1986).
159. Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 *Va. J. Int’l L.* 809 (1984) thoroughly analyzes the issue and notes that UNCLOS represents little change in the prior law. The High Seas Convention, *supra* note 20, art. 8, 13 U.S.T. at 2315, T.I.A.S. No. 5200, 450 U.N.T.S. at 86; and UNCLOS, *supra* note 2, art. 29, define warships, and *Liberty* clearly matched these traditional requirements. The case of the U.S.S. *Pueblo*, seized by North Korea at about the same time, was similar, except that it was asserted that *Pueblo* was in North Korean territorial waters as distinguished from an announced security zone. Compare Press Statement by Secretary of State Dean Rusk, Dec. 22, 1969, with *North Korean Document Signed by U.S. at Panmunjom*, 60 *Dep’t St. Bull.* 2 (1969); Panel, *The Pueblo Seizure: Facts, Law, Policy*, 1969 *Proc. Am. Soc’y Int’l L.* 1 (1969). Although it is debatable whether *Pueblo* was ever in North Korean territorial waters as asserted by that state, the sole remedy against a warship engaged in territorial seas passage that is not innocent is to require the warship to leave. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958 [hereinafter *Territorial Sea Convention*], arts. 14, 23, 15 U.S.T. 1606, 1610, 1612, T.I.A.S. No. 5639, 516 U.N.T.S. 205, 214, 220; UNCLOS, *supra*, arts. 17, 19, 30.
160. S.C. Res. 242, para. 2(a), U.N. Doc. 8/RES/242/(1967), *reprinted in* Karel C. Wellens, *supra* note 42, at 454.
161. Daniel P. O’Connell, *supra* note 19, at 112, had similarly criticized a 1951 Council resolution. See *supra* note 144 and accompanying text.
162. Wolff von Heinegg, *supra* note 147, at 29. Denied overflight routes because of the contemporaneous Organization of Petroleum Exporting Countries oil embargo threat, the United States resupplied Israel by air. James Cable, *supra* note 77, at 21, 250-51.
163. Daniel P. O’Connell, *supra* note 19, at 101-03; see also James Cable, *supra* note 77, at 20.
164. Chaim Herzog, *supra* note 157, at 266-69.
165. *Supra* note 145.
166. Treaty of Peace, Mar. 26, 1979, Egypt - Israel, art. 5, 18 *Int’l Legal Mat’ls* 362, 365 (1979). The U.S. Navy had assisted in Canal clearance operations in 1974-75. See generally Arthur W. Rovine, *Digest of United States Practice in International Law 1974*, at 352-54 (1975); Eleanor C. McDowell, *id.* 1975, at 433-34 (1976). For a debate on the Treaty, compare Mohamad El Baradei, *The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime*, 76 *Am. J. Int’l L.* 532 (1982) with Ruth Lapidoth, *The Strait of Tiran, the Gulf of Aqaba*, and the 1979 Treaty of Peace Between Egypt and Israel, 77 *id.* (1983).
167. Protocol Concerning Relations of the Parties, Annex III to Treaty of Peace, Mar. 26, 1979, Egypt-Israel, art. 8, 18 *Int’l Legal Mat’ls* 391.
168. 1 Anthony H. Cordesman & Abraham R. Wagner, *The Lessons of Modern War 104-08* (1990); Chaim Herzog, *supra* note 157 at 263-69.
169. 1 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 168, at 216, citing Richard A. Gabriel, *Operation Peace for Galilee 142, 148* (1984).
170. See *supra* notes 125-37, 162-64, 168-69 and accompanying text.
171. See *supra* note 165 and accompanying text. See also *supra* notes 138-45 and accompanying text.
172. See *supra* note 157 and accompanying text.
173. See *supra* note 158 and accompanying text.
174. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on Fisheries and Conservation of the Living Resources of the High Seas, Apr. 29, 1958 [hereinafter 1958 Fisheries and Conservation Convention], 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; Territorial Sea convention, *supra* note 159, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; 1958 High Seas Convention, *supra* note 20.
175. NWP 9A, *supra* note 4, para. 1.1, at 1-2 n.4.
176. 1958 High Seas Convention, *supra* note 20, art. 2, 13 U.S.T. 2314, T.I.A.S. No. 5200, 450 U.N.T.S. 82-84. See Francis V. Russo, Jr., *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law*, 19 *Ocean Devel. & Int’l L.* 381, 384 (1988) for the point that the law of the sea, as partly stated in the High Seas Convention and other agreements, exists alongside the law of naval warfare and other applicable rules of international law. This view is confirmed by the commentary of the International

Law Commission (ILC) on the Vienna Convention on the Law of Treaties, May 23, 1969, art. 73, 1155 U.N.T.S. 331, 350, in *Report of the Commission to the General Assembly*, U.N. Doc. A/6309/Rev. 1 (1966) [hereinafter *ILC Report*], reprinted in 1966(2) Y.B. Int'l L. Comm'n 267-68:

Different considerations appeared to the Commission to apply to the case of an outbreak of hostilities between parties to a treaty. It recognized that the state of facts resulting from an outbreak of hostilities may have the practical effect of preventing the application of the treaty in the circumstances prevailing. It also recognized that questions may arise as to the legal consequences of an outbreak of hostilities with respect to obligations arising from treaties. But it considered that in the international law of today the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States. Thus, the Geneva Conventions codifying the law of the sea contain no reservation in regard to the case of an outbreak of hostilities notwithstanding the obvious impact which such an event may have on the application of many positions of those Conventions; *nor do they purport in any way to regulate the consequences of such an event.* It is true that one article in the Vienna Convention on Diplomatic Relations (article 44) and a similar article in the Convention on Consular Relations (article 26) contain a reference to cases of "armed conflict." Very special considerations, however, dictated the mention of cases of armed conflict in those articles and then only to underline that the rules laid down in the articles hold good even in such cases. The Vienna Conventions do not otherwise purport to regulate the consequences of an outbreak of hostilities; nor do they contain any general reservation with regard to the effect of that event on the application of their provisions. Accordingly, the Commission concluded that it was justified in considering the case of an outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties to be codified in the present articles; and that no account should be taken of that case or any mention made of it in the draft articles. (emphasis added).

The ILC was established in 1947 by U.N. General Assembly resolution. Its 25 members, all distinguished scholars, are representative of the world community and are elected by the Assembly on the basis of government nominations. The view of Herbert W. Briggs, then the U.S. member, coincided with the ILC position; other sources must be examined in conflict situations. Herbert W. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 Am. J. Int'l L. 51 (1974).

177. Territorial Sea Convention, *supra* note 159, art. 24(1), 15 U.S.T. at 1612, T.I.A.S. No. 5639, 516 U.N.T.S. at 220; Frederick C. Leiner, *Maritime Security Zones: Prohibited Yet Perpetuated*, 24 Va. J. Int'l L. 967, 980-81 (1984). The assertion contained in *Id.* at 980 that the 1958 conventions "conclusively rejected the legality of peacetime maritime security zones" is not correct. As Bernard H. Oxman, *supra* note 159, at 811, demonstrates for UNCLOS, *supra* note 2, and by inference for the 1958 Convention these agreements are concerned with peacetime uses of the seas but are subject to other bodies of international law, e.g., the law of maritime warfare. A security zone is a feature of the latter, and as will be developed *infra*, is lawful so long as it is necessary and proportional for its purposes under the law of self-defense.

178. 1958 High Seas Convention, *supra* note 20, arts. 4-5, 13 U.S.T. 2315, T.I.A.S. No. 5200, 450 U.N.T.S. 84-85. Scholars had debated the approach, derived from the *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4. See, e.g., Myres S. McDougal et al, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 Am. J. Int'l L. 25, 114-16 (1960) (vehemently opposed), citing Philip C. Jessup, *The United Nations Conference on the Law of the Sea*, 59 Colum. L. Rev. 234, 256 (1959); A.D. Watts, *The Protection of Merchant Ships*, 33 Brit. Y.B. Int'l L. 52, 84 (1957) (favoring the concept). Paradoxically, the World Court chose a more traditional concept for corporations in the *Case Concerning the Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, analyzed in Herbert W. Briggs, *Barcelona Traction: The Jus Standi of Belgium*, 65 Am. J. Int'l L. 327 (1971). The "genuine link" debate persists. See *infra* notes 183, 198, 308-13, 328-29, 374, 441, 465 and accompanying text.

179. See generally Boleslaw A. Boczek, *Flags of Convenience: An International Legal Study* (1962), updated by Rodney P. Carlisle, *Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience* (1981).

180. 1958 High Seas Convention, *supra* note 20, arts. 8-9, 13 U.S.T. 2315, T.I.A.S. No. 5200, 450 U.N.T.S. 86.

181. *Id.* arts. 24-25, 13 U.S.T. 2319, T.I.A.S. No. 5200, 450 U.N.T.S. 96.

182. 1958 Fisheries and Conservation Convention, *supra* note 174, arts. 1-2, 17 U.S.T. 140, T.I.A.S. No. 5969, 559 U.N.T.S. 286-88.

183. Restatement (Second), Foreign Relations Law of the United States § 28 (1965).

184. *But cf. id.* § 64.

202 Targeting Enemy Merchant Shipping

185. Rudigar Wolfrum, *Reflagging and Escort Operation in the Persian Gulf: An International Law Perspective*, 29 Va. J. Int'l L. 386, 391-92 (1989) [hereinafter Rudigar Wolfrum], citing Constitution of the Maritime Safety Comm. of the Inter-gov'tal Marit. Consultative Org., 1960 I.C.J. 150, 170.

186. Rudigar Wolfrum, *supra* note 176, at 393.

187. Myres S. McDougal & Florentino P. Feliciano, *supra* note 18, at 587-96.

188. Ross Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, 37 Int'l & Comp. L. Q. 629, 635 n.27 (1988), citing Myres S. McDougal & Florentino P. Feliciano, *supra* note 18, at 494, which is part of the authors' discussion of neutrality.

189. Myres S. McDougal & Florentino P. Feliciano, *supra* note 18, at 587-96, which is part of their chapter on combat situations, e.g., "regions of war" or "theaters of war." Cf. *id.* at 568-72, which is more concerned with land warfare and areas excluded from attack.

190. Compare *id.* at 501-09 with *id.* at 597.

191. C. John Colombos, *The International Law of the Sea* 548-55, 559-60, 586-626 (1967).

192. *Id.* at 695-99, 786-94.

193. *Id.* at 528-31.

194. NWIP 10-2, *supra* note 57, para. 503(b)(3), discussed *supra* note 57 and accompanying text.

195. W. Thomas Mallison, *Studies in the Law of Naval Warfare: Submarines in General and Limited War* 106-29 (1968).

196. See *id.* at 55-56, 89-90, 93, 129-30.

197. Myres S. McDougal & William T. Burke, *The Public Order of the Oceans* 805 (1962).

198. *Id.* at 1035. See also *supra* notes 178, 183 and accompanying text.

199. 2 Daniel P. O'Connell, *supra* note 11, at 805-06.

200. *Id.*, citing *inter alia* Daniel P. O'Connell, *supra* note 19, at 123 and Daniel P. O'Connell, *International Law and Contemporary Naval Operations*, 44 Brit. Y.B. Int'l L. 18, 36 (1970); Wolff von Heinegg, *supra* note 147, at 34; 4 Marjorie M. Whiteman, *supra* note 64, at 513-14, reprinting telegram of U.S. Ambassador to France Amory Houghten to Secretary of State Dulles, Jan. 26, 1958; telegram of the U.S. Embassy, Paris, to Secretary Dulles, Nov. 6, 1959; Christian Science Monitor, Dec. 28, 1960, at 2. See also Note, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 Vand. J. Transnat'l L. 1161, 1218 (1989); Anna van Zwanenberg, *Interference with Ships on the High Seas*, 10 Int'l & Comp. L.Q. 785, 791 (1961).

201. Daniel P. O'Connell, *supra* note 200, at 38-39.

202. Wolff von Heinegg, *supra* note 147, at 34.

203. 10 Keesing's Contemporary Archives 15277 (1956); 11 *id.* 16080, 16184 (1958).

204. In 1958 Iceland unilaterally extended her exclusive fishing zone limit from 4 to 12 miles. Regulations Concerning the Fishing Limits Off Iceland, June 30, 1958, quoted in 4 Marjorie M. Whiteman, *supra* note 64, at 1157-58. A seven-nation conference, including Britain, protested and announced they would continue to fish in the eight-mile belt. Britain had announced it would send armed escorts to protect U.K. trawlers, if necessary, on July 4. *Id.* at 1160, quoting N.Y. Times, July 21, 1958, at 12. The Royal Navy began to intervene to protect trawlers and their crews, although other states' trawlers remained outside the 12-mile limit. Icelandic Ministry for Foreign Affairs, *British Aggression in Icelandic Waters* 5-13 (June 1959), quoted in 4 Marjorie M. Whiteman, *supra* at 1163-69. British trawler owners voluntarily withdrew from the disputed area in 1960, pending the then-ongoing Geneva Conference on the Law of the Sea. *Id.* at 1174, citing dispatch of the U.S. Embassy, London, to U.S. Department of State, Apr. 29, 1960, and N.Y. Times, May 13, 1960, at 3, and *id.*, Aug. 12, 1960, at 2. The Conference broke up in disagreement over the breadth of the territorial sea. See Robert D. Powers & Leonard R. Hardy, *How Wide the Territorial Sea?* in Carl M. Franklin, *The Law of the Sea: Some Recent Developments* 304 (1961). The dispute was resolved in 1961 by Exchange of Notes Between Great Britain and Iceland, Mar. 11, 1961, 397 U.N.T.S. 275. In 1972 Iceland asserted a 50-mile fishing zone, assault on British and German trawlers began, and Britain filed suit against Iceland in the International Court of Justice, which indicated interim measures and ultimately held that Iceland could not unilaterally exclude Great Britain from historic fishing waters. The litigants were admonished to negotiate differences. Fisheries Jurisdiction Case (U.K. v. Ice.), 1972 I.C.J. 12 (request for interim measures); 1973 I.C.J. 3; 1974 I.C.J. 4 (merits); James Cable, *supra* note 77, at 249-50. The U.S. reaction to similar seizures, occurring primarily off the west coast of Latin America and in the Gulf of Mexico by nations claiming territorial seas or economic zones in excess of those claimed by the United States, was an insurance compensation system to secure release of crews and boats, coupled with diplomatic protests. Theodor Meron, *The Fisherman's Protective Act: A Case Study in Contemporary Legal Strategy of the United States*, 69 Am. J. Int'l L. 290 (1975). Although the Act is still on the books, 22 U.S.C. §§ 1971-80 (1980), its efficacy has been limited by the broader view the United States has taken today of offshore jurisdictional claims, e.g., for the EEZ through the Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801-82 (1988, Supp. II 1990), unless the seizure otherwise violates international law as recognized by the United States. There is a further proviso, however, that would appear to broaden the Protective Act's coverage.

See Steven J. Burton, *The 1976 Amendments to the Fishermen's Protective Act*, 71 Am. J. Int'l L. 740 (1977). For other more explosive confrontations with fishing vessels, see Daniel P. O'Connell, *supra* note 200, at 73-75.

205. Proclamation No. 3504, 3 C.F.R. 232 (1959-1963), referring to S.J. Res. 230, Pub. L. No. 87-733, 76 Stat. 697 and an October 23, 1962 resolution passed under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, arts. 6, 8, 62 Stat. 1681, 1701, T.I.A.S. No. 1838, 21 U.N.J.S. 77, 97, 99. For commentator analysis, see generally Abram Chayes, *The Cuban Missile Crisis* (1974); Robert A. Divine, *The Cuban Missile Crisis* (1971); Louis Henkin, *supra* note 19, at 279-302. Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (1969); 10 Marjorie M. Whiteman, *supra* note 43, at 8-20, 874 (1968); Abram Chayes, *Law and the Quarantine of Cuba*, 41 Foreign Aff. 550 (1963); Carl Q. Christol & C.R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba*, 56 Am. J. Int'l L. 525, 527 (1963); W. Thomas Mallison, *Limited Naval Blockade or Quarantine - Interdiction: National and Collective Defense Claims Valid under International Law*, 31 Geo. Wash. L. Rev. 355, 387-88 (1962); Sally V. Mallison & W. Thomas Mallison, *A Survey of the International Law of Naval Blockade*, 102 U.S. Nav. Inst. Proc. 44, 49-50 (No. 2, 1976); Brunson MacChesney, *Some Comments on the "Quarantine" of Cuba*, 57 Am. J. Int'l L. 592, 593 (1963); Joseph B. McDevitt, *The UN Charter and the Cuban Quarantine*, 17 JAG J. 71 (1963); Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 Am. J. Int'l L. 557 (1963); John H. McNeill, *Neutral Rights and Maritime Sanctions: The Effects of Two Wars*, 31 Va. J. Int'l L. 631, 633 (1991); Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 Am. J. Int'l L. 515 (1963); William O. Miller, *Collective Intervention and the Law of the Charter*, Nav. War Coll. Rev. 71 (Apr. 1970); William O. Miller, *Law of Naval Warfare*, *id.* 35 (Feb. 1972); Covey T. Oliver, *International Law and the Quarantine of Cuba: A Hopeful Prescription for Legal Writing*, 57 Am. J. Int'l L. 373 (1963); Quincy Wright, *The Cuban Quarantine*, *id.* 546, 554-56 (1963).

206. *E.g.*, Vaughan Lowe, *supra* note 19, art. 128, 137 referring to Nicaragua Case, *supra* note 1, which held, *inter alia*, that a customary right of self-defense existed alongside those rights articulated in the U.N. Charter, art. 51, but that the United States was not entitled to rely on collective self-defense because Nicaragua's providing rebels in El Salvador with arms or logistical or other support was not an "armed attack," so that the right of self-defense was not triggered. 1986 I.C.J. at 94-100, 103-05, *quoting*, *inter alia*, the Rio Treaty, *supra* note 205, art. 3, 62 Stat. at 1700, T.I.A.S. No. 1838, 21 U.N.T.S. at 95-97, which articulates the inherent right of self-defense of U.N. Charter, art. 51. The quarantine response was under article 6 and 8, which involved "aggression . . . not an armed attack."

207. S.C. Res. 216, 217, U.N. Docs. S/RES/216, 217 (1965), *reprinted* in 5 Int'l Legal Mat'ls 167-68 (1966).

208. Daniel P. O'Connell, *supra* note 19, at 174-75, referring to S.C. Res. 221, U.N. Doc. S/RES/221 (1965), *reprinted* in 5 Int'l Legal Mat'ls 534 (1966). See also James Cable, *supra* note 77, at 123-26; Daniel P. O'Connell, *supra* at 137-38. The United States generally complied. Exec. Order No. 11322, 3 C.F.R. 243 (1967 Compil.). Congress made an exception for Rhodesian chrome ore exports to the United States. See *Diggs v. Shultz*, 470 F.2d 461, 465-67 (D.C. Cir.), *cert. denied*, 411 U.S. 931 (1972). The chrome ore exception was removed by 1977 legislation. See 22 U.S.C. § 287c (1988) and Act of Mar. 18, 1977, 91 Stat. 22.

209. 16 Keesing's Contemporary Archives 22525 (1968).

210. See, *e.g.*, S.C. Res. 232, U.N. Doc S/RES/232 (1966) and S.C. Res. 253, U.N. Doc. S/RES/253 (1968), terminated by S.C. Res. 460, U.N. Doc. S/RES/460 (1979), *reprinted* in Karel C. Wellens, *supra* note 42, at 84-89, 104-05.

211. See *infra* notes 569-73 and accompanying text.

212. See *supra* notes 89, 92-93, *infra* notes 373-77, 399, 425-27, and accompanying text.

213. *Cf.* U.N. Charter, art. 42. See also NWP 9A, *supra* note 4, paras. 4.3.2, 7.7, and *infra* note 229 and accompanying text.

214. See *supra* note 45 and accompanying text.

215. Government of Pakistan v. R.S.N. Co., Ltd., 40 I.L.R. 472 (High Ct. of Dacca, Pakistan, 1965).

216. See generally P. Sharma, *The Indo-Pakistan Maritime Conflict, 1965: A Legal Appraisal* (1970). For an abbreviated discussion of Charter issues, see *supra* notes 11-32 and accompanying text. The Indian Navy effort during the Goa campaign of the early sixties was "confined to territorial waters." D. K. Palit, *The Lightning Campaign: The Indo-Pakistan War 1971*, at 145 (1972). Goa generated heated debate in the U.N. Security Council and a World Court decision that in effect supported India's occupation of the Portuguese enclave. See Status of Goa, 16 U.N. SCOR (987th mtg) at 10-11, 16; *id.* (988th mtg.) at 7-8; Case Concerning Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6. The initial Pakistani list of absolute contraband included:

(a) All kinds of arms, ammunitions and explosives, and all kinds of materials or appliances suitable for use in chemical, biological or atomic warfare; machines for the manufacture or repair of any of the foregoing; component parts thereof, articles necessary or convenient for their use; materials or

204 Targeting Enemy Merchant Shipping

ingredients used in their manufacture; articles necessary or convenient for the production or use of such materials or ingredients.

(b) Fuel of all kinds; all contrivances for, or means of, transportation on land, in water or air, and machines used in their manufacture or repair, component parts thereof; instruments, articles and animals necessary or convenient for their use; materials or ingredients used in their manufacture, articles necessary or convenient for the production or use of such materials or ingredients.

(c) All means of communication, tools, implements, instruments, equipment, maps, pictures, papers and other articles, machines, or documents necessary or convenient for carrying on hostile operations; articles necessary or convenient for their manufacture or use.

(d) Precious metals and objects made thereof, coin bullion, currency, evidence of debts, debentures, bonds, coupons, materials, dies, plates, machinery, or other articles necessary or convenient for their production, manufacture.

Schedule II on conditional contraband comprised:

All kinds of food, foodstuffs, feed, forage and clothing and manufactured textile products; tobacco, articles and material necessary or convenient for their production, manufacture or use.

A later list did not distinguish between absolute and conditional contraband:

(a) All kinds of arms and ammunitions and explosives; their components and ingredients, radio-active materials.

(b) Crude oil and fuel and lubricants of all kinds.

(c) All means of transportation on land, in water or air, and components thereof.

(d) Electronics and telecommunication equipment.

(e) Optical equipment specially designed for military use.

(f) Precious metals and objects made thereof, coin bullion, currency, evidence of debts, debentures, bonds, coupons, stocks, and shares or any negotiable or marketable security; precious or semi-precious stones, jewels.

Wolff von Heinegg, *supra* note 147, at 30, *citing* All Pak. Legal Decisions 437, 472 (1965). In September 1965 India copied the initial Pakistani list of absolute contraband. No list was officially ratified. Wolff von Heinegg, *supra*, at 30.

217. 15 Keesing's Contemporary Archives 21327 (1966).

218. Panel, *supra* note 19, at 171 (Remarks by Professor Lagoni), referring to U.N. General Assembly Resolution 2162 of Dec. 5, 1966.

219. See *supra* notes 73-76 and accompanying text.

220. A U.S. naval task force, sent to facilitate evacuation of U.S. nationals from Bangladesh, arrived after hostilities were over. D. K. Palit, *supra* note 216, at 144-50; Wolff von Heinegg, *supra* note 147, at 31. Both belligerents published contraband lists, including materials traditionally considered absolute contraband. NWP 9A, *supra* note 4, para. 7.4.1, at 7.25 n. 98, *citing* *Belligerent Interference with Neutral Commerce*, in *Contemporary Practice of the United States Relating to International Law*, 66 Am. J. Int'l L. 386-87 (1972). Pakistan issued a contraband list almost identical with that of 1965, *supra* note 216, with these additions:

(g) Implements and apparatus for manufacture or repair of all types of military hardware equipment.

(h) All other types of goods and equipment, and parts and accessories thereof, that can be used or may assist in the conduct of war.

See *supra* note 216.

India transmitted this contraband list to the New Delhi diplomatic community:

1. arms of all kinds, including arms for sporting purposes, and their distinctive component parts,
2. projectiles, charges, and cartridges of all kinds, and their distinctive component parts,
3. powder and explosives specially prepared for use in war,
4. gunmountings, limber boxes, limbers, military wagons, file forges, and their distinctive component parts,
5. clothing and equipment of a distinctively military character,
6. all kinds of harness of a distinctively military character,
7. saddle, draught, and pack animals suitable for use in war,
8. armour plates,
10. warships, including boats, and their distinctive component parts of such nature that they can only be used on a vessel of war,
11. aeroplanes, airships, balloons, and aircraft of all kinds and their component parts, together with accessories and articles recognizable as intended for use in connection with balloons and aircraft,
12. implements and apparatus designed exclusively for the manufacture of war, for the manufacture or repair of arms, or war material for use on land and sea,
13. surface to surface missiles, surface to air missiles, air to surface rockets and guided missiles and warheads for any of the above weapons, mechanical or electronic equipment to support or operate the above items,
14. any other class of materials or items as may assist the army in the prosecution of the armed conflict against the Union of India.

Eight Indian ports were declared subject to control on December 8, and on December 15, 1971 the Bengal Chamber of Commerce advised neutral shipping it would not risk attack in the Bay of Bengal if these instructions were obeyed:

- (a) No ship should approach Sandheads to a distance less than 40 miles between dusk and dawn.
- (b) Masters should be warned that they are liable whilst on passage in the Bay, to be challenged by Units of Indian Navy to establish their bonafides; they should cooperate and they will get courtesy and considerate treatment.
- (c) For such ships as have left Calcutta having been detained here on account of their contraband cargo, which they had to discharge in accordance with official instructions it is strongly suggested that masters should obtain an endorsement from customs to the effect that all contraband cargo has been discharged. In addition, it is further recommended that agent should obtain an endorsement from the Indian Navy to the same effect and the officer to be contacted in this respect is . . .

The next day the Indian Parliament adopted the Naval and Aircraft Prize Act, 1971, which declared in part:

“Prize” [is defined as] anything which . . . may be subjected to adjudication . . . including a ship or an aircraft and goods carried therein irrespective of whether the ship is captured at sea or seized in port or whether the aircraft is on or over land or sea at the time of capture or seizure. [According to Section 3 (3) the Act is applicable] during war or as a measure of reprisal during an armed conflict or in the exercise of the right of self-defense” [and according to Section 4(3) the Prize Court] . . . shall adjudge and condemn all such ships, vessels, aircraft and goods belonging to any country or state or the nationals, citizens or subjects thereof.

The Act had no practical relevance, but the Indian navy stopped and searched more than 100 neutral merchant vessels during the conflict that lasted only two weeks. On December 21, 1971, India suspended visit and search of neutral vessels. Wolff von Heinegg, *supra* note 147, at 31-33.

221. Daniel P. O'Connell, *supra* note 19, at 86-87, 129; 2 Daniel P. O'Connell, *supra* note 11, at 1099.

222. See *supra* footnote 220.

223. Wolff von Heinegg, *supra* note 147, at 33.

224. Fred Greene, *The Indian-Pakistan War and the Asian Power Balance*, 25 Nav. War Coll. Rev. 16 (No. 3, 1973).

225. These dates have been chosen because 1962 marked the first major infusion of U.S. forces into Vietnam; the last U.S. service people left in 1973, although U.S. aid continued through 1975. See generally Stanley Karnow, *Vietnam: A History* 247-69, 655-56, 661, 678, 684 (1983); Louis Henkin, *supra* note 19, at 303-12.

226. R.L. Schreadly, *The Naval War in Vietnam, 1950-1970*, in Frank Uhlig, Jr., *Vietnam: The Naval Story* 274, 280-87 (1986); James A. Hodgman, *Market Time in the Gulf of Thailand*, *id.* 308; see also 2 D.P. O'Connell, *supra* note 11, at 1097-99, 1122-23, and Daniel P. O'Connell, *supra* note 19, at 176-77.

227. W.J. Fenrick, *supra* note 62, at 18; Fenrick, *supra* note 62, at 256. Cf. Hague XI, *supra* note 55, art. 3, 36 Stat. 2408-09, T.S. No. 544; Institute of International Law, *Oxford Manual of Naval War*, arts. 3, 12, 37, (1913), in *Law of Naval Warfare*, *supra* note 1, at 277, 280, 282, 293; The *Pacquete Habana*, 175 U.S. 677 (1900); W. Thomas Mallison, *supra* note 195, at 15-16, 126-28 (1968). See also *supra* notes 61-96 and accompanying text.

228. 2 Edward J. Marolda & Oscar P. Fitzgerald, *The United States Navy and the Vietnam Conflict* 518 (1986). The original defense zone was promulgated in Republic of Vietnam Decree on Sea Surveillance, Apr. 27, 1965, in 4 Int'l Legal Mat'ls 461 (1965).

229. 2 Edward J. Marolda & Oscar D. Fitzgerald, *supra* note 228, at 118-20.

230. *Id.* at 228-39.

231. *Id.* at 309. Like much of the rest of the RVN Navy, it was supplied by the United States. *Id.* at 311.

232. Daniel P. O'Connell, *supra* note 19, at 325; von Heinegg, *supra* note 147, at 34.

233. Lane C. Kendall, *U.S. Merchant Shipping and Vietnam*, in Frank Uhlig, Jr., *supra* note 226, at 482, 491, 499-500.

234. W.J. Fenrick, *supra* note 62, at 18; *id.* at 256, citing Daniel P. O'Connell, *supra* note 19, at 110.

235. 1 Edwin Hooper et al., *supra* note 88, ch. 12; Daniel M. Redmond, *Getting Them Out*, 116 U.S. Nav. Instit. Proc. 44 (No. 8, 1990). About a million Vietnamese went south, 560,000 by ship, 240,000 by airlift, and over 140,000 on foot or by boat.

236. Horace B. Robertson, Jr., *New Technologies and Armed Conflicts at Sea*, 14 Syracuse J. Int'l L. & Comm. 699, 703 (1988).

237. W.J. Fenrick, *supra* note 62, at 18; W.J. Fenrick *supra*, note 62, at 256-57; Swayze, *Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam*, 29 JAG J. 143 (1977); Bruce A. Clark, *Recent Evolutionary Trends Concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device*, 27 *id.* 160 (1973). See also Daniel P. O'Connell, *supra* note 19, at 94-95. NWP 9A, *supra* note 4, para. 7.7.5 at 7-38, for the premise that this method of interdiction is "useful" despite a trend away from belligerents' practice of establishing a blockade according to the traditional rules. Earlier, inland waters and rivers of North Vietnam had been mined. For other political and operational aspects of the campaign, see Ulrik Luckow, *Victory Over Ignorance and Fear: The U.S. Minelaying Attack on North Vietnam*, 35 Nav. War Coll. Rev. 17 (No. 1, 1982).

238. 2 Edward J. Marolda & Oscar P. Fitzgerald, *supra* note 228, at 320-25.

239. 18 Keesing's Contemporary Archives 25338 (1972).

240. Cf. NWP 9A, *supra* note 4, para. 8.2.3, at 8-21 n. 65.

241. See generally *id.*, para. 7.7.5; Frank B. Swayze and Bruce A. Clark, *supra* note 237.

242. See *supra* note 103 and accompanying text.

243. See *supra* notes 49-52 and accompanying text.

244. GWSEA, *supra* note 105, arts. 22-35, 6 U.S.T. at 3234-40, T.I.A.S. No. 3363, 75 U.N.T.S. at 100-06.

245. Daniel P. O'Connell, *supra* note 19, at 10-12; Bruce Swanson, *supra* note 86, at 268-69. The PRC had mounted a similar but unsuccessful effort in 1950. 1 Edwin B. Hooper et al., *supra* note 88, at 339-41.

246. Eleanor C. McDowell, *supra* note 166, at 13-15, 423-26, 766, 777-83, 879-86; Arthur W. Revine and Eleanor C. McDowell, *Contemporary Practice of the United States Relating to International Law*, 69 Am. J. Int'l L. 861-63, 874-79 (1975); U.S. Recovers Merchant Ship Seized by Cambodian Navy, 72 Dep't St. Bull. 719-22 (1975); Thomas E. Behuniak, *The Seizure and Recovery of the S.S. Mayaguez: A Legal Analysis of United States Claims*, 82 Mil. L. Rev. 41 (1978), 83 *id.* 59 (1979).

247. See *supra* note 94 and accompanying text.

248. 1958 Territorial Sea Convention, *supra* note 159, arts. 14-17, 15 U.S.T. 1610-11, T.I.A.S. No. 5639, 516 U.N.T.S. 214-16; UNCLOS, *supra* note 2, arts. 17-26.

249. 1958 Territorial Sea Convention, *supra* note 159, art. 24, 15 U.S.T. 1612-13, T.I.A.S. No. 5639, 516 U.N.T.S. 220; UNCLOS, *supra* note 2, art. 31.

250. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, art. 1, 23 U.S.T. 701, 704-07, T.I.A.S. No. 7337.

251. Cf. Luigi Migliorino, *Commentary*, in *Law of Naval Warfare*, *supra* note 1, at 615, 620; Horace B. Robertson, Jr., *A Legal Regime for the Resources of the Seabed and Subsoil of the Deep Sea: A Brewing Problem for International Lawmakers*, *Nav. War Col. Rev.* 61 (Oct. 1968); Tullio Treves, *Military Installations, Structures, and Devices on the Seabed*, 74 *Am. J. Int'l L.* 808 (1980); Rex J. Zedalis, *A Response*, 75 *id.* 926 (1981), and Tullio Treves, *Reply*, *id.* 933 (1981); discuss these issues in the context of the UNCLOS, *supra* note 2, negotiations. For analysis of UNCLOS in the context of merchant ship issues, see *infra* notes 304-30 and accompanying text.

252. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972 [hereinafter 1972 Bacteriological Convention], arts. 1-4, 26 U.S.T. 583, 587-88, T.I.A.S. No. 8062.

253. Cf. Vaughan Lowe, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 640, 648.

254. 1972 Bacteriological Convention, *supra* note 252, art. 8, 26 U.S.T. 589, T.I.A.S. No. 8062, referring to Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, and U.S. reservation, Dec. 16, 1974, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

255. Howard S. Levie, *Nuclear, Biological and Chemical Weapons*, in Horace B. Robertson, Jr., *supra* note 19, at 331, 335-45. NWP 9A, *supra* note 4, paras. 10.3.2.1, 10.4.2, states the U.S. position that first use of chemical weapons and any use of biologicals would violate customary international law.

256. Vaughan Lowe, *supra* note 253, at 641, 647-48.

257. U.N. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977 [hereinafter 1977 Environmental Modification Convention], arts. 1-2, 31 U.S.T. 333, T.I.A.S. No. 9614.

258. Luis Rodriguez, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 661; see also Comment, *Weather Genesis and Weather Neutralization: A New Approach to Weather Modification*, 6 *Cal. W. Int'l L.J.* 412 (1976).

259. Michael Bothe et al., *New Rules for Victims of Armed Conflict* 290-91 (1982); Michael Bothe, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 760; Yves Sandoz et al., *Commentary on the Additional Protocols of 8 June 1979 to the Geneva Conventions of 12 August 1949*, at 605-06 (1987); W.F. Fenrick, *supra* note 62, at 41; Howard S. Levie, *Means and Methods of Combat at Sea*, 14 *Syracuse J. Int'l L. & Comm.* 727, 729-30 (1988). As Yves Sandoz et al., *supra* at 606, and Michael Bothe, *supra* at 761, note, however, other parts of the Protocol - not directly germane to this analysis - are not thus limited and do apply to sea warfare.

260. Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977 [hereinafter Protocol I], art. 49(3), in *The Law of Naval Warfare*, *supra* note 1, at 673, 725-26.

261. E.g., Louise Doswald-Beck, *The Principles of Humanity in the Law of Sea Warfare: The Protection of Civilians and the Hors de Combat*, in Panel, *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part II)*, 1988 *Am. Soc'y Int'l L. Proc.* 599, 600-01 (1990), arguing for one standard. See also Natalino Ronzitti, *Remarks*, in *id.* 603, 604. Protocol I is in force for 108 nations, as compared with 168 parties to the 1949 Geneva Conventions. *Ratifications and Accessions*, *supra* note 104, at 5.

262. Protocol I, *supra* note 260, art. 52, in *The Law of Naval Warfare*, *supra* note 1, at 727-28. See also W.J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 *Mil. L. Rev.* 91 (1982); Louise Doswald-Beck, *supra* note 261, at 601.

263. Protocol I, *supra* note 260, art. 53, in *The Law of Naval Warfare*, *supra* note 1, at 728, referring to the 1954 Hague Cultural Property Convention, analyzed *supra* notes 113-24.

264. See *supra* notes 1, 2 and accompanying text.

265. Protocol I, *supra* note 260, art. 54, in *The Law of Naval Warfare*, *supra* note 1, at 728-29.

266. 1977 Environmental Modification Convention, *supra* note 257, 31 U.S.T. 333, T.I.A.S. No. 9614.

267. Protocol I, *supra* note 260, art. 55(1), in *The Law of Naval Warfare*, *supra* note 1, at 729. See also *id.*, art. 35(3), in *The Law of Naval Warfare*, *supra*, at 729.

268. See *supra* notes 257-58 and accompanying text.

269. Protocol I, *supra* note 260, art. 56, in *The Law of Naval Warfare*, *supra* note 1, at 729-30.

270. *Id.*, art. 57, in *The Law of Naval Warfare*, *supra* note 1, at 730-31.

271. George H. Aldrich, *New Life for the Laws of War*, 75 *Am. J. Int'l L.* 764, 778 (1981).

208 Targeting Enemy Merchant Shipping

272. Protocol I, *supra* note 260, art. 58, in *The Law of Naval Warfare*, *supra* note 1, at 732.

273. See NWP 9A, *supra* note 4, para. 8.3.1, referring to *id.*, para. 8.2.2.2, noting the shift from principles stated in, *inter alia*, Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, art. 1(1), *The Law of Naval Warfare*, *supra* note 1, at 347, 348, which never came into force; London Treaty for the Limitation and Reduction of Naval Armaments, Apr. 22, 1930, art. 22, 112 L.N.T.S. 65, 88; Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London, Nov. 6, 1936, Rules 1, 2, 173 *id.* 353; to the practice during World War II, detailed in Robert W. Tucker, *supra* note 62, at 55-70, and W. Thomas Mallison, *supra* note 195, at 106-23.

274. Protocol I, *supra* note 260, arts. 51(4), 51(5), in *The Law of Naval Warfare*, *supra* note 1, at 727.

275. *Id.*, arts. 35(1), 35(2), in *The Law of Naval Warfare*, *supra* note 1, at 719.

276. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Apr. 10, 1981 [hereinafter 1981 Conventional Weapons Convention], reprinted in Dietrich Schindler & Jiri Toman, *The Laws of Armed Conflicts* 179 (3d ed. 1988).

277. 1981 Conventional Weapons Convention, *supra* note 276, Protocol I, in Dietrich Schindler & Jiri Toman, *supra* note 276, at 185. For analysis of the Convention and Protocol I, see J. Ashley Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?*, 105 Mil. L. Rev. 3 (1984).

278. 1981 Conventional Weapons Convention, *supra* note 276, Protocol III, in Dietrich Schindler & Jiri Toman, *supra* note 276, at 190.

279. James Ennes, *supra* note 158, at 67-68, 70, 81, 92, 152. See also *supra* note 158 and accompanying text.

280. Cf. 1981 Conventional Weapons Convention, *supra* note 276, Protocol III, art. 1(2), in Dietrich Schindler & Jiri Toman, *supra* note 276, at 190.

281. *Id.*, Protocol II, art. 1, in Dietrich Schindler & Jiri Toman, *supra* note 276, at 185. For further analysis, see Burris M. Carnahan, *The Law of Land Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 103 Mil. L. Rev. 73 (1984).

282. 1981 Conventional Weapons Convention, *supra* note 276, col II, arts. 3(3), 4(2), 5, 7-8, in Dietrich Schindler & Jiri Toman, *supra* note 276, at 186-88.

283. NWP 9A, *supra* note 4, paras. 8.2.3, at 8-19, citing Max Hastings & Simon Jenkins, *The Battle for the Falklands* 158 (1983); Martin Middlebrook, *Operation Corporate: The Falklands War 186-87* (1985); 1 Howard S. Levie, *The Code of International Armed Conflict* 186 (1985). See also Howard S. Levie, *The Falklands Crisis and the Laws of War*, in Alberto R. Coll & Anthony C. Arend, *supra* note 41, at 64, 67. USSR surveillance ships and aircraft, plus satellites, could monitor the task force movement, but it is not clear whether the ships could or did enter the MEZ or the DSA; USSR aircraft could approach Ascension Island, the British staging area, but could not reach the Falklands/Malvinas. 3 Anthony H. Cordesman & Abraham R. Wagner, *The Lessons of Modern War* 280 (1990). On May 10, Britain declared a 100-mile controlled airspace around Ascension. *Id.* at 250.

284. See generally, 3 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 283, at 330-31. Max Hastings & Simon Jenkins, *supra* note 283, at 88-89, 161, 214, 227-28, 277-84, 292, 349-51; Martin Middlebrook, *supra* note 283, at 79-80, 178, 243-51, 400-01. Roger Villar, *Merchant Ships at War: The Falklands Experience* (1984) is an additional, excellent study.

285. Anthoine A. Bouvier, *Humanitarian Protection and Armed Conflicts at Sea: Means and Methods of Identifying Protected Craft*, 14 Syracuse J. Int'l L. & Comm. 759, 765 (1988); *Commentary*, *id.* 765 (Remarks of Commander Fenrick, Mr. Eberlin).

286. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 23, 6 U.S.T. 3114, 3130, T.I.A.S. No. 3362, 75 U.N.T.S. 31, 46.

287. 3 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 283, at 242-44, 249. Max Hastings & Simon Jenkins, *supra* note 283, at 105, 119, 124-25, 133, 143, 147, 157; Martin Middlebrook, *supra* note 283, at 97, 98, 126. United Nations lawmaking had minimal effect on the war. On April 3, 1982, the Security Council determined that there was a breach of the peace, demanded immediate cessation of hostilities and withdrawal of Argentine forces, and called on the belligerents to seek a diplomatic solution. The USSR, China, Poland and Spain abstained. S.C. Res. 502, U.N. Doc. S/RES/502, 21 Int'l Legal Mat'ls 679 (1982). The rationale for Soviet noninvolvement is explored in Vojtech Mastny, *The Soviet Union and the Falklands War*, 36 Nav. War Coll. Rev. 46, 47 (No. 3, 1983). The Organization of American States (OAS) resolution of April 28 urged Argentina and the United Kingdom to cease hostilities within the region defined by the Rio Treaty, Sept. 2, 1947, art. 4, 62 Stat. 1699, 1700-01, T.I.A.S. No. 1838, 21 U.N.T.S. 77, 97, and to refrain from any act that might affect inter-American peace and security. The OAS advocated a truce and peaceful settlement of the problem. OAS Resolution I, Serious Situation in the South Atlantic, Apr. 28, 1982, O.A.S. Doc. OEA/Ser. F/II.20, Doc. 28/82 rev. 3 (Apr. 28, 1982), 21 Int'l Legal Mat'ls 669 (1982). The European Community had suspended imports from Argentina on April 16. E.C. Council Regulation 877/82 Suspending Imports of All Products Originating in Argentina, Apr. 16, 1982, 1982 O.J. (L 102) 1, E.C.S.C. Council

Decision 82/228/ECSC Suspending Imports of All Products Originating in Argentina, Apr. 16, 1982, 21 Int'l Legal Mat'l's 547-48 (1982). These were extended on May 18, 1982. See *id.* at 549-50. The United States suspended military exports, security assistance and export credits to Argentina on April 30. See *Statements Concerning Assistance to and Sales to Argentina*, *id.* 682-84. Security Council Resolution 505 of May 26, 1982 urged the belligerents to accept the U.N. Secretary-General's good offices. S.C. Res. 505, U.N. Doc. S/RES/505, reprinted in Karel C. Wellens, *supra* note 42, at 404. An OAS resolution then took an anti-E.C., U.K. and U.S. position on May 29, 1982, 21 Int'l Legal Mat'l's 672-74. The E.C. and U.S. measures were rescinded in June and July 1982 respectively. *Id.* 1210. John Norton Moore, *The Inter-American System Snarls in Falklands War*, 76 Am. J. Int'l L. 830 (1982) states that the May 29 OAS resolution was *ultra vires*. For analysis of events leading up to the 1982 war, see Michael P. Socarras, *The Argentine Invasion of the Falklands: International Means of Signaling*, in W. Michael Reisman & Andrew R. Willard, *International Incidents: The Law that Counts in World Politics* 115 (1988). See also Marshall Hall, *Argentine Policy Motivations in the Falklands War and the Aftermath*, 36 Nav. War. Coll. Rev. 21 (No. 6, 1983). For general accounts of the conflict, see 3 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 283 at 238-361; Harry D. Train III, *An Analysis of the Falkland/Malvinas Islands Campaign*, 41 Nav. War. Coll. Rev. 33 (No. 1, 1988). For analysis of the territorial claims and claims of self-defense in international law, see James F. Gravelle, *The Falklands (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 Mil L. Rev. 5 (1985).

288. W.J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 1986 Canad. Y.B. Int'l L. 91, 109-12; see also Max Hastings & Simon Jenkins, *supra* note 283, at 147, 157; Martin Middlebrook, *supra* note 283, at 151; Howard S. Levie, *supra* note 283 at 65; Howard S. Levie, *supra* note 259, at 735-38; Vojtech Mastny, *supra* note 287, at 49.

289. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 431-33 (1989), reversing 830 F.2d 421, 423 (2d Cir. 1987); Sally V. Mallison & W. Thomas Mallison, *supra* note 62, at 269.

290. 3 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 283, at 260; 2 Daniel P. O'Connell, *supra* note 11, at 1112.

291. 3 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 283, at 250-51, 334, 336.

292. W.J. Fenrick, *supra* note 288, at 124-25; accord Vaughan Lowe, *The Impact of the Law of the Sea on Naval Warfare*, 14 Syracuse J. Int'l L. & Comm. 657, 673 (1988).

293. W.J. Fenrick, *supra* note 288, at 125, citing, inter alia, NWIP 10-2, *supra* note 57, paras. 430(b), 520(a).

294. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 423-24 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989). The Supreme Court thus agreed with the U.S. District Court, which dismissed, on Foreign Sovereign Immunities Act grounds, *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986), and dissenting Judge Kearse in the Second Circuit, 830 F.2d at 429-31. See also *supra* note 289 and accompanying text.

295. W.J. Fenrick, *supra* note 288, at 116.

296. L.F.E. Goldie, *Maritime War Zones & Exclusion Zones*, in Horace B. Robertson, Jr., *supra* note 19, at 156, 174. Leckow, *supra* note 188, at 635-36, agrees as to the British zone. He does not consider legality of the Argentine South Atlantic zone, but presumably would say it was illegal because, in his view, "war zones can be justified only in very restricted circumstances, where inconvenience to neutral vessels is kept to a minimum." *Id.* at 635.

297. Cf. 2 Daniel P. O'Connell, *supra* note 11, at 1111-12; W.J. Fenrick, *supra* note 288, at 94, 113, 121; L.F.E. Goldie, *supra* note 296, at 194; Prof. Lagoni, in Panel, *supra* note 19, at 163, argues that a "defensive protection zone is admissible only if it is adjacent to the coast of the state establishing it," a position seemingly contrary to other commentators. If his view is taken, the U.K. DSA, or "defensive bubble," *supra* note 287 and accompanying text, was illegal under international law. Lagoni's is a minority position among commentators.

298. L.F.E. Goldie, *supra* note 296, at 160-74, 183-94; Miller, *Belligerency and Limited War*, Nav. War Coll. Rev. 19 (Jan. 1969).

299. See also *supra* notes 11-39 and accompanying text.

300. See *supra* notes 61-62, 91, 94, 225-31, 248, 283 and accompanying text.

301. Compare *supra* notes 50-60, 129-34, 157, 168-69, 199-202, 215-16, 233-44, 247, and accompanying text with *supra* note 284 and accompanying text.

302. See *supra* notes 286-87 and accompanying text.

303. Compare *supra* note 289 and accompanying text with *supra* notes 54-60, 82-86, 199-201, 221-23.

304. UNCLOS, *supra* note 2, arts. 88, 301.

305. For analysis of UNCLOS, primarily in the context of the peacetime environment, see, e.g., 2 Daniel P. O'Connell, *supra* note 11, ch. 25.

306. See *supra* note 2.

307. UNCLOS, *supra* note 2, arts. 87, 89.

210 Targeting Enemy Merchant Shipping

308. See 1958 High Seas Convention, *supra* note 20, art. 2, 13 U.S.T. at 2314, T.I.A.S. No. 5200, 450 U.N.T.S. at 82-84.

309. Compare UNCLOS, *supra* note 2, arts. 91-92, 94 with 1958 High Seas Convention, *supra* note 20, art. 5, 13 U.S.T. 2315, T.I.A.S. No. 5200, 450 U.N.T.S. 84-86.

310. U.N. Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 Int'l Legal Mat'l's 1236 (1987). The European Community has begun attacking the problem through the Rome Treaty. Note, *Common Maritime Transport Policy for the EEC: The Commission Does Battle with Flags of Convenience*, 13 B.C. Int'l & Comp. L. Rev. 447 (1990). The problem of unsafe ships under open registry has also been the subject of treaty negotiations. Eberes Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 Am. J. Int'l L. 604 (1979).

311. UNCLOS, *supra* note 2, arts. 95-96, 110.

312. See *supra* notes 185-86 and accompanying text.

313. UNCLOS, *supra* note 2, arts. 116-20.

314. *Id.* arts. 192-96.

315. See *supra* notes 257-58, 266-68, and accompanying text.

316. Vaughan Lowe, *supra* note 292, at 664, raises some of these issues from the UNCLOS perspective.

317. UNCLOS, *supra* note 2, art. 87(1).

318. 1958 High Seas Convention, *supra* note 20, art. 2, 13 U.S.T. 2314, T.I.A.S. No. 5200, 450 U.N.T.S. 82-84. See also *supra* note 176 and accompanying text.

319. E.g., UNCLOS, *supra* note 2, art. 116(a) (obligations under treaties an exception to the right to engage in fishing).

320. Hague XI, *supra* note 62, art. 3, 36 Stat. 2408-09, T.S. No. 544 (coastal fishing and trading boats exempt from capture so long as they do not take part in hostilities).

321. Compare UNCLOS, *supra* note 2, art. 87(1) with 1958 High Seas Convention, *supra* note 20, art. 2, 13 U.S.T. 2314, T.I.A.S. No. 5200, 450 U.N.T.S. 82-84. See also *supra* notes 174-67, and accompanying text.

322. UNCLOS, *supra* note 2, art. 88.

323. *Id.* art. 301. For analysis of the right of self-defense and other Charter issues, see *supra* notes 11-39 and accompanying text.

324. Vaughan Lowe, *supra* note 13, at 132; Professor Oxman agrees with this analysis. "[T]he rules of armed conflict are not addressed by the Convention." Bernard H. Oxman, *supra* note 159, at 811. See also Boleslaw Boczek, *Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea*, 20 Ocean Devel. & Int'l L. 359 (1989); Herbert W. Briggs, *supra* note 176, at 51; *ILC Report, supra* note 176, 1966(2) Y.B. Int'l L. Comm'n at 267-68; Francis V. Russo, Jr., *supra* note 176, at 384.

325. 2 Daniel P. O'Connell, *supra* note 11, at 1106-26.

326. *Id.* at 1105-06.

327. *Id.* at 1108-09. See also *id.* at 1131-37.

328. *Id.* at 1112-13, referring to *id.* at 747-69.

329. See *supra* notes 174-84 and accompanying text.

330. 2 Daniel P. O'Connell, *supra* note 11, at 1109-12.

331. For an overview of the history of the Persian Gulf and prior naval involvement in the region, see Samuel P. Menefee, *Gunboat Diplomacy in the Persian Gulf? An Alternative Evaluation of a Contemporary Naval Conflict*, 31 Va. J. Int'l L. 566 (1990).

332. Elaine P. Adam, *Chronology 1980*, 59 Foreign Aff. 714, 725, 729-32 (1981); David L. Peace, *Major Maritime Events in the Persian Gulf War*, in Panel, *supra* note 19, at 146, 147 (1990); David L. Peace, *Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis*, 31 Va. J. Int'l L. 545, 547 (1991); J. Ashley Roach, *Missiles on Target: Targeting and Defense Zones in the Tanker War*, *id.* 593, 600-02 (1991). A U.N. initiative to evacuate 70 neutral vessels anchored at the Shatt al-Arab terminals and trapped by the Iranian decree under the International Committee of the Red Cross flag was given up as a failure by March 1982, because Iraq refused to allow them to depart. Boleslaw Boczek, *Law of Warfare and Neutrality: Lessons from the Gulf War*, 20 Ocean Devel. & Int'l L. 239, 244, 257 (1989), who argues that this may have been violative of the law of blockade, which allows neutrals a grace period to depart at the beginning of a blockade.

333. J. Ashley Roach, *supra* note 332, at 604-05.

334. 2 Anthony H. Cordesman & Abraham R. Wagner, *The Lessons of Modern War 90-91*, 101-02, (1990); Frankis V. Russo, Jr., *supra* note 176, at 393, reports that Kuwait and Saudi Arabia also made substantial cash grants to Iraq to help finance its war effort. See also Farhaug Mehr, *Neutrality in the Gulf War*, 20 *id.* 105 (1989).

335. NWP 9A, *supra* note 4, para. 7.4.1, at 7-25 n.98, citing, inter alia, Milton Viorst, *Iran at War*, 65 Foreign Aff. 349, 350 (1986); see also 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 92; J. Ashley Roach, *Missiles on Target: The Law of Targeting and the Tanker War*, in Panel, *supra* note 19, at 154, 156-57; J. Ashley Roach, *supra* note 332, at 596-97, 600-01. Captain Roach has stated that even though Iraq did not follow the formalities of blockade - announcement and effectiveness - an argument could be made

that Iraq was enforcing an air blockade of Iran, and that neutral ships assumed the risk of attack if they chose to carry Iranian oil during the conflict. J. Ashley Roach, *supra*, at 157; *id* at 607-08. Yoram Dinstein, *Commentary, in Panel, supra* note 261, at 606, 608 says that "[n]o blockade [was] proclaimed . . . , and had it been . . . , it would have been a 'paper blockade.' Consequently, the law of blockade [was] inapplicable." Paper blockades are by definition ineffective. 2 Daniel P. O'Connell, *supra* note 11, at 1150-51, *citing* Paris Declaration Respecting Maritime Law, Apr. 16, 1856, art. 4, The Law of Naval Warfare, *supra* note 1, at 61; 65; London Declaration Concerning the Laws of Naval War, Feb. 26, 1909, art. 2, The Law of Naval Warfare, *supra* at 223, 227-28. Professor Dinstein also stated that oil shipped out of the Gulf could not have been contraband, since the right to capture "is limited to import goods and does not cover export items. The Declaration of London makes it abundantly clear that a cargo cannot constitute contraband if it is not destined for the enemy . . . [O]il shipped out of the Gulf does not come within the purview of contraband." Yoram Dinstein, *supra*, at 608. While the argument is technically correct, it might be noted that goods characterized as contraband that are exported from one enemy port to another enemy port are subject to capture and condemnation. Declaration of London, *supra*, arts. 30-39, *in* The Law of Naval Warfare, *supra* at 238-41. 2 Daniel P. O'Connell, *supra* note 11, at 1144-47 subscribes to the general theory but notes the tendency of nations to treat goods as enemy-destined cargo when the consignee is an enemy agent in neutral territory where the agent could reconsign the goods to the enemy. It would seem a logical extension of this to say that if enemy goods (e.g., oil) are sold for the benefit of the war effort, and the proceeds are then sent, perhaps by electronic funds transfer, to enemy bank accounts where they can further the war effort, the practical result is the same. Thus Professor Dinstein is technically correct as to the exact words of the 1909 London Declaration, which perhaps reflects the commercial and economic warfare practices of its day or earlier conflicts, but today's realities are that outgoing shipments of warfighting/war-sustaining goods are also contraband, albeit by the circumlocutory analysis stated above.

336. Panel, *supra* note 19, at 170 (Remarks by Mr. Burnett); Panel, *supra* note 261, at 609 (Remarks by Mr. Wiswall).

337. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 126-27; Wolff von Heinegg, *supra* note 147, at 35.

338. 28 Keesing's Contemporary Archives, *supra* note 343.

339. The United States also stopped shipments on turbines for Iraqi frigates being built in Italy. 27 *id.* 31011 (1981). *See also* Council Calls on Iran and Iraq to Settle Dispute Peacefully, 17 U.N. Chron. 5, 7 (Sept. 1980).

340. S.C. Res. 479, U.N. Doc. S/RES/479 (1980), *reprinted in* Karel C. Wellens, *supra* note 42, at 357.

341. W. Michael Reisman, *supra* note 25, at 589, 590; *see also* Samuel P. Menefee, *supra* note 331, at 586, who reports USSR Premier Leonid Brezhnev's December 1980 speech on Soviet principles for the Gulf:

Not to set up military bases in the Persian Gulf and on contiguous islands and not to deploy nuclear or any other weapons of mass destruction there;

Not to use or threaten to use force against the Persian Gulf Countries and not to interfere in their internal affairs; . . .

Not to create any impediments or threats to normal trade exchange and the use of maritime communications connecting the states of this region with other countries.

342. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 133-34.

343. 28 Keesing's Contemporary Archives 31522 (1982) (emphasis added).

344. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 171; 28 Keesing's Contemporary Archives 31850 (1982); 29 *id.* 32594 (1983); 30 *id.* 32680, 33058-59 (1984); 31 *id.* 33560 (1985); Janis Kreslins, *Chronology 1982*, 61 Foreign Aff. 714, 725-26 (1983); J. Ashley Roach, *supra* note 332, at 605.

345. 29 Keesing's Contemporary Archives 32594-95 (1983).

346. 28 *id.* 31850 (1982); 30 *id.* 33058 (1984).

347. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 171; Janis Kreslins, *supra* note 344, at 225-26; J. Ashley Roach, *supra* note 332, at 605.

348. *Final Declaration of 12th Summit of Arab Heads of State*, Sept. 6-9, 1982, 21 Int'l Legal Mat'l 1144, 1145-46 (1982). For other peace initiatives of these years, *see generally* 28 Keesing's Contemporary Archives 31852 (1982) (GCC); 29 *id.* 32595 (1983); 30 *id.* 33058 (1984) (GCC condemns Iranian aggression); 31 *id.* 33561 (1985) (Arab League, among others); 32 *id.* 34264-65 (1986) (GCC claimed Iran persisted in ignoring efforts to end the war).

349. S.C. Res. 540, U.N. Doc. S/RES/540 (1983); S.C. Res. 552, U.N. Doc. S/RES/552 (1984) *reprinted in* Karel C. Wellens, *supra* note 42, at 359-60, 377-78. *See also* W.J. Fenrick, *supra* note 288, at 120-21. One commentator has argued that "[a]t the very least, [Resolution 552 was] a ringing reaffirmation of the

212 Targeting Enemy Merchant Shipping

right of neutral shipping engaged in interneutral commerce to be free from intentional attack on the high seas. Further, Resolution 552 clearly [did] not condemn the Iraqi attacks, and thus implies . . . its acceptance of their legality." J. Ashley Roach, in Panel, *supra* note 19, at 158; J. Ashley Roach, *supra* note 332, at 604. The resolutions were not meant to impede customary rights of visit and search, however. Francis V. Russo, Jr., *supra* note 176, at 395.

350. See 3 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 283, ch. 5 for analysis of the Central Command in the context of strategic technology for limited force engagements. The early history of the U.S. Navy's Middle East Force, partial predecessor to the Central Command, is traced in Peter W. De Forth, *U.S. Naval Presence in the Persian Gulf: The Mideast Force Since World War II*, 28 Nav. War Coll. Rev. 28 (No. 1, 1975).

351. Thomas Naff, *The Iran-Iraq War: Implications for U.S. Policy* 64, 65 (1985); *Chronology* 1984, 63 Foreign Aff. 672, 682-86 (1985); Christopher Greenwood, *Remarks*, in Panel, *supra* note 19, at 158.

352. Panel, *supra* note 19, at 171 (Remarks by Mr. Kaladkin).

353. Marian Leich, *United States Defense Measures in the Persian Gulf Area*, 78 Am. J. Int'l L. 884 (1984).

354. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 191-98, 205-13, 227, 534-39; Ken Booth, *Law, Force and Diplomacy at Sea* 178 (1985); *Chronology* 1984, 63 Foreign Aff. 672, 682-86 (1985); L.F.E. Goldie, *Low Intensity Conflict at Sea*, 14 Syracuse J. Int'l L. & Comm. 597, 625-26 (1988); Kay King, *Chronology* 1985, 64 Foreign Aff. 645, 658-61 (1986); Wolff von Heinegg, *supra* note 147, at 35-36; Frank L. Wiswall, *Remarks*, in Panel, *supra* note 261, at 594, 596; Frank L. Wiswall, *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf*, 31 Va. J. Int'l L. 619, 623 (1991).

355. Richard W. Murphy, *Review of Developments in the Middle East*, 86 Dep't St. Bull. 39, 41 (Mar. 1986).

356. The precipitating event was Iranian interception of the U.K. merchantman *Barber Perseus*. Panel, *supra* note 19, at 158-59 (Remarks by Professor Greenwood).

357. Frits Kalshoven, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, 272, 274.

358. Jeffrey Schloesser, *U.S. Policy in the Persian Gulf*, 87 Dep't St. Bull. 38, 41 (Oct. 1987).

359. S.C. Res. 514, U.N. Doc. S/RES/514 (1982); S.C. Res. 522, U.N. Doc. S/RES/522 (1982); S.C. Res. 540, U.N. Doc. S/RES/540 (1983); S.C. Res. 552, U.N. Doc. S/RES/552 (1984), *reprinted* in Karel C. Wellens, *supra* note 42, at 357-60, 377-78.

360. Convention of Constantinople, Oct. 22, 1888, *supra* note 145.

361. 31 Keesing's Contemporary Archives 33371-73 (1985). As noted, *supra* at note 112 and *infra* at note 381 and accompanying texts, laying mines under these circumstances was unlawful.

362. See S.C. Res. 598, U.N. Doc. S/RES/598, *reprinted* in 26 Int'l Legal Mat'l's 1479 (1987).

363. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 229-30, 236-37; Horace B. Robertson, Jr., *Chronology* 1986, 65 Foreign Aff. 653, 672-76 (1987).

364. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 244, 255, 271-74; Norman Cigar, *The Soviet Navy in the Persian Gulf: Naval Diplomacy in a Combat Zone*, 42 Nav. War Coll. Rev. 56 (No. 2, 1989); Christopher Greenwood, in Panel, *supra* note 19, at 158; David L. Peace, in Panel, *supra* note 19, at 149; David L. Peace, *supra* note 332, at 550; Wolff von Heinegg, *supra* note 147, at 35 n. 355.

365. Christopher Greenwood, in Panel, *supra* note 19, at 158.

366. 32 Keesing's Contemporary Archives 34514 (1988).

367. 33 *id.* 35160, 35597 (1987).

368. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 271-81; Norman Cigar, *supra* note 364, at 59, 63; Peter Hayes, *Chronology* 1987, 66 Foreign Aff. 638, 655-60 (1988).

369. Caspar Weinberger, *A Report to Congress on Security Arrangements in the Persian Gulf*, 26 Int'l Legal Mat'l's 1434, 1448, 1450-52, 1458, 1461-63 (1987); Comment, *Reflagging Kuwaiti Tankers: A U.S. Response in the Persian Gulf*, 1988 Duke L.J. 174, 202; David L. Peace, in Panel, *supra* note 19, at 150-51; David L. Peace, *supra* note 332, at 553-54; Frank L. Wiswall, *supra* note 354, at 662 n. 12; Rudiger Wolfrum, *supra* note 185, at 386-94; Statement by Assistant Secretary of State Richard William Murphy, May 19, 1987, 87 Dep't St. Bull. 58-60 (July 1987); *contra*, Yoram Dinstein, in Panel, *supra* note 261, at 608-09, who may not have had access to other indicia of a "genuine link." Query whether a "genuine link" is necessary at all from the perspective of the law of armed conflict. See *supra* notes 176-86, 197, 310-11, 328 and accompanying text. See also Panel, *supra* note 261, at 610 (Remarks by Mr. Wiswall). Wiswall, *supra* at 622-23 says that the reflagging was not a departure from U.S. Merchant Marine policy and was not anomalous. Statement by Michael H. Armacost, Undersecretary of State for Political Affairs, to U.S. Senate Foreign Relations Comm., June 16, 1987, 26 Int'l Legal Mat'l's 1429, 1431 (1987) notes that Kuwait had already reflagged two tankers under the U. K. ensign. One practical reason for reflagging was that the U.S. Navy did not have enough ships to escort all vessels beneficially owned by U.S. nationals, which may have been a third or more of the tankers in the Gulf. Frank Wiswall, in Panel, *supra* note 261, at 595-96. For a contemporary debate on reflagging and other Tanker War issues, see Conference Report, *The Persian/Arabian Gulf Tanker War: International Law or International Chaos*, 19 Ocean Devel. & Int'l L. 299 (1988); see also Francis V. Russo, Jr., *supra* note 176, for another thoughtful analysis.

370. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 289-90, 549-58. See generally Statement of U.S. Secretary of State George P. Shultz, May 20, 1987, 87 Dep't St. Bull. 62-63 (July 1987); *Iran-Iraq War and Navigation in the Gulf*, 26 Int'l Legal Mat'ls 1422-31 (1987); William H. Nelson, *Peacekeepers at Risk*, 113 U.S. Nav. Inst. Proc. 90 (July 1987); David L. Peace, in Panel, *supra* note 19, at 149; David L. Peace, *supra* note 332, at 551-53. For a comparative study, see Joseph F. Bouchard, *Accidents and Crises: Panay, Liberty and Starke*, 41 Nav. War. Coll. Rev. 87 (No. 4, 1988).

371. David L. Peace, in Panel, *supra* note 19, at 149-50; Peace, *supra* note 332, at 552; J. Ashley Roach, *supra* note 332, at 610; Caspar Weinberger, *supra* note 374, at 1454-55, 1459-60, 1463. The texts of the 1984 warnings are published in Marian Leich, *supra* note 353. The warnings were published within days after the official report on the bombing of the U.S. Marine headquarters at Beirut International Airport in 1983. J. Ashley Roach, *supra* at 609. Daniel P. O'Connell, *supra* note 19, at 169-80; J. Ashley Roach, *Rules of Engagement*, 36 Nav. War Coll. Rev. 46 (No. 1, 1983) and Ivan A. Shearer, *Rules of Engagement and the Implementation of the Law of Naval Warfare*, 14 Syracuse J. Int'l L. & Comm. 767 (1988) analyze ROE from an international law perspective. See also *infra* note 533 and accompanying text, and Bradd C. Hayes, *Naval Rules of Engagement: Management Tools for Crisis* 40-44 (1989).

372. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 290-92, 298-300; Walter Isaacson, *Into Rough Water*, Time, Aug. 10, 1987, at 8; John H. McNeill, *supra* note 205, at 635, 638; David L. Peace, in Panel, *supra* note 19, at 149; David L. Peace, *supra* note 318 at 554; Wolff von Heinegg, *supra* note 147, at 36; Rudiger Wolfrum, *supra* note 185, at 397-98; see also London Declaration Concerning the Laws of Naval Warfare, Feb. 26, 1909, arts. 61-62, in *The Law of Naval Warfare*, *supra* note 1, at 223, 251-52.

373. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 318-19; Bradd C. Hayes, *supra* note 371, at 47-48; letter of President Ronald Reagan to U.S. Speaker of the House Jim Wright, Sept. 4, 1987, 23 Weekly Comp. of Pres. Doc. 1066-67 (1987). Commentators have differed on whether the U.S. claim of self-defense was legitimate under the circumstances, but Theodor Meron, *Remarks*, in Panel, *supra* note 19, at 164; John H. McNeill, *supra* note 205, at 638-39; David L. Peace, in Panel, *supra* note 19, at 151-52; and David L. Peace, *supra* note 332, at 554-57, conclude that the attack on *Iran Ajr* was allowable under international law.

374. Christopher Greenwood, in Panel, *supra* note 19, at 159 (footnote omitted), quoting answer by the Minister of State, Foreign and Commonwealth Office to a parliamentary question, Jan. 28, 1986, 90 Parl. Deb., H.C. (6th ser.) 426 (1986). For the French attitude, see *supra* note 354 and accompanying text.

375. Christopher Greenwood, in Panel, *supra* note 19, at 159-61 (footnote omitted) quoting U.K. Foreign and Commonwealth Office and Ministry of Defence, *Joint Memorandum* to House of Commons Select Committee, 3d Rep., Defence Committee 1986-87, H.C. 409, at 70 (1987). See also *infra* note 394 and accompanying text.

376. Rainier Lagoni, in Panel, *supra* note 19, at 163, referring to Hague Convention (VIII) Regarding Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541. See also Howard S. Levie, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 140, 142-44, 146, Howard S. Levie, *Mine Warfare and International Law*, Nav. War. Coll. Rev. 27 (Apr. 1972), and *supra* note 361 and accompanying text.

377. Caspar Weinberger, *The Permanence of U.S. Interests in the Persian Gulf*, remarks to the American Defense Preparedness Association, May 20, 1987, Office of the Assistant Secretary of Defense (Public Affairs) News Release No. 264-87, at 4. See also Table 9.7, *Targets in the Tanker War as of October 12, 1987*, in 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 327-28.

378. Norman Cigar, *supra* note 364, at 64; Bradd C. Hayes, *supra* note 364, at 655-60.

379. Vienna Economic Summit, *Statement on Iran-Iraq War and Freedom of Navigation in the Gulf*, June 9, 1987, 23 Weekly Comp. of Pres. Doc. 647-48 (1987). See also Caspar Weinberger, *supra* note 369, at 1449-50.

380. S.C. Res. 598, U.N. Doc. S/RES/598, reprinted in Karel C. Wellens, *supra* note 42, at 362-63.

381. Saudi Arabia also committed its four minesweepers to clearance operations. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 300, 304, 313-14; Bradd C. Hayes, *supra* note 368, at 655-60.

382. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 328-31; Bradd C. Hayes, *supra* note 376, at 48-49; N.Y. Times, Oct. 20, 1987, at A10; John H. McNeill, *supra* note 205, at 638-39; David L. Peace, in Panel, *supra* note 19, at 152; David L. Peace, *supra* note 332, at 557-58; see also letter of President Reagan to House Speaker Wright, Oct. 20, 1987, 23 Weekly Comp. of Pres. Doc. 1206 (1987).

383. Frank L. Wiswall, *supra* note 354, at 622.

384. See *infra* notes 394-95 and accompanying text.

385. Compare *supra* notes 383-84 and accompanying text with *supra* notes 11-39, and accompanying text; see also Vaughan Lowe, *supra* note 19, at 129.

386. David L. Peace, in Panel, *supra* note 19, at 152-53; David L. Peace, *supra* note 318, at 558. Similar situations had occurred in August 1987 with no casualties; deadly force was not required. Bradd C. Hayes, *supra* note 371, at 46; Howard S. Levie, *The Status of Belligerent Personnel "Splashed" and Rescued by a Neutral in the Persian Gulf Area*, in Panel, *supra* note 261, at 597; Howard S. Levie, *The Status of Belligerent Personnel*

214 Targeting Enemy Merchant Shipping

"Splashed" and Rescued by a Neutral in the Persian Gulf Area, 31 Va. J. Int'l L. 610 (1991). One reason for particular concern with respect to possible small craft attacks was that the Iranian Navy had been conducting maneuvers in Iran's exclusion zone and territorial waters, including simulated speedboat attacks on suicide runs. Peter Hayes, *supra* note 368, at 658.

387. See *supra* notes 283, 302.

388. David L. Peace, in Panel, *supra* note 19, at 153-54; David L. Peace, *supra* note 332, at 558. This might be contrasted with the Dogger Bank Case (U.K. v. Russ.) (1905), J. Scott, Hague Court Reports 403 (1916), in which a Russian battleship division fired on English fishing boats on the Dogger Bank in the North Sea, killing two fishermen, wounding six, sinking one boat and damaging four other craft, during the 1904-05 Russo-Japanese War. The Russian fleet had been warned of the possibility of Japanese torpedo-boat attacks, quite similar to the U.S. concern over speedboat suicide runs, *supra* note 386. The difference was that the Russian warships opened fire without any warning shots. The commission of inquiry held Russia liable; Russia accepted the decision and paid damages. The incident very nearly resulted in war between Russia and Great Britain. Richard F. Lebow, *Accidents and Crises: The Dogger Bank Affair*, 31 Nav. War Coll. Rev. 66, 69-73 (No. 1, 1978).

389. *Text of Communique from Amman Summit*, 27 Int'l Legal Mat'ls 1651-52 (1988).

390. Wolff von Heinegg, *supra* note 147, at 35.

391. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 336-37; Bradd C. Hayes, *supra* note 368, at 660.

392. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 375-80; letter of President Reagan to House Speaker Wright, Apr. 19, 1988, 24 Weekly Compil. of Presid. Documents 493 (1988). For operational details, see Bud Langston & Don Bringle, *Operation Praying Mantis: The Air View*, 115 U.S. Nav. Inst. Proc. 54 (May 1989); Ronald O'Rourke, *Gulf Ops*, id. 42, 44; J.R. Perkins III, *Operation Praying Mantis: The Surface View*, id. 66. Bradd C. Hayes, *supra* note 371, at 51-52, erroneously characterizes the response to the Roberts mining as a "reprisal."

393. The Federal Republic of Germany sent ships to the Mediterranean Sea to replace ships sent to the Gulf. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 313-17, 570; U.S. Department of State, Western Defense: The European Role in NATO 16-17 (1988). 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* at 528, credit the U.S. convoying as catalyzing other nations' participation in the operation.

394. Statement by Secretary of Defense Frank Carlucci, 88 Dep't St. Bull. 61 (July 1988). The initial executive decision had been taken with respect to protection of the jack-up barge *Scan Bay*, of Panamanian registry but with U.S. nationals aboard. Ronald O'Rourke, *supra* note 392, at 46-47. For the U.K. view, see *supra* note 375 and accompanying text.

395. Frank L. Wiswall, *supra* note 354, at 628; Rudigar Wolfrum, *supra* note 185, at 398-99. Frank L. Wiswall, *supra* at 623, suggests that if the U.S. policy had been the same as French policy, see *supra* note 354, the deterrent would have reduced the carnage.

396. 34 Keesing's Contemporary Archives 35938 (1988).

397. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 390-94; letter of President Reagan to House Speaker Wright, July 14, 1988, 24 Weekly Comp. of Pres. Doc. 938 (1988). For a factual account of the Airbus incident, see 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* at 573-84.

398. League of Arab States, *Text of Communique from Algiers Summit*, 27 Int'l Legal Mat'ls 1654 (1988), referring to *Text of Communique from Amman Summit*, *supra* note 389 and accompanying text.

399. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 398-99; Bradd C. Hayes, *Chronology 1988*, 68 Foreign Aff. 220, 232-38 (1989).

400. John H. Cushman, Jr., *Navy to End Convoys in Gulf But It Will Still Protect Ships*, N.Y. Times, Sept. 17, 1988, at 2; See also Ronald O'Rourke, *supra* note 392, at 48.

401. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 401.

402. *Id.* at 400-01.

403. W.J. Fenrick, *supra* note 62, at 20-21; see also W.J. Fenrick, *supra* note 62, at 260.

404. Francis V. Russo, Jr., *supra* note 176, at 397; Frank L. Wiswall, *Remarks*, in Panel, *supra* note 261, at 594-95; Frank L. Wiswall, *supra* note 354, at 621.

405. Frank L. Wiswall, *supra* note 261, at 595; cf. Frank L. Wiswall, *supra* note 354, at 621. Although Professor Goldie would agree on most of these points, he would argue that the threat of an oil surplus in the 1980s and "the favorable conditions of insurance . . . rendered such attacks relatively less unacceptable to the tanker fleets' owners than did such attacks during the World Wars," when there was a scarcity of shipping and cargoes. L.F.E. Goldie, *supra* note 296, at 176.

406. David L. Peace, in Panel, *supra* note 19, at 147-48; David L. Peace, *supra* note 332, at 548-49; J. Ashley Roach, in Panel, *supra* note 19, at 156; J. Ashley Roach, *supra* note 332, at 603-08.

407. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 530.

408. W.J. Fenrick, *supra* note 288, at 121-22; see also Boleslaw Boczek, *supra* note 332, at 258.

409. Ross Leckow, *supra* note 188, at 639.

410. L.F.E. Goldie, *supra* note 296, at 176.
411. Yoram Dinstein, *in Panel, supra* note 261, at 608.
412. David L. Peace, *in Panel, supra* note 19, at 148-49; David L. Peace, *supra* note 332, at 547-48.
413. *See generally, e.g.*, 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, and *supra* note 335 and accompanying text.
414. *See supra* notes 403-04 and accompanying text.
415. W. Thomas Mallison, *supra* note 195, at 121; Boleslaw Boczek, *supra* note 332, at 258; J. Ashley Roach, *supra* note 19, at 156; *see also* NWP 9A, *supra* note 4, para. 8.2.2.2, at 8-12, and Robert W. Tucker, *supra* note 62, at 69 n.53.
416. W. Thomas Mallison, *supra* note 195, at 122; J. Ashley Roach, *supra* note 332, at 156.
417. W. Thomas Mallison, *supra* note 195, at 121; NWP 9A, *supra* note 4, para. 8.2.2; David L. Peace, *in Panel, supra* note 19, at 148-49; David L. Peace, *supra* note 332, at 318; J. Ashley Roach, *in Panel, supra* note 19, at 156; J. Ashley Roach, *supra* note 332, at 606-07; Wolff von Heinegg, *supra* note 147, at 35-36; *but see* Robert W. Tucker, *supra* note 62, at 66, and *compare id.* at 69 n. 13; *contra* Rainier Lagoni, *in Panel, supra* note 19, at 163. Francis V. Russo, Jr., *supra* note 176, at 396-97, says that the legality of attacks would depend on a variety of factors: the relationship of a State with which a ship is trading to the hostilities; the ship's cargo; the cargo's ultimate use; the extent to which the cargo directly or indirectly supports the belligerent's war economy. This argument is analogous to the problem of defining contraband, which has baffled prize courts for years, or the genuine link theory for ships urged by at least one commentator. *See supra* notes 178-79, 183, 198, 308-13, 328-29, 369 and accompanying text. While Commander Russo's approach shows real analysis of the complexities of the problem and may be helpful for prize court jurisprudence, it does not solve the problem of an attack and sinking followed by claims of law violations under international law, unless the attacking state is willing to run that risk. Assuming a high seas scenario outside a war zone, it would seem that the ideal preventive (or risk minimization) approach would be a declaration by a belligerent as to what is contraband, acknowledgment of such by the world community, use of a warning system by neutrals (*see, e.g., supra* note 289 and accompanying text), and a navicert or clearcert system such as those used in World Wars I and II, particularly if the conflict is protracted. The notification/warning/navicert/clearcert methodologies should be feasible in today's world of facsimile and other instantaneous communication, even in the event of partial communications disruptions. For a discussion of the navicert system developed during World Wars I and II, *see* 7 Green H. Hackworth, *Digest of International Law* 212-17 (1943); 1 William N. Medlicott, *The Economic Blockade* 436-42 (1952); 2 *id.* 153-59, 420-27 (1959); 11 Marjorie M. Whiteman, *Digest of International Law* 38-51 (1968). The older terms were passport or sea-letter. Many bilateral agreements stated the terms for these during the eighteenth and nineteenth centuries. 2 John B. Moore, *International Law Digest* 1045-69 (1906). John H. McNeill, *supra* note 205, while citing NWP 9A, *supra*, questions whether the rules have now changed from visit, search, and capture to attack and sink for ships carrying warfighting/war-sustaining cargo.
418. J. Ashley Roach, *in Panel, supra* note 19, at 157; J. Ashley Roach, *supra* note 332, at 607.
419. 2 Anthony H. Cordesman & Abraham R. Wagner, *supra* note 334, at 90-92, 101-02, 133-34, 170, 186; Farhaug Mehr, *supra* note 334, at 105; Francis V. Russo, Jr., *supra* note 176, at 393.
420. W. Thomas Mallison, *supra* note 195, at 132; Boleslaw Boczek, *supra* note 332, at 258-59; J. Ashley Roach, *supra* note 332, at 157. Iran's argument of the right of retaliation, or reprisal, has been properly rejected. Boleslaw Boczek, *supra* at 259-60; *see also supra* notes 28-32 and accompanying text.
421. Robert W. Tucker, *supra* note 62, at 334-35, *citing, inter alia*, London Naval Protocol, Feb. 26, 1909, arts. 61-62, *in The Law of Naval Warfare, supra* note 1, at 223, 251-52.
422. Boleslaw Boczek, *supra* note 332, at 261-62; *see also supra* notes 11-39 and accompanying text; *see also* Rainier Lagoni, *in Panel, supra* note 19, at 163-64, who regards defense of merchantmen of flags other than the warship's as an open question.
423. *Compare, e.g. supra* notes 54-60, 89-90, 92-93, 135-38, 157-58, 163, 204, 212, 237, 284, 289, 303, and accompanying text, *with supra* notes 421-22.
424. Rainier Lagoni, *in Panel, supra* note 19, at 163.
425. Robert W. Tucker, *supra* note 62, at 204.
426. On the last, *see* L.F.E. Goldie, *Lieber Group Panel: 83d ASIL Annual Meeting on Planning Further Meetings to Develop the Principles of International Humanitarian Law Governing Armed Conflict at Sea*, 14 *Syracuse J. Int'l L. & Comm.* 555 (1989). *See also infra* notes 473-535 and accompanying text.
427. 1 Howard S. Levie, *supra* note 283, at xxi-xxii.
428. *Id.* at 162-63.
429. 2 *id.* at 821-23.
430. *Id.* at 821-24.
431. Note Professor Levie's careful omission of reference to pure state practice not grounded in a treaty or other significant document, *supra* note 427 and accompanying text.
432. *See supra* note 428 and accompanying text.

216 Targeting Enemy Merchant Shipping

433. 1 & 2 Howard S. Levie, *supra* note 283, at 179-203, 524-40, 554-57, 560-61, 570-74.
434. 1 *id.* at 107-08.
435. Restatement (Third), *supra* note 1, §§ 331(2)(a), 336 & reporters' note 4.
436. *Id.* §§ 501-02.
437. Compare *id.* § 521 with UNCLOS, *supra* note 2, art. 87(1). See also *supra* notes 317-23 and accompanying text.
438. Restatement (Third), *supra* note 1, § 521, comment b & reporters' notes 1, 2; § 905, comment g & reporters' note 7, discussing differences in the scope of the right of self-defense after ratification of the U.N. Charter. See also *supra* notes 11-39 and accompanying text.
439. U.N. Charter, art. 103, invalidates provisions of any other international agreement inconsistent with the Charter. Nothing is said in the Charter about the place of custom.
440. The Nicaragua Case, *supra* note 1, found that a customary norm equated to the U.N. Charter, art. 51, right of self-defense. *Id.*, art. 93(1), declares that all states that are Members of the United Nations "are *ipso facto* parties to the Statute of the International Court of Justice." I.C.J. Statute, art. 38(1), lists treaties, custom and general principles of law as coequal sources of international law, and thus it could be argued that insofar as a customary norm has developed, it should be considered along with any treaty principles. If there are no treaty principles, custom or general principles should prevail. Whether a custom in derogation of the Charter would be upheld, given the broad sweep of Charter purposes and principles, U.N. Charter, arts. 1, 2, and the possible finding of a customary norm parallel to them, is unlikely. On the other hand, since under the I.C.J. Statute, art. 59, decisions of the International Court of Justice are not given precedential value and are given secondary source status under *id.*, art. 38(1)(d), whether the reasoning of the Nicaragua Case, *supra* note 1, would be followed is open to argument in the next case before the Court and may be a slim reed for dispute resolution in other contexts. Others have argued differently. Cf., e.g., Vaughan Lowe, *supra* note 19, at 128, 137. If there is no source - i.e., no custom, treaties, etc., that apply to a situation - the Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 says that parties are free to act in the interest of their own jurisdiction. See generally George K. Walker, *supra* note 1, at 9.
441. Restatement (Third), *supra* note 1, Part VI.
442. See generally *id.* §§ 701-11.
443. Cf. *id.* §§ 701, reporters' note 6, and 702, reporters' note 11. The reporters' notes, although informative, are not considered part of the "restated law" as the comments are. George K. Walker, *supra* note 1, at 36.
444. Restatement (Third), *supra* note 1, § 702, Comment a, reporters' note 1.
445. *Id.*, reporters' note 11. See also, e.g., George K. Walker, *supra* note 1, at 32-33, citing different theories of the scope of *jus cogens* and its application to treaties, and see *supra* note 443 for the weight to be given Restatement reporters' notes.
446. See U.S. Department of State, Treaties in Force 329 (1992), citing Genocide Convention, *supra* note 109.
447. 2 Restatement (Third), *supra* note 1, at 443-47 (table of multilateral international agreements), citing Hague Convention (IV) on the Law and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The Restatement does cite several agreements related to armed conflict situations. Restatement (Third), *supra* at 443-47, citing, e.g., Genocide Convention, *supra* note 109; Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity, Nov. 11, 1970, 754 U.N.T.S. 73.
448. See *supra* note 328 and accompanying text.
449. See *supra* notes 368-69 and accompanying text, which indicate that the United States and Kuwait at least considered the possible impact of the genuine link theory, in that underneath the change of flags were actions that would have satisfied the theory.
450. The lack of need for a warning is explained by the advent of modern technology - e.g., satellite communications, over-horizon weapons and antiship missile systems - that make lack of warning imperative in some cases for the attacking warship. NWP 9A, *supra* note 4, para. 8.2.2. Sally V. Mallison & W. Thomas Mallison, *supra* note 62, at 287, omitted the controversial seventh category from their recapitulation, in 1991, of their list of enemy merchant vessels subject to attack and destruction. Commander Fenrick included the seventh category in his 1989 report to the IIHL Roundtable at Bochum, adding the caveat that the 1936 London Protocol must be followed unless under the specific circumstances of the encounter, the attacker would be subject to "imminent danger" or it would otherwise be infeasible to comply. See *infra* note 535 and accompanying text. John H. McNeill, *supra* note 205, at 633-34, asks whether the seventh category represents a change in the rules, from the traditional rights of visit, search and capture to a claim of right to attack and sink.
451. J. Ashley Roach, in Panel, *supra* note 19, at 154-55; Roach, *supra* note 332, at 594-95, citing U.S. Department of Defense General Counsel letter of Sept. 27, 1972, 67 Am. J. Int'l L. 122 (1973).
452. NWP 9A, *supra* note 4, para. 7.5.
453. See *supra* note 411 and accompanying text.

454. See *supra* note 415 and accompanying text. See also NWP 9A, *supra* note 4, paras. 4.3.2, 4.3.2.1.
455. NWP 9A, *supra* note 4, para. 8.2.3.
456. Compare *id.* para. 8.3.1 with *id.* para. 8.2.2.
457. *Id.* para. 8.3.2.
458. *Id.* para. 8.4.
459. *Id.* para. 7.5.
460. See *supra* notes 178-79, 183, 198, 308-13, 320-29, 369, 396 and accompanying text.
461. NWP 9A, *supra* note 4, para. 7.5 n. 112, citing Caspar Weinberger, *supra* note 374, at 1450-51.
462. See *supra* notes 374-75, 377, and 406 which show that some time intervened between reflagging and sailing the ships.
463. NWP 9A, *supra* note 4, at para. 7.8.
464. *Id.* ch. 10.
465. *Id.* para. 11.10.2, at 11-22.
466. See *id.* ch. 11.
467. *Id.* para. 7.4
468. Compare *id.* para. 7.6 with *id.* para. 3.8, the latter referring to OPNAVINST 3120.32B, which is not published with NWP 9A.
469. NWP 9A, *supra* note 4, paras. 7.6, 7.9, 7.9.1.
470. *Id.* para. 7.7.
471. *Id.* paras. 7.9.2-7.10.
472. See *supra* notes 11-39, 52-45, 207-08 and accompanying text.
473. See *General Report of the Preliminary Round Table of Experts on International Humanitarian Law Governing Armed Conflicts at Sea* and the *List of All Participants* and program, 14 Syracuse J. Int'l L. & Comm. 563-69 (1988).
474. Panel, *Developments in the Law of Naval Warfare: Custom or Codification?*, 1989 Proc. Am. Soc'y Int'l L. 145, 151 (1990) (Remarks by Professors Meron and Dinstein). David L. Larson, *Naval Weaponry and the Law of the Sea*, 18 Ocean Devel. & Int'l L. 125, 156 (1987) also urged a codification conference. For analysis of the Restatements in the context of the law of naval warfare, see *supra* notes 183-84, 435-47 and accompanying text.
475. Panel, *supra* note 474, at 145 (Remarks by Professor Merson).
476. *Id.* at 146, 147 (Remarks by Professor Goldie), referring to *General Report of the Preliminary Round Table of Experts on International Humanitarian Law Governing Armed Conflicts at Sea*, 14 Syracuse J. Int'l L. & Comm. 563 (1988).
477. Panel, *supra* note 474, at 147 (Remarks by Professor Goldie), referring to *The Law of Naval Warfare*, *supra* note 1.
478. See 7 Bochumer Schriften zur Friedensicherung und zum Humanitaren Volkerrecht, *supra* note 62; 8 *id.* (Wolff von Heinegg ed. 1992).
479. See Panels, *supra* notes 19, 261, 479.
480. Panel, *supra* note 479, at 146-47 (Remarks by Professor Goldie).
481. *Id.*
482. Horace B. Robertson, Jr., *supra* note 39, a series of commentaries on NWP 9A, *supra* note 4.
483. Panel, *supra* note 474, at 149 (Remarks by Professor Reisman). See also *id.* at 149-52 (Remarks by other participants), which noted development of the analogous Oxford Manual of Naval Warfare (1913), reprinted in *The Law of Naval Warfare*, *supra* note 1, at 277, by the Institut de Droit International.
484. I.C.J. Statute, art. 38(1)(d); Restatement (Third), *supra* note 1, § 103(2)(c).
485. Panel, *supra* note 474, at 146 (Remarks by Mrs. Doswald-Beck).
486. See *supra* note 477 and accompanying text.
487. I.C.J. Statute, art. 38(1)(d); Restatement (Third), *supra* note 1, § 103(2)(c).
488. Havana Convention on Maritime Neutrality, Feb. 28, 1928, 47 Stat. 1989, T.S. No. 845, 135 L.N.T.S. 188; Stockholm Declaration Regarding Similar Rules of Neutrality, May 27, 1938, 188 L.N.T.S. 294, involving Denmark, Finland, Iceland, Norway and Sweden. See also *infra* notes 514-15 and accompanying text.
489. Paris Declaration Respecting Maritime Law, Apr. 16, 1856, reprinted in *The Law of Naval Warfare*, *supra* note 1, at 61.
490. See *supra* notes 174-86, 304-24 and accompanying text for a discussion of the 1958 conventions.
491. Natalino Ronzitti, *supra* note 1, at 4-5.
492. Compare *id.* at 6-7, 39-41, with the analysis, *supra* notes 287-98; see also NWP 9A, *supra* note 4, paras. 7.8, 7.8.1. Professor Lagoni, in Panel, *supra* note 19, at 163 would similarly assert that defensive protection zones are valid only if adjacent to the coast of a nation establishing such. See also *supra* note 297 and accompanying text.

218 Targeting Enemy Merchant Shipping

493. Andrea de Guttry, *Commentary*, in *Law of Naval Warfare*, *supra* note 1, at 102, 108-09, analyzing Hague Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907, *reprinted in The Law of Naval Warfare*, *supra* note 1, at 93, and not in force for the United States.

494. Compare Gabriella Venturini, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 120, 126, with NWP 9A, *supra* note 4, para. 7.5.1. Hague Convention (VII) Relating to the Conversion of Merchant Ships into Warships, Oct. 18, 1907, *reprinted in The Law of Naval Warfare*, *supra* note 1, at 111, is also not in force for the United States.

495. Howard S. Levie, *Commentary*, in *Law of Naval Warfare*, *supra* note 1, at 140, 146, analyzing Hague Convention (VIII) Relating to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541; *see also* NWP 9A, *supra* note 4, para. 9.2, which says Hague VIII is a "guide" to the law on employment of naval mines, and *supra* note 376 and accompanying text on mine warfare during the 1980-88 Tanker War.

496. Ivan A. Shearer, *Commentary*, in *Law of Naval Warfare*, *supra* note 1, at 183, analyzing Hague (XI) *supra* note 62; *see also* NWP 9A, *supra* note 4, para. 8.2.3, which lists other vessels exempt from capture under other agreements.

497. Dietrich Schindler, *Commentary*, in *Law of Naval Warfare*, *supra* note 1, at 211, analyzing Hague Convention (XII) Regarding Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545.

498. Dietrich Schindler, *supra* note 502, at 211-13.

499. *Id.* at 213-14; for analysis of these rights and duties, *see id.* at 215-21.

500. *Id.* at 221.

501. Frits Kalshoven, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 257, 272-73.

502. Edwin Nwogugu, *Commentary*, in *id.* 353; L.F.E. Goldie, *Commentary*, in *id.* 489, analyzing Washington Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, arts. 1-4, in *id.* 343, 344-45, which never entered into force; London Treaty for the Limitation and Reduction of Naval Armaments, Apr. 22, 1930, art. 22, 46 Stat. 2858, 2881-82, T.S. No. 830, 112 L.N.T.S. 65, 88, now expired; Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, Nov. 6, 1936, 173 *id.* 353, not in force for the United States; Nyon Arrangement, Sept. 14, 1937, 181 *id.* 137, not in force for the United States; Agreement Supplementary to the Nyon Arrangement, *id.* 151, also not in force for the United States.

503. Lyndel V. Prott, *Commentary*, in *Law of Naval Warfare*, *supra* note 1, at 582, analyzing 1954 Hague Cultural Property Convention, *supra* note 113. *See also supra* notes 113-22, 263 for further analysis.

504. *See* NWP 9A, *supra* note 4, paras. 2.1.2.2, 3.4, *citing*, *inter alia*, 9 Marjorie M. Whiteman, *Digest of International Law* 221, 434 (1968); Marian Leich, *Digest of United States Practice in International Law: 1980*, at 999-1006 (1986).

505. Roerich Pact, *supra* note 113.

506. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

507. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226.

508. Michael Bothe, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 760, analyzing Protocol I, *supra* note 260. *See also supra* notes 259-75 and accompanying text.

509. L.D.M. Nelson, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 779, 783, analyzing Havana Convention on Maritime Neutrality, *supra* note 488 and Hague Convention (XIII) Concerning Rights and Duties of Neutral Powers in Naval War, *supra* note 496, noting the U.S. reservation to article 12(3) of the Havana Convention, which would have equated armed merchantmen with warships with respect to sojourn and provisioning limitations.

510. Ove Bring, *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 839, 843, analyzing Stockholm Declaration Regarding Similar Rules of Neutrality, *supra* note 488.

511. *See, e.g.*, *supra* notes 490, 500-07 and accompanying text.

512. *See supra* note 288 and accompanying text.

513. Natalino Ronzitti, *The Right of Self-Defense and the Law of Naval Warfare*, 14 *Syracuse J. Int'l L.* 571, 575 (1988), apparently referring to Howard S. Levie, *supra* note 283 at 727, 736-38.

514. Howard S. Levie, *supra* note 283, at 737; W.F. Fenrick, *supra* note 288, at 102.

515. Natalino Ronzitti, *supra* note 518, at 575; *see also id.* at 578 and Daniel P. O'Connell, *supra* note 200, at 27-39, who articulates the same ambivalence.

516. *See, e.g.*, *Commentary*, 14 *Syracuse J. Int'l L. & Comm.* 581, 587 (1988) (Remarks of Dr. Fischer).

517. *Id.* at 590 (Remarks of Mrs. Doswald-Beck); *cf. id.* at 590-91 (Remarks of Professor Lowe), 594 (Remarks of Professor Robertson).

518. Vaughan Lowe, *supra* note 292, at 672-75; *but see also Commentary*, 14 *Syracuse J. Int'l L. & Comm.* 677, 683-85, 690-91 (1988) (Remarks of Professors Lowe and Kalshoven), and *Commentary, id.* at 704, 715, 718 (Remarks of Commander Fenrick and Professor Robertson).

519. Hague Convention (IX) Respecting Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. No. 542.

520. Protocol I, *supra* note 260, art. 52, in *The Law of Naval Warfare, supra* note 1, at 727-28. *See also supra* note 261 and accompanying text.

521. Horace B. Robertson, Jr., *New Technologies and Armed Conflicts at Sea*, 14 *Syracuse J. Int'l L. & Comm.* 699-704 (1988), referring to Horace B. Robertson, *Commentary*, in *The Law of Naval Warfare, supra* note 1, at 161.

522. *Commentary*, 14 *Syracuse J. Int'l L. & Comm.* 704, 714 (1988) (Remarks of Professor Robertson).

523. *Id.* at 705-13, 726, 722-25 (Remarks of Commander Fenrick, Dr. Van Hegelsom, Professor Robertson, Mrs. Doswald-Beck, Dr. Bring, Professor DeLupis, Col. Dahl, Professor Kalshoven, Professor Gordon, Professor Amer). *See also* Horace B. Robertson, Jr., *supra* note 521, at 169-70.

524. Howard S. Levie, *supra* note 259, at 728-30, 736-38; *see also Discussion & Notes, id.* at 741, 747-48, 749, 752-53 (Remarks of Professor Levie, Mr. Halkiopoulos, Dr. Van Hegelsom). *But see id.* at 751 (Remarks of Dr. Fischer).

525. *Discussion & Notes, id.* at 748-49 (Remarks of Commander Fenrick), *citing* W. Thomas Mallison, *supra* note 195, at 117-23, and W.F. Fenrick, *supra* note 288; *see also Discussion & Notes, supra* at 751-53, 756 (Remarks of Professor DeLupis, Admiral Clara, Professor Reisman).

526. *Discussion & Notes, supra* note 524, at 749, 751, 753, 756, 758 (Remarks of Professor DeLupis, Colonel Dahl).

527. Antoine A. Bouvier, *supra* note 285; *Commentary*, 14 *Syracuse J. Int'l L. & Comm.* 765 (1988) (Remarks of Commander Fenrick, Mr. Eberlin); *see also supra* notes 285-86 and accompanying text.

528. Ivan A. Shearer, *supra* note 371. The conference also had available *Selected United States Rules of Engagement, Vietnam Era, id.* 795 (1988), reprinted from 121 Cong. Rec. S9897-S9905 (1975). Classified ROEs are subject to the state secrets privilege. *Zuckerbraun v. General Dynamic Corp.*, 935 F.2d 544 (2d Cir. 1991), affirming dismissal of a wrongful death suit involving a deceased U.S.S. *Stark* sailor; the claims were against missile defense system manufacturers, designers and testers and required technical details of the Phalanx close-in defense weapons system, alleged to have malfunctioned in the Iraqi attack on *Stark* during the Tanker War. *See also supra* note 370 and accompanying text.

529. Remiguisz Bierzanek, *Reprisals in Armed Conflicts*, 14 *Syracuse J. Int'l L. & Comm.* 829 (1988).

530. *General Report of the Preliminary Round Table of Experts on International Humanitarian Law Governing Armed Conflicts at Sea*, 14 *Syracuse J. Int'l L. & Comm.* 563 (1988).

531. Compare I.C.J. Statute, art. 38(1)(d) with Restatement (Third), *supra* note 2, § 103(2)(c).

532. Panel, *supra* note 474, at 146 (Remarks by Mrs. Doswald-Beck).

533. W.J. Fenrick, *supra* note 62.

534. Protocol I, *supra* note 260, art. 52(2), *The Law of Naval Warfare, supra* note 1, at 728.

535. W.J. Fenrick, *supra* note 62, at 63-64. This paper was presented at the beginning of the conference, and participants were invited to submit comments, which are also being published, but which are not cited here because of space limitations.

536. G.J.F. van Hegelsom, *Methods and Means of Combat in Naval Warfare*, in 8 *Bochumer Schriften zur Friedensicherung und zum Humanitaren Volkerrecht* 1, 3 (Wolf von Heinegg ed., 1992), introductory report presented to the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Toulon, France, Oct. 19-23, 1990.

537. In 1990 the group met in Toulon, France; *see id.*; in 1991, in Bergen, Norway; *see* Christopher Greenwood, *supra* note 19 and Wolf von Heinegg, *supra* note 147; in 1992, in Ottawa, Canada; *see* Horace B. Robertson, Jr., The "New" Law of the Sea and the Law of Armed Conflict at Sea 43 n.1 (1992), originally presented as the introductory report to the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflict at Sea, Ottawa, Canada, Sept. 25-28, 1992. Additional conferences have been planned.

538. I.C.J. Statute, art. 38(1)(d).

539. Restatement (Third), *supra* note 1, § 103(2)(c).

540. *See, e.g., supra* note 483 and accompanying text.

541. Restatement (Third), *supra* note 1, § 103(2)(d) & Comment c.

542. U.N. Charter, arts. 24, 25, 37, 39, 41, 42, 48. *See also supra* notes 45-47, 73-76 and accompanying text.

543. NWP 9A, *supra* note 4, para. 8.2.3 & n.61, says that liners should not be attacked unless carrying troops or military cargo because civilian loss of life would be disproportionate to any military advantage gained.

220 Targeting Enemy Merchant Shipping

544. Cf. Horace B. Robertson, Jr., *Preface*, in Horace B. Robertson, Jr., *supra* note 19, at x, states much the same goals for his book.
545. *E.g.*, the reluctance of the U.S. Government to publish the Vietnam ROE. Ivan A. Shearer, *supra* note 371, at 767-68.
546. Cf. I.C.J. Statute, art. 38(1)(b); Restatement (Third), *supra* note 1, § 102. See also George K. Walker, *supra* note 1, at 7-13.
547. See *supra* note 62 and accompanying text.
548. See *supra* note 61 and accompanying text.
549. See *supra* notes 226-27 and accompanying text.
550. See *supra* note 283 and accompanying text.
551. See *supra* notes 285-86, 527 and accompanying text.
552. See *supra* notes 128-29 and accompanying text.
553. See *supra* notes 220-21 and accompanying text.
554. See *supra* notes 112, 233-42, 361, 373, 376 and accompanying text.
555. See *supra* note 284 and accompanying text.
556. See *supra* note 335 and accompanying text.
557. See *supra* note 416 and accompanying text.
558. See *supra* notes 420-21 and accompanying text.
559. See *supra* notes 422-23 and accompanying text.
560. See *supra* notes 43, 63, 162-63, 168-69, 220, 343 and accompanying text.
561. See generally, *e.g.*, James F. McNulty, *Blockade: Evaluation and Expectation*, Nav. War. Coll. Rev. 65 (Oct. 1966).
562. See *supra* notes 200, 205, 207-08, 237-38.
563. See *supra* note 206.
564. See *supra* note 63 and accompanying text.
565. See *supra* notes 287-92 and accompanying text.
566. See *supra* notes 332, 347, 354 and accompanying text.
567. W.J. Fenrick, *supra* note 288, at 124.
568. See *supra* notes 29-32 and accompanying text.
569. To fail to consider these additional sources may invite an incomplete analysis. Cf. the difficulty with relying exclusively on Howard S. Levie, *supra* notes 427-34, who carefully notes the lack of analysis of customary norms not generated by other documents such as treaties.
570. See *supra* notes 108, 242-43 and accompanying text.
571. See *supra* notes 257-58 and accompanying text.
572. Cf. I.C.J. Statute, art. 38(1)(c), and Restatement (Third), *supra* note 1, §§ 102, 103; see also George K. Walker, *supra* note 1, at 31-32.
573. See *supra* notes 107-12 and accompanying text.
574. See *supra* notes 286-87 and accompanying text.
575. See *supra* notes 338-29 and accompanying text.
576. See sources *supra* at note 259.
577. See *supra* notes 110-12 and accompanying text.
578. See *supra* notes 113-23 and accompanying text.
579. See *supra* notes 174-86, 304-17, 328-29 and accompanying text.
580. See *supra* notes 259-75 and accompanying text.
581. See *supra* notes 276-82 and accompanying text.
582. See, *e.g.*, *supra* notes 344, 349, 362, 379, 389, 393-399.
583. Cf. I.C.J. Statute, art. 38(1)(d); Restatement (Third), *supra* note 1, § 103.
584. See *supra* notes 473-537 and accompanying text.
585. David L. Larson, *supra* note 474, at 156; Natalino Ronzitti, *supra* note 1, at 51.
586. Both the I.C.J. Statute, art. 38(1), and the Restatement (Third), *supra* note 1, § 102 list custom, treaties and general principles of law as co-equal source of law, the Restatement restricting principles to a supplementary function for the other two. This contrasts with the primacy of treaties over custom in U.S. practice. See, *e.g.*, George K. Walker, *supra* note 1, at 7, 41-45.
587. George K. Walker, *supra* note 1, at 13-14.
588. See *id* at 7.
589. Horace B. Robertson, Jr., *Modern Technology and the Law of Armed Conflict at Sea*, in Horace B. Robertson, Jr., *supra* note 19, at 362; Horace B. Robertson, Jr., *supra* note 521, at 699; Horace B. Robertson, Jr., *Commentary*, in *The Law of Naval Warfare*, *supra* note 1, at 169-70.
590. James Russell Lowell put it poetically:
New occasions teach new duties;
Time makes ancient good uncouth;

They must upward still, and onward,
Who would keep abreast of Truth.

The Present Crisis (1844), 1 James R. Lowell, *Poetical Works* 185, 190 (1890); see also Philip C. Jessup, *supra* note 34, at 98; Myres S. McDougal, *supra* note 34, at 63. This point can be a correlative of the previous one. See *infra* note 591 and accompanying text. On the other hand, a situation may arise in which there is little or no treaty law on point; examples are air and space warfare in this century.

591. See, e.g., 6 U.S.T. 3267-3310, 75 U.N.T.S. 419-62, for a partial recitation. The United States also reserved to use the death penalty. See also Richard R. Baxter, *The Geneva Conventions of 1949*, *Nav. War Coll. Rev.* 59 (Jan. 1956); Gerald Draper, *Rules Governing the Conduct of Hostilities: The Laws of War and Their Enforcement*, *id.* 22 (Nov. 1965).

592. The London Declaration Concerning the Laws of Naval War, Feb. 26, 1909, *The Law of Naval Warfare*, *supra* note 1, at 223, was rejected by the U.K. House of Lords, for example. Frits Kalshoven, *Commentary*, *in id.* at 271.

593. This was the approach taken with NWP 9A, *supra* note 4, which has two versions. The text version of 1989, reprinted in Horace B. Robertson, Jr., *supra* note 19, at 385, is designed for naval commanders and for instructing nonlawyers. The annotated version, also issued in 1989, is copious in its citations and bibliography. A revision, to appear as NWP 9B, is currently underway. See also George K. Walker, *Book Review*, 45 *Nav. War Coll. Rev.* 172 (No. 2, 1992).

594. Frits Kalshoven, *Noncombatant Persons*, in Horace B. Robertson, Jr., *supra* note 19, at 300, 301, 325 notes this problem for the drafters of NWP 9A.

595. Cf. W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 *Cal. W. Int'l L.J.* 133 (1987).

596. Myres S. McDougal, *The Hydrogen Bomb Tests*, 49 *Am. J. Int'l L.* 357-58 (1960).

597. Besides the principles that may be invoked from the law of treaties in the uncertainties arising from the breakup of states, the law of treaty succession also must be taken into account. See generally Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, U.N. Doc. A/CONF. 80/31 (1978), 17 *Int'l Legal Mat'ls* 1488 (1978); Ian Brownlie, *supra* note 3, at 655-73; Arnold D. McNair, *The Law of Treaties* chs. 37-41 (2d ed. 1961); 2 Daniel P. O'Connell, *State Succession in Municipal Law and International Law* (1967).

Comments on George K. Walker Paper State Practice Following World War II, 1945-1990

By
L.C. Green ★

It is not the purpose of these remarks to comment on the various conflicts considered by Professor Walker. Rather, they seek to draw attention to general problems relating to naval warfare law raised by the paper.

Professor Walker rightly draws attention to the varied sources or agencies from which evidence as to the rules on international law may be drawn, and there can be no doubt that the rules of armed conflict may be drawn from similar sources, bearing in mind in this context the significance of the Martens clause with its reference to “usages established among civilized peoples, the laws of humanity and the dictates of the public conscience”.¹ While it is true that Hague Convention IV relates to warfare on land, it cannot be denied that these same basic principles are of general application, regardless of the theatre involved. This view finds some support in the Preamble to Convention IX of 1907 relating to Bombardment by Naval Forces,² which expressly refers to “the desire to serve the interests of humanity and to diminish the severity and disasters of war.”

Care must be taken, however, not to exaggerate the significance of analogies, for, as Judge Badawi Pasha has pointed out,³ “in international law, recourse to analogy should only be had with reserve and circumspection.” Caution must therefore be exercised in applying the rules which have been enunciated for one dimension of activity to another, unless the rules in question are of so general a character that it is obvious that they are intended to apply to armed conflict generally, regardless of whether it be conducted on land, at sea or in the air. This is particularly important in relation to Protocol I which expressly states in Article 49 that “the provisions of [the] Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.” This latter reference to ‘territory under the control of an adverse party’ clearly implies that it relates to land. Moreover, the Article goes on to state that its “provisions . . . apply to any land, air or sea warfare which *may affect the civilian population, individual civilians or civilian objects on land*. They further apply to *all attacks from the sea . . . against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea. . . .* (emphasis supplied)⁴ Clearly, therefore, the Protocol is only of direct effect insofar as naval warfare is concerned when that warfare is directed against the land. As to warfare at sea, whether it involves belligerent or neutral shipping or nationals belonging to an adverse party or to

a neutral power, it is the traditional customary law, plus the relevant Hague Conventions that govern, and the Protocol provision "has no application to ship-to-ship . . . combat."⁵ The Protocol, therefore, is only relevant to the extent that it reproduces customary rules of warfare which may be regarded as of a general or fundamental character. Thus, rules regarding proportionality would be relevant,⁶ for "[t]he principle of proportionality is a general principle of the law of armed conflict which has found its expression in such provisions as the prohibition of 'unnecessary' suffering" in Article 23(c) of the Hague Regulations annexed to Convention IV.⁷ These comments apply even more emphatically to the Restatement (Third) Foreign Relations Law of the United States,⁸ which does not purport to deal in any way with the law of armed conflict other than somewhat superficially in regard to war crimes. Any comments made in the *Restatement* concerning the registration of ships or any other matter can hardly be said to "provoke a[n]y spillover effect into the law of armed conflict."⁹

In his paper, Professor Walker has excluded any consideration of sea to air engagements, whether directed against enemy or neutral aircraft. However, it should be noted that civil aircraft are as much "transports" as are merchant ships, while NWP 9 constantly coalesces its comments regarding both seagoing vessels and aircraft. It is perhaps proper, therefore, that at least some comment be made with regard to the targeting of civil aircraft. There can be no question that if there is ample evidence to indicate that a neutral aircraft is so assimilated to the forces or service of an adverse party, it is as amenable to attack as is a neutral merchant vessel in similar circumstances. However, the restrictions which traditional naval warfare law imposes with regard to the safety of personnel would not be normally applicable if such aircraft were attacked. The problem of a civil aircraft belonging to a belligerent arose in its most glaring form in relation to the attack upon an Iranian civil aircraft by the *USS Vincennes* during the Gulf War. This is perhaps not the place to consider whether the United States was in the position of a belligerent during that conflict and, if so, the identity of its adverse party. The fact that Captain Rogers considered himself to be under attack and the fact that United States naval forces were engaged in combat with Iranian vessels on occasion enables us to comment at least briefly on this particular incident. This attack, combined with warnings directed also to neutral aircraft in the vicinity of U.S. naval craft, while flying in an internationally recognized scheduled airplane, emphasizes the importance of careful attention not only to rules of engagement, but also to the factual situation, proper reading of technological information and, especially, the maintenance of proper training and discipline on individual vessels. The issue of wrongful determination of the intention of an aircraft in the vicinity of operations must, in the first instance, be the responsibility of the naval commander, provided, however, that he exercises all reasonable precautions that may be expected of one of his rank when in action. This is particularly important in view of the provision in NWP 9¹⁰

that "civilian airliners in flight are subject to capture but are exempt from destruction . . . unless at the time of the encounter they are being utilized by the enemy for a military purpose . . . or refuse to respond to the directions of the intercepting warship." It is also probably required that the naval commander should be reasonably certain that his "directions" are received and understood. It is recognized that this may put a heavy burden upon the naval commander in question, but it would appear, since such aircraft are *prima facie* immune from destruction, that the burden of denying immunity or protection rests upon him.

Although, as has been pointed out, Professor Walker has drawn attention to the problem of proportionality, which may be said to underlie the whole of the law of armed conflict, and although he comments on it in the light of Protocol I,¹¹ it is suggested that he perhaps over-extends the analogies from land warfare with which the relevant sections of the Protocol deal. It is further suggested that he has not fully discussed the problem as it may arise in actual naval combat. A merchant vessel which may well be a legitimate target in the circumstances may nevertheless have to be granted immunity from attack on account of the disproportionate damage that would ensue, particularly to the environment or of a long-term character, if an attack were launched. This issue could easily arise if the vessel in question were an oil tanker or, even more seriously, nuclear-powered. He bases his approach to this issue on the attacker's intent to destroy the vessel, without paying sufficient attention to the direct and reasonably anticipated consequences of such an attack.¹² In such a case it might well be that, regardless of the legitimacy of the target, a naval commander might be required by his rules of engagement to consult with his political masters whether an attack should be undertaken. The effect of the destruction of such a vessel, particularly if that effect could result in damage to a neutral coast, might be so disproportionate to the advantage to be gained from a sinking that a commander would be well-advised, if he is unable to capture the vessel, to allow it to continue on its way.

A further problem arises concerning attacks on vessels carrying food, or, as in the Korean war, fishing vessels—a problem that would be aggravated if the adverse party was essentially a fish-eating state. While it is true that in customary law food may be considered as conditional contraband, new attitudes with regard to proportionality and the rights of non-combatants would require greater care than may have been necessary in the past. Once again a commander might have to weigh with care the effects of a sinking upon the civilian population as distinct from preventing a cargo of food that might be intended for the armed forces of the adverse party. The fact that NWP 9 is silent on the status of even coastal fishing vessels should not be taken to mean that such vessels belonging to nationals of the adverse party are automatically to be considered as legitimate targets either for sinking or capture, although if there is sufficient economic intelligence available to suggest a reasonable conclusion that the food is in fact

intended for the armed forces there would be justifiable grounds to seize the vessel and submit it to prize jurisdiction. There is strong ground for arguing that, regardless of technical and similar changes that have taken place in recent years, the law remains as it was settled by Hague Convention XI¹³ in 1907, until such time as that Convention has been revised. It should be remembered that at Nuremberg the Tribunal took the line that “by 1939 [after a mere thirty years the] rules [laid down in Hague Convention IV] were recognized by all civilized nations as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter” establishing the Tribunal.¹⁴ The Preamble to Convention XI states that “it is expedient to lay down in written mutual engagements the principles which have hitherto remained in the uncertain domain of controversy, or have been left to the discretion of Governments.” Perhaps even more significant was the attitude of the Tribunal with regard to the London Naval Agreement of 1930¹⁵ and the 1936 Protocol¹⁶ concerning unrestricted submarine warfare against merchant ships. The fact that both sides had indulged in such warfare did not remove guilt from Doenitz and Raeder¹⁷ in respect of having ordered such breaches of the law. The law remains despite naval practice, but punishment for breaches in such circumstances may be discounted.

In this regard, it must be emphasized that international law is the product of state practice as evidenced by custom or by agreement in treaty. However, the mere fact that a treaty has not been amended or denounced does not mean that it remains declaratory of the law when belligerents have ceased to comply with its provisions. Such behavior may indicate that the treaty has fallen into desuetude and that the contrary practice, particularly when pursued by both sides without protest or attempt to indict an adverse party with criminality, is a better indication of what they consider acceptable or legitimate.

Professor Walker suggests¹⁸ that “[a]n inference could be made that the negotiators [of the 1949 Geneva Convention on the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea¹⁹] would not have included [in its protective provisions] all merchant seamen, including those aboard enemy merchant vessels, if they did not feel that all such ships were subject to attack, which had become the norm during World War II.” It could perhaps even more easily be inferred that it was because such conduct had become the norm during World War II, the draftsmen sought to protect such merchant seamen and to emphasize that if they were the victims of unlawful attacks they were still to be protected.

While it may be true that the humanitarian law of armed conflict is part of the law of human rights, it may be submitted that the instance cited in the Walker Report²⁰ concerning “a war of genocidal experimentation at sea, or an [order by an] individual commander that directs execution of a captured crew with genocidal intent” does not need any reference to general human rights law or

the specific crime of genocide. In view of the accepted law with regard to war crimes, regardless of the theatre in which they are committed, to base criminality on the general body of human rights law in such circumstances would only amount to "gilding the lily". The reference²¹ to the perfidious use of the protective emblem with regard to cultural property is not confined to a vessel purporting to be carrying such property. It is of general application with regard to the use of any protective emblem, and is merely indicative of the problem that will face any commander who suspects that an emblem is being improperly used. Similarly, it is suggested that the references made to the 1958 Law of the Sea Conventions are not really in point since they are dealing with the normal uses of the sea in time of peace and do not purport in any way to affect the rights of belligerents, for, as Professor Walker himself points out,²² the freedom of the high seas is exercised—and therefore limited by—"the other rules of international law" as well as the stipulations of the Convention. Equally the reference in UNCLOS, 1982, that "the high seas shall be used only for peaceful purposes"²³ implies that the contents of that Convention have no relevance to naval warfare, at least until such time as there is no doubt that naval warfare as traditionally conducted is contrary to international law *per se*.

Rather than drawing analogies from Protocol I, it might be better, particularly in view of the number of major naval powers that have failed to ratify this instrument, and of the fact that there is by no means universal agreement as to which articles of the Protocol amount to rules of customary law in regard to warfare on land, let alone to fundamental principles underlying the law of armed conflict as such, to ignore the terms of the Protocol and seek to evolve a draft applicable to naval warfare alone. Moreover, it should be remembered that Protocol I is intended to elaborate the Geneva Conventions of 1949 as they apply to humanitarian law in armed conflict. In the light of the experience of World War II and the technological advances that have evolved since, it would appear that the various Hague and later agreements concerning naval warfare have become somewhat archaic and tend to be disregarded. Experience in the Gulf War and the use of protective fleets by non-participants suggest that it is time to revise also the rights and duties of neutrals in naval warfare and to re-examine their right to establish protective convoys,²⁴ for it is submitted the legal position is not as clear as Professor Walker asserts.²⁵ Any such revision would, of course, make use of any relevant principles to be found in the agreements mentioned by Professor Walker.

However, to seek to extend to naval warfare principles especially drafted with a view to the needs of land warfare often makes the exercise somewhat artificial and far-fetched. This is particularly true when the specific provisions of Protocol I are incompatible with the customary or previously established treaty law relevant to naval warfare.²⁶ The comments here made with regard to Protocol I are equally applicable to the Protocols appended to the 1980 Conventional

Weapons Convention.²⁷ At the same time it should always be borne in mind that the fact that neither a specific Convention nor customary law specifically “requires or approves or permits” a particular line of conduct, such as the establishment of a “Red Cross Box” during the Falklands conflict,²⁸ does not in any way prevent the parties to the conflict from setting up any similar “box” or making any arrangement that they choose and, as between themselves, this would even apply to an arrangement derogating from a treaty requirement. This is probably true even of those agreements that have been made for the protection of persons *hors de combat*, unless it can be maintained that the treaty provision in question amounted to a principle of *jus cop-ens* applicable to the protection of human rights even during armed conflict.²⁹

In connection with the Gulf War and the destruction and attacks on neutral shipping, Professor Walker draws attention to Commander Fenrick’s comment:³⁰

It is somewhat surprising that the actions of Iran and Iraq in the Persian Gulf did not generate a stronger, or at least more vociferous, response on the part of other states. It is presumed the relative lack of response is owing to the desire of the superpowers to avoid conflict with each other in a sensitive area. . . .

In view of the apparent willingness of the superpowers to tolerate the situation and indulge in minesweeping, chartering or reflagging of vessels, it seems unlikely that such a conflict might have ensued. Perhaps it may be suggested that the reason for the lack of more vigorous response was that the superpowers were not prepared to state that Iranian and Iraqi practices were in conflict with the rights of belligerents to attack neutrals when there was some evidence to suggest that they were in fact trading with or indirectly supporting a belligerent. Moreover, practice during World War II, as well as during the Gulf War, suggests that belligerents will disregard the former distinction between absolute and conditional contraband or the requirement that contraband lists be published, and will instead seek to inhibit any trade with an adverse party, contending that such trade automatically assists the economic war effort, which would appear to be recognized by NWP 9³¹ and this, moreover, seems to be Commander Fenrick’s current view.³² While it is true that both Fenrick’s proposals and the draft to have come out of Pisa and Bochum³³ are completely unofficial, they may be indicative of the manner in which the law of naval warfare, at least in regard to the targeting of merchant vessels, might proceed.

 Notes

* LL.B., LL.D., F.R.S.C., University Professor, Honorary Professor of Law, University of Alberta.

1. Preamble to Hague Convention IV, 1907, *reprinted in* Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* 70 (3d ed. 1988) [hereinafter Schindler and Toman].
2. *Id.* at 812. *See also* Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 113-4 (para. 218).
3. *Reparation for Injuries Case*, 1949 I.C.J. 205, 211.
4. Schindler and Toman, *supra* note 1, at 650.
5. Michael Bothe *ET.AL*, *New Rules for Victims of Armed Conflicts* 290 (1982).
6. *See, e.g.*, U.S. Department of the Navy, *Commander's Handbook on the Law of Naval Warfare*, NWP 9 (1987) 8.1.2, 8.5.1.7 [hereinafter NWP 9]; W.J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 *Mil. Law Rev.* 91 (1982). On the general principle of "proportionality", *see* Case Concerning Air Service Agreement (U.S. v. France) 18 *Rep. Int'l Arb. Awards* 417, 443-5.
7. *Supra* note 5, at 119; *see also id.*, at 194-5.
8. George K. Walker, *State Practice Following World War II, 1945-1990*, 65 *International Law Studies: Targeting Enemy Merchant Shipping* 172 (Richard J. Grunawalt, ed., 1993).
9. *Id.* at 174.
10. NWP 9, *supra* note 6, at 8.2.3.6.
11. *Supra* note 8, at 182.
12. *Id.* at 182-186.
13. *Convention Relative to Certain restrictions with regard to the Exercise of the Right of Capture in Naval Warfare*, *reprinted in* Dietrich Schindler and Jiri Toman, *supra* note 11, at 819.
14. H.M.S.O., *Cmd. 6964*, 65; 141 *Ain, J. Int'l L.* 1947, 172, 248-9.
15. *supra* note 1, at 881.
16. *Id.* at 883.
17. *Loc. cit.*, n. 12, 109, 112; 304-5, 308, *resp.*
18. *Supra* note 8, at 131.
19. *Supra* note 1, at 401.
20. *Supra* note 8, at 131.
21. *Id.* at 132.
22. *Id.* at 156-157.
23. *Id.* at 156.
24. *Id.* at 170.
25. *See, e.g.*, Robert W. Tucker, *The Law of War and Neutrality at Sea*, 1955 *International Law Studies* 335 (1957).
26. *Supra* note 8, at 148 *et seq.*
27. *Supra* note 1, at 179-96. *See* W.J. Fenrick, *New Developments in the Law Concerning Conventional Weapons in Armed Conflicts*, 19 *Can. Y.B. Int'l L.* 229 (1981).
28. *Supra* note 8, at 153.
29. *See, e.g.*, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989).
30. *Supra* note 8, at 169.
31. NWP 9, *supra* note 6, at 8.2.2.2(7).
32. *Supra* note 8 at 185-186.
33. *Id.* at 186.

Chapter V

Targeting Realities: Platforms, Weapons Systems and Capabilities

A paper by
James Service *

Comments by
J. H. Doyle, Jr.

Targeting Realities: Platforms, Weapons Systems and Capabilities

Ladies and Gentlemen, I am neither a legal scholar nor an academic. In fact, my only real academic credential stems from the fact that I once was privileged to preside over the world's finest War College — the institution in which we meet today. What I am is a retired naval officer, an aviator by military profession, and a former Battle Force Commander. Through a period of 35 years of active duty service I became familiar with the responsibility that goes along with the application of military force in pursuit of national interests. My purpose here is to present my view — the view of the naval warrior — of the realities of naval warfare in the modern world. To do this I must first describe what I think might happen during a future conflict.

I. The Future Conflict

We'll start with some assumptions concerning the nature of future conflict. First, I assume that in the current international political climate, the likelihood of a large, conventional and declared war is relatively low, while the likelihood of a limited conflict is high. Second, I assume that any conflict today, particularly one that might be prolonged, will involve economic targeting. Third, I assume that modern warfare, even that of a limited nature, will be fought, in part at least, with technologically advanced weapons. Fourth, and here, perhaps, is my shakiest assumption, I assume that the recent events in the Persian Gulf are a prototype of contemporary international armed conflict which may occur in the maritime environment. Each of these requires some further explication.

A. Limited Conflict

My first assumption, that conflict will be of a limited nature, requires some definition. I fully recognize that "limited" is a term that may mean many things to many people. Certainly it is no comfort to the person being shot at that the conflict he is engaged in may be perceived by outsiders as limited. It is rather like an observation made by Admiral Jim Watkins when he was the Chief of Naval Operations. In referring to the state of world order, he remarked that this may indeed be a time of peace, but it is a very violent one. For my purposes, I view limited conflict as one that involves few belligerents and is conventional (i.e., non-nuclear) in its nature.

In my opinion, we have reached a stage in world history when the interests of peace are truly global in nature. I think it beyond question that it is in the

best interests of both the Soviet Union and the United States to preserve the peace – however tense that peace might be from time to time. To a greater extent than ever before, the world today is largely comprised of status quo powers. More than this, virtually all nations of the world have an interest in containing the effects of armed conflict.

Most nations prefer to see the international polity continue largely as it exists; yet an anomaly persists. In some parts of the world, war still retains the natural and legitimate connotations it had in the Western world prior to World War I. My view of the world yields a “good news/bad news” cliché. The bad news is, international conflict will continue to exist into the foreseeable future, even in the presence of a relatively universal desire for peace. The good news is that such conflict probably will be limited in scope, if not in nature. No rational belligerent nation will want to risk resort to expansive warfighting means that may invite other nations to become belligerents in opposition to them, and no ostensibly neutral nation will want to commit itself to a struggle for its very survival solely in another nation’s interest.¹

In addition, since modern technology produces weapons that give a significant advantage to the nation that strikes first, it is unreasonable to expect that highly publicized declarations of war will precede contemporary hostilities. The last declaration of war was the Arab–Israeli War of 1948; since that time, no nation has, in that manner, signaled its intent to engage in hostilities.² Given the technological and legal sophistication of nations today, I will assume that future conflicts also will commence without formalities.

B. Targeting Economic Assets

My second assumption, that future wars will involve targeting of economic assets, is based on two premises. First, I believe the days of territorial conquest are now a part of history. This is not to say that wars may not continue to erupt over disputed claims of sovereign territory, but I consider it highly unlikely that future wars will be fought for literal national survival — in part because the international polity cannot accept the possibility that a nation may pass out of existence at the pleasure of another nation. Witness, for example, the concerns of many smaller nations over the relatively benign 1983 invasion of Grenada by U.S. forces.

Second, since territorial conquest is an unlikely result of future wars, an alternative means of bringing armed conflict to a favorable conclusion will be employed. I believe the mechanism of choice will be an attempt to diminish the enemy’s economic capability to continue the war effort.³ Of course, throughout history economics frequently has played a role in war-fighting tactics and strategy. The difference today is that now it could be a predominant factor.

If my first assumption is a correct one, that wars will be fought by limited numbers of nations, then in a very real sense, each belligerent will be an island. To the extent that an opposing belligerent can prevent that “island’s” ability to

resupply and/or to gain economic credits with which to purchase military supplies, a significant, and perhaps a decisive, advantage can be gained. War may not be rational, but it must be functional.

C. Modern Warfare is Technologically Advanced

My third assumption, that future wars will be heavily influenced by modern technological advances in weaponry, is really a product of empirical verification. Once the exclusive province of the more advanced nations, today "smart" weapons, missile technology and highly sophisticated naval platforms are available to virtually all nations. The India-Pakistan war of 1971 was a sobering experience for much of the world simply because it was fought by third-world nations with big-power weapons. In this conflict, the world witnessed the first naval missile battle in history and, I believe, presaged the shape of things to come. Since that time, virtually all nations involved with international armed conflict have employed modern technology to advantage.

The weapons of the Persian Gulf tanker war are clear, contemporary examples of this reality. Iraq employed modern air platforms to launch Exocet missiles at the tankers purchasing oil from Iran. Iran deployed Silkworm missiles both for defensive and offensive purposes. By war's end, both nations were engaged in a "War of the Cities" using modern missile technology.

The practices of other nations serve to underscore the point. Argentina employed Exocet missiles in the Falklands/Malvinas conflict. Brazil and India both are endeavoring to build modern submarine fleets. South Korea, Israel, France and other nations are heavily involved in supplying modern arms to third-world powers. Even guerrilla fighters seem to have unlimited access to modern weapons if they have the cash to purchase them.

D. The Iran-Iraq Tanker War Model of Contemporary Warfare

My final assumption that the Iran-Iraq Tanker War is a model for wars of the future really proceeds from a combination of the three prior assumptions. That war began without formality when Iraq crossed the border to occupy disputed territory. In all likelihood, future wars will begin as this one did or, equally probable, when internal pressures become strong enough for another nation to begin actively supporting insurgent forces.

From the perspective of the belligerents, the war was, of course, total, but it was a war of two belligerents only. It can hardly be argued that either the great powers or the nations of the Middle East were impartial, but all attempted to remain apart from the actual conflict itself. I believe that too will be a pattern for the future.⁴

Of particular interest is the fact that, from the outset, the Persian Gulf Tanker War was a conflict of attrition. The objectives were primarily economic, although later in the war attrition focused on baser objectives (i.e., when the Iran-Iraq

War became a “War of the Cities” and the civilian populace of each nation was deliberately targeted). Iraq clearly focused belligerent efforts on the economic sustenance of Iran’s warmaking capability by targeting the tankers purchasing Iranian oil. Iran, without the ability similarly to target Iraqi oil, attempted to make the war economically painful for all nations through indiscriminate mining and violent harassment of merchants bound for other Persian Gulf ports.

Finally, both nations fought the conflict with a combination of traditional means (e.g., armed foot soldiers) and sophisticated weaponry (e.g., Exocet, Scud and Silkworm missiles). In an era when even insurgents have Stinger missiles, modern assault rifles and high-tech weapons platforms, we must expect that nations who fight each other will surely be able to obtain — and equally surely, will utilize — sophisticated means of destruction.

II. Targeting the Enemy

Having laid a predicate for my arguments with the foregoing assumptions, I can now turn to the issue of targeting. Targeting the enemy has, in essence, two main objectives. The first is destruction of the enemy’s implements of war and the second is reduction of the enemy’s capability to sustain a war effort. Both objectives seek to bring the war to a successful conclusion through attrition. Targeting the enemy implements of war is an obvious necessity, but one not necessarily germane to the issue that you seek to resolve in this conference. Therefore, I turn to the second objective of targeting, reducing the enemy’s capability to carry on the fight.

In any prolonged conflict of the future, it will be essential that the enemy’s capability to sustain its war effort be targeted from the outset. In a very real sense, war has progressed, if you can call it that, from a territorial imperative to an economic issue. Accordingly, a major role for naval commanders in the future will be to interdict and/or destroy enemy merchant shipping. The concomitant conclusion is that economic viability will be a critical element for any belligerent. This means, in turn, that the military commander will have an equally important task in protecting his own nation’s economic base — including merchant vessels.

This objective of warfare is hardly a novel one. Laying siege to the enemy fortification was a form of economic warfare. In the early years of the nineteenth century, France and England were locked in a titanic struggle and each sought to weaken the other through economic means. Napoleon, by the Berlin Decrees of 1806 and the Milan Decrees of 1807, sought to sever Europe’s trade with England, imposing, in essence, an outward facing blockade. The British struck back with the “Orders in Council” by which they hoped to regulate trade so as to force their own wares upon Europe while strangling the export trade of France and her allies. Neither system was wholly successful, but both were instrumental in achieving a threshold of economic pain for the other.

During the U.S. Civil War, both blockade and targeting of the South's economic base (i.e., international commerce in cotton) played a major role in the North's overall strategy to bring the conflict to a successful conclusion. In both World Wars, Germany made a concerted effort to interdict Great Britain's seaborne resupply efforts while Great Britain, in turn, sought to foreclose all commerce to and from occupied Europe. In the Second World War, the submarine force of the U.S. Pacific Fleet was employed to destroy Japan's merchant fleet and thereby restrict her access to the raw materials that sustained her industrial might. In the India-Pakistan War of 1971 visit-and-search techniques were applied to interdict maritime commerce. Iran also employed visit-and-search techniques extensively during the Iran-Iraq conflict.

In sum, targeting an enemy's economic base has proved in the past to be an effective means of conducting warfare. Not infrequently, it has been a decisive factor, affecting both land and naval campaigns. In an appropriate situation, it may be a decisive factor in bringing hostilities to an early resolution. My conclusion, then, as a student of history and as a former military planner, is that economics will continue to play a significant role in any prolonged armed conflict.

That brings me to the essence of my thesis. Given that economics have played an effective role in warfare of the past, it remains to be seen why targeting the enemy's economic base — that is, actual destruction — is, or may be, necessary. It is fair, I think, to reflect on the utility of less destructive means of coercion, such as visit and search, blockade and mining. Certainly these mechanisms have been effective means of applying economic coercion in the past.

The reality, I believe, is that the structure of the international polity is significantly different today than it was just a few decades ago. Successful avoidance of the strictures of mining and blockade have always been possible through concerted internal effort. Today, however, nations are economically interdependent, international corporations are multi-national in scope and structure and, most importantly, profits are there to be made — or lost — on the vagaries of world conflict. So long as the enormous profits associated with trading in war materials are available, there will be successful attempts to evade international commitments stemming from blockades or national directives — attempts that transcend and multiply substantially the capability of the individual nation to avoid the effects of those tactics. In this situation, passive methods of interdicting commerce may be useful, but only marginally so.

III. Capabilities, Limitations and Tactics of Naval Platforms

A. Capabilities

At sea, the essence of tactical success in modern naval warfare has been the ability to first put ordnance on target. In a limited, conventional war, this tactic, when applied to the economic resources of the enemy, well may be a strategic

consideration. Today, the capabilities of naval platforms to accomplish that task are significantly more impressive than their counterparts of only a few years ago. Advanced weapons technology, coupled with increased capabilities to gather real-time information about the potential enemy's disposition and location, puts at hazard the enemy platform in ways never before even conceived.

Missile technology yields a stand-off strike capability that is relatively new. The U.S. Navy's Harpoon, for example, is an anti-ship guided missile with a range of 60 nautical miles. It may be launched from air, surface or subsurface platforms in any weather state. The platform launching the Harpoon may receive guidance data from other platforms and the missile itself requires no data inputs subsequent to launch. During the Iran-Iraq Tanker War, Iraq very effectively used French-made Exocet missiles to target oil tankers doing business with Iran. The high-speed, sea-skimming capabilities of an Exocet makes it a very dangerous weapon indeed, and one for which the merchant ship has little, if any, defense.

In addition to missiles, "smart-weapons" with built-in TV or imaging infrared seeker guidance systems provide a good stand-off capability with a high degree of accuracy. Similarly, wire guided torpedoes and mines that react only to preset conditions may effectively increase the capability to target enemy merchant vessels with specificity and relative safety.

Still, all these capabilities are of little value if the information needed to put the ordnance on target is not known. It is probably pedestrian to say that intelligence is a constant of war, but it is nevertheless true. The value of radar in World War II, or that of the communications intelligence developed in the same era, cannot be overemphasized, and the ability to use stand-off weapons has now put an enhanced premium on having the information needed to accurately deliver those weapons.

The concomitant of weapons technology and "smart" weapons is that intelligence technology has been advanced as well. Today, the ability to gain the information needed effectively to use a stand-off capability also has been developed. The result is that technology and information capabilities coalesce to make sea strikes from afar a probable fact of naval targeting in future conflict.⁵

B. Limitations

Despite these very significant capabilities, there are accompanying limitations. Primary among the limitations of modern naval platforms is their vulnerability. That first strike capability I mentioned previously is a critical advantage in modern naval engagements. No longer are surface ships capable of absorbing those first few cannon shots and still win the battle with skillful seamanship and daring commanders. Air platforms today do not return to base with their canvas skins full of bullet holes. Today's high performance aircraft are more capable than their predecessors, but so are the missile defenses used to thwart an aerial

attack. Submarines depend on stealth and deep water for survival and are extremely vulnerable once on the surface.

In addition, if the enemy naval forces are a significant threat relative to your own, battle tactics will require massing your forces in sufficient numbers to apply a concentration of firepower capable of defeating that first attack — or threat of attack. This, in turn, means that the ability to disperse forces for commerce raiding is reduced. Therefore, the probability is that the raider will be a lonely platform.

Moreover, a warcraft with great offensive firepower and little means of defense is an inherently vulnerable platform. That platform will necessarily depend on such variables for a first strike capability as stealth, intelligence and weapon-range combinations plus speed and agility. To successfully survive its attack on the enemy — whether merchant or military — the platform will need the stand-off distance afforded by modern technology merely to ensure escape. The obvious conclusion to be drawn from these facts is that the air platform or the silent submarine, if available, will often be the weapons of choice for targeting the merchant vessel.

Complicating the equation is the fact that there is an inherent scarcity of high value munitions and an uncertain ability for those weapons to destroy the enemy. Surface platforms, even with their greater magazine capabilities, can carry only so much ordnance. Submarines, which are highly vulnerable upon detection, can carry only so many torpedoes or submarine-launched cruise missiles (SLCMs), and aircraft are even more obviously limited. In any prolonged conflict that involves relatively equal naval capabilities between the antagonists, I believe we will see ships at sea with empty missile magazines and, perhaps, little to show for their delivery. When Admiral Arleigh Burke was asked what he would change in the new class of guided missile destroyers named for him, he said he would add a brace of cutlasses.⁶

Finally, intelligence, however capable, still has its limitations and this can present the Battle Group Commander with a dilemma. Propulsion system and radar signatures can be catalogued for high-value military platforms, but the task of assembling definitive targeting information on all merchant vessels would be daunting. Furthermore, repair and replacement of various electronic components would be difficult to track and catalogue as the merchant fleet undergoes periodic maintenance.

The Joint Operational Targeting System (JOTS) overhead satellite systems and tactical systems available to the Battle Group Commander have superb capabilities, but, in the final analysis, none can replace VID (visual identification) to confirm whether the potential target is the right one. There is, therefore, a risk that any attack on merchant shipping launched over-the-horizon without visual ID may find an innocent victim.⁷ I think it is also fair to state that only a few nations possess sophisticated targeting/intelligence systems such as

those I have described. In the absence of such systems, less capable nations will be inclined to shoot first and ask questions later as we have witnessed during the recent Iran/Iraq conflict. In other words, adherence to the 1936 Naval Protocol by one party only (perhaps by the more capable nation) may place it at a considerable disadvantage — at least until it recognizes how the game is being played.

C. Tactics

Given the foregoing, my conclusions as to the tactics likely to be employed in a future war at sea are that over-the-horizon OTH systems, to the extent possible, will be the weapons of choice. Mine warfare may be utilized, and where it is, I would expect that it would be employed primarily to blockade ports or to channelize merchant shipping. Unquestionably, the nation that possesses aerial capabilities to target the enemy merchant vessel will have an advantage that will be fully exploited. And, finally, surface and sub-surface attacks will be swift and carried out with as much stand-off capability as possible to avoid the potential of being targeted in return. Submarines, especially, have awkward command and control and limited defensive capabilities.

I think the conclusions to be drawn from these tactics are fairly clear. There is no doubt in my mind that any platform engaging a merchant will attack without warning and then retreat rapidly from the area of conflict after that attack for the simple reason that the stand-off capabilities available to him are also likely to be available to the enemy as well. The uncomplicated fact is, delaying an exodus from an area of attack will be hazardous to the longevity of the attacker.

IV. Relevance of the 1936 Protocol

All this brings me to the central topic of your discussion today — the relevance in 1990 of the London Protocol of 1936. If I were once again to place myself in the position of a battle group commander, responsible for interdicting enemy commerce on the high seas, I would have to consider the following issues and problems when a possible enemy merchant vessel is discovered.

A. Surface Platform Interdiction

Should my platform engage or warn? If I warn at a distance, will my communication to the merchant reveal my own position and subject me to immediate targeting by enemy warships, enemy aircraft or by the merchant itself?⁸ In any case, would a warning from an unseen enemy be sufficient to cause the merchant to stop and abandon ship? If I warn through visual signals, to avoid electro-magnetic emissions, will the merchant nevertheless broadcast the situation? Is the merchant being escorted by other vessels, including air or sub-surface platforms? Even if none of these situations are immediately threatening, will my

proximity in the area for the length of time necessary to warn, to permit the crew to abandon and to then sink or scuttle the merchant nevertheless be unacceptably hazardous to my own unit?

B. Subsurface Platform Interdiction

Should my submarine silently torpedo the merchant or should I come to the surface to warn? All my previous problems with the surface vessel now arise, with a few more thrown in. A submarine on the surface is not only an unwieldy platform, slow to respond and maneuver, but, without the cloak of deep water, it is highly vulnerable with virtually no surface oriented defenses. Moreover, if the merchant should carry armament itself, it would have an immediate tactical advantage over the submarine within range of its weapons system. Even without armament, it is probable that a large merchant would withstand ramming far better than a submarine.

C. The Airborne Platform

Of all platforms, the airborne one stands in the least risk of immediate destruction from warning the enemy merchant before releasing ordnance on it. Yet, here too, the anomaly of the London Protocol for modern warfare is evident. It is true that the air platform may be better able to escape enemy forces called to defend the merchant that has been warned, but that says no more than that the warning may also be the hunter's signal to abandon the quarry. Moreover, the length of time necessary to bring the ship to all stop and to disembark passengers, crew and ship's papers will almost certainly exceed the fuel capability of an attack aircraft to loiter over the target. Indeed, if the aircraft were to be required to permit passengers and crew to disembark prior to commencing a bombing attack, the purpose of the interdiction could be defeated by a dilatory crew. The alternative would be to hold that aircraft may not attack merchant vessels.⁹

V. The Commander's Decision Matrix

The military commander's focus is on his mission, not on the specific platform he may use, and generally not on the specific tactics he may employ, to accomplish the mission.¹⁰ As a general proposition, the military commander will not avoid using an effective and efficient tactic, otherwise lawful, merely because of an ambiguity in international law. Having said that, I also need to say that I do not believe any U.S. military commander would reject, out of hand, any ostensible requirement of international law when structuring his forces and tactics.

I think this is true because we who have been responsible for planning and executing the application of military force are acutely aware that the laws of

armed conflict both serve a valid purpose and complement the principles of warfare. Yet, it is we, and our forces, who sit on that knife's edge when it comes time to take up arms. Because of this, we feel keenly the need for reality and theory to come together in international law and particularly so in the laws of armed conflict. To give you an idea how the military planner might approach this problem, it may be helpful for you to understand how I personally might view the situation. My own decision matrix would begin with observations something like this:

First, my objective is to help bring the war to a speedy conclusion on favorable terms to my government. Second, I have an inherent responsibility to protect my nation's assets — which includes my own forces. Third, I have a similarly inherent responsibility to minimize the effects of war to the extent possible. Fourth, I view interdiction of enemy economic resupply efforts as a viable means of shortening the conflict and minimizing damage on both sides. Fifth, my enemy has targeting capabilities similar to mine. Sixth, I cannot commit all my forces to commerce raiding — substantial assets must be massed to engage enemy military forces or to support the land and air campaign. Seventh, modern communications and intelligence methods are such that, once located, any military platform is at risk from enemy forces. Eighth, high value modern munitions will generally be reserved for high value targets. Ninth, use of iron bombs and naval gunfire will decrease range to potential enemy targets and increase vulnerability. Tenth, in shallow waters or restricted operating areas the vulnerability of submarines is magnified.

As I put these considerations into the tactical situation I find an inherent inconsistency between the most effective means of accomplishing my military mission and the literal requirements of the London Protocol. If I can accomplish my mission with minimal loss of life and destruction of property then, as a responsible military commander, I must do so. While I recognize that the inherent rationale for the London Protocol is to minimize loss of life, with today's modern weapons systems available to most nations, I believe adherence to that Protocol will, more probably than not, yield the opposite result.

Blind adherence to the literal words of the Protocol would unacceptably put at risk all of my forces, decrease the probability of success for my assigned mission and unnecessarily prolong the conflict. My conclusion is, therefore, that the Protocol does not meet well the needs of the community of nations it serves.

If I were to go to war today, with the conditions as I have assumed them to be, I would recommend to my superiors tactics that would be inherently at odds with the London Protocol. Not insignificantly, however, I believe those tactics would be consonant with the original purpose of the Protocol — to minimize the effects of war.

Notes

*Former President, U.S. Naval War College, Newport, R.I. Vice Admiral, U.S. Navy (Ret.). The author would like to express his appreciation for the assistance given by CDR M.E. Bowman, JAGC, USN in editing earlier drafts of this article.

1. I recognize that this analysis does not take into account the collective security provisions of the United Nations Charter. Articles 41 and 42 of the Charter, if implemented, could mandate involvement by nations on behalf of the collective security and peace-keeping mission of the Security Council. A few years ago I might have dismissed that possibility out of hand; today, as the gulf between Western and Bloc nations appears to be narrowing, there may be some potential for implementation of the original collective security mission envisioned in 1945.

2. Some might argue that Panama is a recent exception. Although the United States did not consider that a state of "war" existed, certainly the dictator Noriega gave up a significant advantage with his premature and clumsy declaration that a state of war was in effect between Panama and the United States.

3. Although I do not intend to raise the specter of large scale conventional war, it is worth noting that should such a conflict occur between NATO and Warsaw Pact nations, a primary survival requirement for the Soviets necessarily would be to prevent or delay the resupply of Europe. That, in turn, would mean a military objective of interdicting and/or destroying merchant shipping bound from the United States for European ports.

4. There may be circumstances in which a nation is bound by a collective security arrangement to enter a conflict according to its international obligations. The NATO alliance, for example, is an "attack on one is an attack on all" alliance. Nevertheless, to the extent feasible, I believe that in the origins of any future conflict all nations will endeavor to view the conflict as a "you and he" problem rather than an "us and them" situation.

5. This is certainly true of land targets today. It may be less true of seaborne merchant targets depending on the weaponry available to the belligerent. It is difficult to imagine selecting weaponry as expensive and limited in numbers as the Harpoon to target merchant vessels. On the other hand, if the belligerent has "smart bombs" or weapons such as Exocet missiles available, it should be equally true for the merchant vessel.

6. Wayne P. Hughes, Jr., *Fleet Tactics: Theory and Practice* 180 (1987).

7. In essence, this was the problem that resulted in the accidental targeting by Iraqi air force pilots of the *USS Stark*.

8. Although we tend to think of merchants as unarmed traders, in a prolonged conflict I would expect that merchants would receive a certain amount of armament as was the practice in World War II. Certainly shoulder-fired anti-air missile defenses are probable. Naval guns and possibly even some missile support might also be expected.

9. Aircraft are not specifically mentioned in the Protocol. I am aware that the inability of an airplane to provide for the safety of passengers, crew and ships papers has persuaded some commentators to adopt the view that the Protocol stands for the proposition that air interdiction and destruction of merchant shipping is not permitted. If this were true, I would view the result as a situation in which international law acted as a bar to a legitimate exercise of armed force. In a full career of association with the laws of armed conflict it has never occurred to me that such a bar would be a rational expression of international law. Moreover, if it did purport to be such a bar I seriously doubt that the "law" would be followed for the simple reason that it would not be an accurate expression of the international will.

10. By this I do not mean that any and all means may be employed or that any and all weapons may be used. The predicate for military planning is legitimacy, both in weapons and in tactics.

**Comments on James Service's Paper:
Targeting Realities:
Platforms, Weapons Systems and Capabilities**

By
J. H. Doyle, Jr. *

**Law of Naval Warfare as Applicable to
Targeting Enemy Merchant Shipping**

Ladies and Gentlemen, it is indeed a great pleasure to be back at the Naval War College with this distinguished group of international lawyers, diplomats, historians, naval lawyers and line officers from the United States and Allied nations. This subject is complex but timely, and deserves the attention of all of us. The War College is to be commended for conducting this symposium on the Law of Naval Warfare related to targeting enemy merchant shipping.

I wish to commend Admiral Jim Service on a fine presentation. His decision matrix for the commanders on the scene is particularly helpful. I will build on his remarks and present other considerations which may be useful to international lawyers in formulating rules of conduct governing naval warfare. I will confine my remarks to the operational considerations in targeting enemy merchant shipping.

I certainly agree that future wars will be heavily influenced by modern technological advances in weaponry. Today, there is a booming international arms market in modern submarines, mines, long range reconnaissance and ASW aircraft, anti-ship cruise missiles, land based surface to air missiles, chemical weapons, coastal defense missiles, ballistic missiles, and, alarmingly, nuclear proliferation. When you consider that there are active ballistic missile programs in countries as diverse as Argentina, Iraq, India, China and Israel and that the warheads could be chemical, nuclear or conventional, at least some form of SDI does not sound unreasonable.

Forty countries in the Third World receive military hardware from other Third World export industries in addition to developed countries. There are 48 countries with anti-ship cruise missiles (2100 Harpoons, 2600 Exocets, 10,000 SS-N-2's). There are 19 countries with diesel attack submarines, 21 countries with naval mining capabilities and 10-16 countries with chemical warfare capabilities. There are increasing numbers of sophisticated submarines available to the Third World in the future, (examples: India and Brazil building SSN's; the French *Rubis* - 3000 ton SSN; advanced air-independent propulsion schemes for diesel submarines - Swedish Stirling engine, West German fuel cell research,

Canadian low power nuclear reactor, Italian Toroidal). India has purchased 6 Soviet Kilo's and 2 West German Type 209 diesels.

Recall that a World War II vintage mine (100-125 kg whd) put the USS *Roberts* out of action. A hit on the side of the ship nearly broke it in half. Superb damage control by the crew saved the ship. However, mines did limited damage to oilers in the Persian Gulf.

Aerospatiale and MBB are working on a supersonic successor to the Exocet called ANS. It is stealthy (low radar cross-section), Mach 2+, 15G maneuver, dual mode (radar and IR) guidance, range 180 km, sea-skimmer (20 ft, off deck), ramjet and integral solid booster propulsion. A current sub-sonic Exocet in the Falklands sank HMS *Sheffield*, damaged HMS *Glamorgan* and sunk the merchant *Atlantic Conveyor* (2 Exocets). In the Persian Gulf, Exocets put the USS *Stark* out of action but did limited damage to large oilers; the oil kept flowing.

In Anti-Submarine Warfare, 2 ASW carriers, 15 frigates, 6 submarines of the Royal Navy plus various ASW aircraft expended over 200 weapons against only 1 Argentine submarine and a sea full of false contacts.

As the examples above indicate, the vulnerability of modern naval platforms even, or perhaps especially, in limited war situations will be a factor. A Commander must take into consideration the various threats to his own forces if he is tasked to destroy or interdict merchant ships, or to protect merchant ships as in the Persian Gulf situation. As Admiral Guilbault pointed out, the threat also involves the threat of detection from space or other active and passive means, including the visual sighting of a flaming datum.

Let us now look at a general war scenario - NATO versus Warsaw Pact. This situation is possible but gets more unlikely each day. The NATO maritime strategy is to take the war to the enemy. An early ASW campaign is contemplated. NATO naval forces would conduct offensive operations in Soviet sea denial zones (2000 km from the "homeland," usually) and impose a high attrition on Soviet naval forces, thereby neutralizing their military capabilities and assuring freedom of the seas to support U.S. and Allied operations and control the critical sea lines of communications that link the Allies with deployed forces.

Naval forces would support the land battle on the flanks. Amphibious forces might be landed. U.S. and Allied submarines, aircraft and surface ships will be far too busy with limited assets targeting enemy submarines, surface ships, airfields, C³ sites, bases and facilities ashore to waste weapons and risk detection in targeting enemy merchant ships. At this stage, Warsaw Pact shipping has little military value considering their extensive and internal land lines of communication. A mining campaign in the Baltic and Black Seas and Arctic Ocean would be more to the point.

244 Targeting Enemy Merchant Shipping

In a general war, the Warsaw Pact has a similar problem. The first priority of their SSNs will probably be to protect their SSBNs in nuclear reserve. If any remain, they will attack ships of the Battle Group, amphibious forces or underway replenishment groups. Soviet Naval Air has a similar priority and has insufficient assets to risk higher casualties by attacking NATO merchant shipping in the Atlantic. If the situation became an attrition war against the sea lines of communications, similar to World War II, NATO would convoy its merchant ships and the Soviets would attempt to sink without warning. One might argue that the strict rules in the London Protocol of 1936 should apply to Allied merchant ships sailing independently in sanitized lanes. However, one would have to assume that the protocol would be violated or at best interpreted narrowly.

Let us turn to the case of a limited war. Here the situation changes drastically. The characteristics of a low level or regional conflict are different from a general war. For example:

- Usually the battle space and sea room are constrained.
- Forces are usually concentrated rather than dispersed.
- Forces operate near or over land and in shallow water, thus making the forces more vulnerable and degrading certain sensors and weapon systems.
- The visual and electronic environment is confused with a mixture of friendly, enemy and neutral ships and aircraft.
- There is a low tolerance for damage and personnel casualties, including hostages, at least in the U.S. Generally, the public's attention span and tolerance vis-a-vis uses of military force will be directly proportional to the loss of life in the action, factored by its duration.
- There are definite rules of engagement constraints on offensive and defensive actions. Admiral Crowe, the former Chairman of the Joint Chiefs of Staff, stated that one of his achievements during his tenure was to modify the rules of engagement so that U.S. forces in crisis situations could take defensive action without absorbing the first blow.
- The identification assessments are complex, e.g., the incident in the Persian Gulf when the USS *Vincennes* mistakenly identified a commercial aircraft as a military aircraft and shot it down with surface to air missiles.
- Friendly support and assistance are varied and unpredictable.
- The threat can be from land, boats, ships, submarines, mines, fighters, bombers, helicopters, swimmers and unmanned vehicles.

- There are political constraints on the use of force that may be far more stringent than the legal constraints in the Commander's Handbook on the Law of Naval Operations (NWP-9).
- There is a high incentive to keep the superpowers from direct confrontation or from taking one side or the other.
- Ground commitments will be less tolerable than naval commitments.

The above considerations apply generally in the case of regional conflicts. In the case of targeting enemy merchant ships, there are other problems. Ideally, one should have a global array of sensors, weapons and delivery systems plus an intelligence network including communication and signal intelligence that can sort out various merchant ships while still in port and then continuously track the particular ship all the way to its final destination. What is needed is a complete library of the electronic, acoustic and visual fingerprints of all merchant shipping; an identification and assessment of cargo as it is loaded; the probable shipping routes; a space surveillance system that can continuously track the merchant ship while at sea irrespective of whether or not the ship is emitting electronic signals; a command, control and communication system that can hand off the track to surface ships, aircraft and/or submarines that are positioned to target the previously identified enemy merchant ship; weapons that can be fired beyond the radar or visual horizon with the discrimination to hit the right merchant ship and with the accuracy and speed to compensate for the time late in firing at a moving target and the right warhead to accomplish the mission - (which is not necessarily to sink the enemy merchant ship). I would much rather have a low cost weapon that is designed to render the ship immobile - dead in the water - with damaged propellers or ship control capability - than have to clean up the oil spill from a 300,000 ton tanker. I doubt if the Coast Guard wants to clean it up either. In a limited war or crisis control situation, environmental considerations *are* going to be important factors.

No nation has the complete capability as I have just described. Some do worse than others. Iraq fired Exocets on large radar contacts hoping the ship was a tanker. We know that Iraq made at least one mistake in the *Stark* incident. Iran planted mines and harassed all merchant ships indiscriminately with missiles and small caliber ammunition fired from helicopters and small ships.

I would have to say that measured against the ideal merchant targeting system described above, U.S. capability is marginal at best. We have no comprehensive library of fingerprints. As yet, we do not have a space based radar satellite system for surveillance of the surface of oceans. We have space assets and sensors that are useful under various conditions, but the ability to keep a continuous track and sort all the friendly, enemy and neutral merchant ships that ply the oceans is limited. Our over the horizon targeting system for long range weapons like

Harpoon and Tomahawk against moving targets leaves much to be desired in terms of hitting the right target on time in a confused environment of friendly, enemy and neutral merchant ships. Our ships, submarines and aircraft are designed primarily for attacking enemy warships, submarines, aircraft and striking targets ashore. Our weapons are optimized for those missions, not for use against merchant ships. We have no low cost weapon in numbers for disabling a merchant ship. This is not to say that we don't have weapons to use, but a Tomahawk cruise missile at \$1.2 million a copy and in short supply would not be the weapon of choice against a merchant ship.

What I am really saying is that targeting enemy ships in a limited war is a tough job. Because of the difficulty in detecting, tracking, and identifying targets in broad ocean areas, the operational commander is forced to search in confined littoral areas, probably near the destination of the particular merchant ship. Then he must use ships and aircraft on scene to locate, track, visually identify and then assess the character of the particular merchant ship. I recall in 1974 during the Cyprus Crisis, I was a Battle Group commander aboard the carrier *Forrestal* with accompanying cruisers and destroyers and submarines. I was ordered to take a position well south of Cyprus just to make sure the Soviets understood that they were not to get involved in the conflict between Greece and Turkey with their Mediterranean Squadron. I was also tasked to maintain continuous surveillance in the Mediterranean between Greece and Cyprus and make reports on all ships in the area, particularly Greek warships. We flew the airwing round the clock starting at dawn trying to keep an updated surface picture. It was a back-breaking operation and we were only partially successful. We could at least sort out merchant ships from Greek warships but as far as sorting out various merchant ships one from the other, that was another problem. There were just too many of all types of ships at sea.

Now the situation has improved. We have better intelligence, sensors, surveillance aircraft and space assets, but it is still a tremendous challenge.

There is technology available to fill in the gaps in an optimum enemy merchant ship surveillance, tracking and targeting system. For example: an active space based surveillance system, imaging radar, infrared techniques, and other technical approaches would help in establishing a coherent surface picture. The Global Positioning System (GPS) will help. I am sure that Admiral Guilbault could devise a space and C³ tracking and handoff system that could do the job if we gave him the money to do it. I think we should press on with developing the new technology. Limited conflicts and regional crises put a higher premium on intelligence, surveillance, identification, and accurate assessments. In our planning we often assume that limited war is a lesser included offense of general war and that ships, aircraft, sensors and weapon systems designed for general war are automatically suitable in low intensity conflicts. That is often not the case

and we need to look more closely at our limited war capabilities and make improvements.

Thus far, I have assumed that in a limited war the U.S. Navy would be tasked to sink enemy merchant ships. This is possible, but unlikely in my judgment. If we are so tasked, we would probably be politically constrained to visit and search procedures to accurately determine the character, destination and cargo of the ship, before taking further action. This means close surveillance by ships and aircraft, using visual means to establish identities. I believe it would be counter-productive to embark on a campaign of sinking enemy merchant ships at sea in a limited war when there are much more lucrative and politically important fixed targets ashore that could contribute to the limited objective at hand. The Libyan strike is a good example.

I think it more likely that the U.S. Navy will be in the role of protecting merchant shipping and assuring freedom of the seas for world commerce. A disruption in world shipping will have a rippling effect in the interrelated world economies that probably cannot be tolerated for long by either the developed or developing countries. In this situation, the incentive will be to confine the conflict geographically, limit the participants, persuade the maritime nations and "superpowers" to cooperate in keeping the sea lines of communication open, and encourage, cajole or threaten the belligerents to negotiate. The U.S. Navy may be tasked to convoy merchant ships, provide for their protection against a variety of threats, sort out neutral merchant ships from belligerents, and use force, as necessary, to contribute to political objectives.

However, whether we end up protecting merchant shipping or targeting them, the requirement for a global surveillance, sorting-out, tracking, hand-off, targeting and suitable engagement system for merchant shipping is still valid. We need to develop a coherent surface picture for the oceans of the world. In any event, the regional crisis and limited war situation need a fresh approach. While the general roles and missions of the U.S. Navy may remain the same, the methods of implementation may be significantly changed. Commanders will not have a free hand in carrying out their mission. The Rules of Engagement (ROE) will be dictated by the National Command Authority and blessed by the State Department. The political constraints may be far more stringent than any legal restraints in NWP-9. Minimizing loss of life, both military and civilian, and damage to property or the environment will be important factors. Weapon systems and sensors may have to be tailored to be more useful in limited wars and crisis control. The Navy may have to adjust to new missions such as assisting in drug enforcement and the like. There is a continuing and vital role for the U.S. Navy, but the Navy must be flexible enough and have the capability to adapt to changing conditions.

Although the policy and ROE constraints in a given limited conflict scenario might be quite stringent, naval commanders must find flexibility in the laws of

248 Targeting Enemy Merchant Shipping

naval warfare to target enemy merchant ships if the need arises. This may require a reassessment or fresh interpretation of the London Protocol of 1936.

Finally, a note of caution in all that I have said about limited conflicts and regional crisis. First, the Navy must retain its capability to fight a general war if necessary. Second, while a limited conflict might necessitate new ways of implementation and a certain tailoring of sensors and weapons, it by no means follows that the aircraft, surface ships and submarines can be less capable and sophisticated. The opposite is more likely the case.

*Consultant, Applied Physics Laboratory, John Hopkins University. Former Professor of Law, George Washington University, Washington, D.C. Vice Admiral, U.S Navy (Ret.).

Chapter VI

Strategic Imperatives: Economic Warfare at Sea

A paper by
Hugh F. Lynch ★

Comments by
Harry Almond

Strategic Imperatives: Economic Warfare at Sea

Economic Warfare at Sea” is a centuries-old practice often employed by naval forces of nations seeking to gain victory by reducing the enemy’s warfighting potential, rather than frontally attacking on land and overcoming him through bloody assault. If this practice has been used down the years, it is also a very current tool in prosecuting warfare in the late twentieth century, as most recently demonstrated in the eight-year Iran-Iraq War. So it is most appropriate, at a symposium on the “Law of Naval Warfare and the Targeting of Merchant Shipping”, that we consider the strategic imperatives which may drive the belligerent nations to attack the merchant shipping of their enemy, and even of neutrals, while we also consider the reciprocal imperatives which may drive the neutral nations to defend their merchant shipping.

In ancient times, nations did not have the benefit of an international code to mark the legal bounds of their conduct of war at sea. In modern times, particularly in the twentieth century, these bounds of lawful maritime behavior have been defined with some precision and tabulated. But they are quite frequently transgressed even by the “best” in the family of nations. Indeed, the layman might be surprised to learn that the international law of naval warfare is as frequently determined by “customary law” as it is by laws codified in treaties.¹ Therefore, in putting into practice their strategic imperatives, nations can actually rewrite the law of naval warfare - provided they obtain enough concurrence in theory, and congruence in practice, among other nations.

In this paper, I intend to explore strategic imperatives within two generalized scenarios: first, in global conventional war between the two superpowers and their respective alliances; next, in the context of limited conflicts between two nations other than the superpowers. I will also look at some of the future variables in limited war at sea, as brought about by transfers of technology and the horizontal proliferation of sophisticated weapon systems.

I have decided not to treat scenarios which include nuclear exchanges among any of the current or candidate nuclear powers. In such a circumstance, economic warfare at sea would have been so overshadowed by the nuclear conflict as to greatly diminish the weight of considerations given to international law at the lower levels of conflict. The powers involved would undoubtedly do whatever they deemed essential to conduct warfare at the more destructive levels. The nuclear “imperatives” would be so compelling as to deemphasize the finer points of the law of armed conflict. One eminent jurist has said it this way: “if it came to the point where strategic nuclear weapons were resorted to, the

boundaries of limited war would have been passed and the law would have little relevance.”²

Before going further, though, let us narrow the focus on what it is we will be discussing when we refer in this paper to “economic warfare at sea.” In the modern literature on economic warfare, there are entire volumes written which include under this general heading any form of coercion which is used by a nation to reduce the economic strength and war potential of an adversary.³ While that may be a useful definition for broader treatises, in this instance we will limit our definition of “economic warfare at sea” to the use or threat of use of military means in a maritime environment to reduce the power of an enemy during overt hostilities.

The Case of Global Conventional War

Now let’s take a look at the first scenario: global conventional war between the Warsaw Pact and NATO. In recent years, the writing of a plausible scenario for the start of such a war has challenged the intellects of some of our best strategic thinkers. They invariably conclude that no intelligent scenario can be devised which could possibly justify launching such a conflict.

Since the advent of *perestroika*, and particularly over the last six months, it has become increasingly difficult to imagine the Warsaw Pact as a viable fighting alliance; we would have to regress to the politics of the Brezhnev era to be able to imagine the unimaginable. But for the sake of strategic imperatives and international law, let us assume such a war “happened.” After all, the military and naval forces for such a conflict still exist; it’s only the changeable political forces which have made a NATO/Warsaw Pact war less likely.

In the Warsaw Pact – NATO scenario, the easiest conclusion to reach with regard to economic warfare at sea is one that says: The Warsaw Pact has interior lines of communication; NATO depends on the sea lines of communication (SLOC); therefore, the Soviets are compelled to resort to unrestricted warfare against merchantmen to stop the flow of reinforcements and resupply from the United States to Europe.

To strengthen that conclusion, many would compare the Soviets’ inventory of over 350 submarines with that of Germany’s inventory of less than 50 at the start of World War II. It’s never quite that simple. While the obvious may have some ring of truth, there are complicating factors on both sides of the equation.

In a protracted war between the two super-alliances, it would be reasonable to expect both sides to attempt to avoid crossing the nuclear threshold. Yet so powerful and ultimate are the nuclear arsenals that both sides would be likely to focus as much or more on the nuclear balance as they would on the battles in the ongoing campaign, in what the Soviets have called the “conventional phase” of war.

The Soviets have long emphasized the importance of their maritime defense perimeter as a means of protecting the homeland. They write of the need to establish "sea denial" zones and to destroy NATO naval forces in those areas. They are particularly concerned about platforms equipped with nuclear strike weapons - that is, those that can threaten the homeland with nuclear warheads contained in cruise missiles, gravity bombs, and ballistic missiles. Closer to the homeland, the Soviets have delineated "sea control" areas in which they would particularly desire to prevent the penetration of NATO's nuclear-powered attack submarines (SSNs). Even in 1990, NATO, and especially the United States, has such superiority in individual nuclear submarine performance that the Soviets must maintain defensive forces in depth to protect the seabased element of their strategic nuclear forces. This is no mean task and will require many nuclear attack submarines and other surface and air platforms dedicated to the defense of their ballistic missile submarines (SSBNs).

The United States Navy has already dispersed its nuclear strike arsenal, and will continue to do so throughout the 1990s. Instead of having fourteen carriers and fewer than forty SSBNs capable of nuclear strike, the U.S. Navy continues to fit out Tomahawk missiles in more than 80 attack submarines and 55 surface combatants already in the Fleet, with more to come. Along with the SSBNs of our British and French allies, this nuclear-capable naval force puts a great strain on the assets of the Soviet Navy for defense of the homeland. In the near term, they are faced with over 200 NATO ships and submarines, and 500 U.S. sea-based strike aircraft, all capable of penetrating the heart of Mother Russia with nuclear warheads.

Such a strong NATO offensive maritime force complicates that easily-concocted Soviet "strategic imperative" for SLOC interdiction of merchant shipping. It means that the Soviets can ill afford an extensive naval campaign against enemy merchantmen, let alone against truly neutral merchantmen. They would have to concentrate more on targets which include naval combatants, naval auxiliaries, reinforcement shipping in convoys, and amphibious task forces. All of these ships are either *prima facie* military warships or can be said to have taken on the character of warships. Therefore, according to current international law, they are subject to attack without warning.

There are also tactical considerations which militate against indiscriminate attacks on merchantmen in the global scenario. The first applies to submarines in particular: with so many other, more lucrative targets at sea, it would seldom be worth it to reveal a submarine's position in order to destroy one merchantman, be it an enemy or a bonafide neutral carrying neutral cargo to a neutral port. With the responsiveness and capabilities of NATO Maritime Patrol Aircraft, ASW (anti-submarine warfare) surface combatants and submarines, the reward for attacking innocent merchantmen is not likely to overcome the risk factor, particularly for the classes of Soviet nuclear attack submarines likely to

be assigned to such SLOC duties. Secondly, the Soviet Navy's ability to replenish weapons at sea is so limited, especially if engaged in combat with NATO, that there are likely to be practical if not doctrinal restrictions placed on the threshold value of targets to be attacked and on the minimum number of weapons to be retained for self-defense. While these considerations apply mostly to combatant ships, especially submarines, similar practical limits will apply to maritime strike aircraft and their Long-Range Aviation counterparts. For the European Theater in particular, Soviet bombers will have to penetrate NATO land-based air defenses to get at most ship targets. Is it worth it to attempt to transit this hostile airspace and then, perhaps, to be confronted by naval air defenses in order to sink individual merchantmen? We think not.

So the strategic imperative of hitting NATO's reinforcement and resupply shipping is not necessarily so compelling early in a NATO-Warsaw Pact war.

That is not to say that the Soviets might not attempt such a campaign on a limited scale. They undoubtedly would, if for no other reason than to complicate the problem for the NATO navies by tying down ASW assets. Nevertheless, their primary targets will be naval combatants and such merchant ships as are included in convoys or other task groups - those laden with military hardware and other military supplies. Their attacks should be concentrated on these legitimate targets - militarily-useful ships - and not on what's commonly referred to as "economic shipping." The latter, which would carry essential foodstuffs and other sustenance for the civilian populations, may be dispatched on individual sailings in protected sea lanes. In such circumstances, they represent low-value, moderate-risk targets, and generally ought not to be regarded as worth the effort in the Soviet's calculus.

The truly compelling thing about the World War III scenario is the high stakes for the participant nations. If World War II were so hard-fought at sea with so little regard for the inviolability of international law with respect to merchant shipping, and if the Nuremberg courts were so understanding of violations of law in this area, then why should World War III be any less compulsive when it comes to risk-benefit analysis? The one overriding imperative from the Soviet point of view is likely to be maximization of exchange ratios, whatever the target, and to hell with international law.

The same might be said for the problem of inadvertent targeting of non-combatants by Soviet over-the-horizon missiles, be they sub-, air-, or surface-launched. It is probably a question of the solutions retrieved from a correlation-of-forces equation more than a question of compliance with law. How many weapons are left in the inventory, and is the missile platform likely to return to fight another day? In most cases, positive visual identification is not worth the trouble!

So much for the Soviets in this scenario and their strategic imperatives on the offensive.

From the perspective of the U.S. and NATO, what will be the strategic imperatives regarding economic warfare at sea in the same scenario?

Certainly the Soviets can reach all their Warsaw Pact allies and their Far Eastern Continental Theater via land lines of communication. However, the Trans-Siberian Railway, deep as it is inside the Soviet Union, is still vulnerable to destruction at key junctures. Even though breaks in that intercontinental conveyor might not mean more than a temporary disruption in its services, we should expect that the Soviets have planned for such contingencies, and that the Far Eastern Military District - absent any conflict on the Chinese border - could be essentially self-sustaining in military supplies and foodstuffs for at least six months.

The polar shipping route, used in the warmer months, could be easily interdicted; the Danish and Turkish Straits, hopefully still under NATO control or at least mined closed, would preclude the need for an oceanic SLOC campaign by NATO. Nevertheless, there are other areas where NATO should be aggressively pressing interdiction of Warsaw Pact merchantmen. These are in the Baltic and Black Seas. With NATO dedicating much of its air power to FOFA - Follow On Forces Attack - or deep interdiction, the Baltic and Black Seas would be important reinforcement waterways to Poland, East Germany, Bulgaria, Romania and, via the Danube and other rivers, even to the heart of central Europe. There are not likely to be many neutral merchantmen in the way, even from the Scandinavian countries.

In summary then, what conclusions would we take from our consideration of the first scenario - general, conventional, worldwide war - and the strategic imperatives pertaining to economic warfare at sea. First, we would conclude that, because the stakes are so high, both sides would do what they must to succeed. Faint attempts might be made to enshroud, within the cloak of the law, those naval encounters with merchantmen carrying only humanitarian support for civilians. But not much time will be spent debating proprieties; practical exigencies will dominate, as they did in World War II.

Second, NATO and the neutrals of the world would generally benefit from the strictest adherence by all parties, to the international law dealing with combatants and merchantmen. The Warsaw Treaty Organization would have the least to gain by complying with such law. At any rate, because of some very practical war-fighting constraints in the nuclear age, the Soviets are not likely to expend considerable resources on merchantmen dedicated to "economic" cargoes.

Limited Conflicts

For our second scenario, I have chosen limited conflicts between two nations other than the United States and the Soviet Union. I don't intend to use any

particular conflict or set of adversaries as a case study. Rather, I'll treat limited war at sea as a general category of conflict, and I'll consider strategic imperatives in these circumstances as necessary judgments or propositions of not only belligerents on the one hand, but those of the neutrals as well. Then I'll refer to the major powers as a particular class of neutrals.

For our purposes, perhaps the best treatment of the genus "limited war" is that contained in the second volume of D.P. O'Connell's *The International Law of the Sea*. In it he categorizes all conflicts since World War II as limited conflicts, and then states that the characteristic limitations of these conflicts were one or more of the following: "the theater of operations; the scale of operations and level of weaponry; and the graduation of force and the scale of response."⁴ I'll adopt these as descriptors for my treatment of economic warfare at sea in a limited war. Later I'll discuss the potential for outgrowing these limitations.

First, we must remember that the belligerents in limited wars will usually have that same strategic imperative that the major powers had in World War II: that is, to achieve victory. Whether it be war between Iran and Iraq, Arabs and Israelis, or India and Pakistan, the first objective is success in combat. It is only when the first goal is not attainable that most countries will settle for a "draw," or, as a last resort, will they opt for national survival in circumstances that would otherwise represent total defeat. These statements may be self-evident, but sometimes we seem to forget them. It should be understandable that the behavior of "third-world" nations, as warriors, can be as fiercely dedicated toward that first goal of victory as the Axis or Allied powers were in the last World War. After all, they too are fighting for personal and national survival. As long as they seem to be able to achieve their goal, while remaining within the principal bounds of commonly accepted international law, most will comply with the rules, and most will keep their war "limited." Frustrate their progress toward that goal, however, and we can expect that they will depart from international law, as required, in order to restore their progress. It seems that, the closer nations come to defeat, the more dastardly are their deeds.

In 1983, after having been at war with Iran for three years, Iraq looked as if it would be defeated by sheer force of numbers. At that point, Iraq resorted to the first use of chemical weapons.⁵ Later, as the Iraqi air blockade pulled the noose tighter around Iranian oil exports, the Iranians responded with the illegal use of mines and indiscriminate attacks upon neutral shipping.⁶ As one observer put it, "the very success of Iraq's air blockade compelled Iranian retaliation."⁷

It's also instructive to remember that, in both World Wars, belligerents on both sides varied their compliance with the law of naval warfare, as it was understood, with regard to submarine attacks on merchant shipping. In the First World War, the Germans did several legalistic U-turns in the U-boat campaign, alternately forbidding and permitting unrestricted submarine warfare against merchantmen. Again in the Second World War, Germany began by observing

the London Protocol of 1936, but by 1940 unrestricted submarine warfare was once more the order of the day; and the United States entered the war using the more practical standard instead of that prescribed by the Protocol.⁸ Adherence to international law seems to have a lot to do with desperation and advantage in combat.

Why should we, then, expect greater compliance with international law in limited wars than we have seen in the two world wars? It reminds one of the rifleman's complaint against the term "Lower Intensity Conflict"; he asks: "lower intensity for whom?"

The second strategic imperative in economic warfare at sea during limited conflicts is one the neutrals should be demanding of the belligerents - that is, adherence to the law of neutrality.

If the law of neutrality had its origin in the doctrines of mercantilism, its evolution to this day has been generally beneficial for the material well-being of most of mankind. But we are now really only at the threshold of an era where the preservation of that law becomes even more challenging. Three occurrences in the last two decades have demonstrated the increasing importance of the interdependence in trade and investment of the world's nations. The first was the OPEC countries' successful constriction of the world's oil supply in the 1970s and the resultant economic dislocations, not the least of which was the high rate of inflation in the United States; second was the crash of the international financial markets, more or less in unison, in October 1987; and third was the infringement upon neutral rights in the Iran-Iraq War.

Economic disruptions in one part of the world have tended to cascade into major crises in other corners of the world. This chain reaction among the major powers has occurred repeatedly, not just in the three major events mentioned, but in many other lesser ones as well. In that same twenty year period, we have seen how some smaller states, e.g. Iran, Syria, Israel, Libya, and even Saudi Arabia, have been able to leverage their influence over world events - all out of proportion to their populations and resources in the family of nations.

So as the world political economy becomes more interrelated if not interlocked, nations must individually and collectively demand stricter observance of the rights of neutrals. If the barbarians wish to fight the barbarians, their battles must be constrained by the law of armed conflict, including the law of neutrality.

Our third imperative is merely a corollary of the second; it says that enforcement of the law of neutrality will be required. The more powerful nations will not allow themselves to be weakened or economically devastated as a result of conflict among lesser powers. When a society achieves a higher standard of living over a period of time, that higher standard of living redefines those things which are considered "necessities" of life. So it will be the populaces, if not the governments, who will demand noninterference with their material pleasures. Stating the imperative in this manner still leaves open the question as to how to

enforce this neutral side of international law. Diplomats and jurists would undoubtedly adopt the more reasonable and pacific approaches to dissuade belligerents from infringing on the rights of neutrals. The preferred methods in such matters would range from the use of “enraged world public opinion”, to economic sanctions short of overt hostilities, to demands for adherence to law, to exhortations for “police action” under the auspices of the United Nations. Unquestionably, these are the most desirable means for the restoration of the rights of neutrals – the court or courts of first resort. Any experienced military advisor should also prefer these means to the final arbiter, the use of superior force.

Yet if none of the pacific means succeeds, the use of sufficient force may become the only remaining option – short of taking no action and suffering the further erosion of the rights of neutrals as a consequence. The key word, of course, is “sufficient.” On the one hand, in this legal frame of reference, one should first acknowledge that some basic principles apply: the doctrines of military necessity, proportionality, and humanity. These are concepts of which all of you are most knowledgeable. They all rightly serve to limit the amount, type and manner in which force may be applied even in upholding the law.

The question of sufficiency or economy of force, however, has another side to it: what is enough force for mission accomplishment, that is, for the enforcement of the rights of neutrals? I will shortly discuss the case of sufficiency of naval forces for guaranteeing the freedom of the seas in the future. For now, let’s consider the present-day sufficiency. The most interesting historical case with closest proximity in time is the Persian Gulf War and the self-help enforcement actions of the United States and some of our NATO allies operating in a non-NATO framework. Generally we can say that sufficient but not excessive force was used by neutrals in and over the Gulf. The two extremes in this application of force in defense of the rights of neutrals were the *Stark* and *Vincennes* incidents. Both represent aberrations from the intended norm of self-defense – the *Stark* incident being a failure to act, and the *Vincennes* a precipitous action taken in error. Both extremes are well documented in the open literature.⁹

Contrasting with them are the circumstances and execution of Operation Praying Mantis, the U.S. Navy’s anti-Iranian strikes in the Persian Gulf on April 18, 1988. After reading the first-hand accounts of two senior commanders in that battle, one would be hard-pressed to criticize the operation for the applications of either too much or too little force. Unquestionably, more force was available than was applied, and the operation did not extend too far in terms of time, or in terms of additional targets. They might have hit other naval targets in port, or land-based targets such as the Silkworm missiles, or some of the airborne Iranian fighters – but they didn’t.¹⁰

With the benefit of historical vision, however, let's look at another proposal, and how it might have fared in the same battle. In an article in the *New York Times* on October 20, 1987 and at various other forums in that timeframe, Elliot Richardson and Cyrus Vance together suggested that the duties of enforcer in the Gulf could be performed with less hazard through U.N. auspices, utilizing a number of unarmed patrol boats as well as naval vessels from member states, not to include the U.S. or U.S.S.R.¹¹ On another occasion, Mr. Richardson stated: "You would then have a small U.N. fleet with an effective capability comparable to the U.S. presence in the Gulf today - somewhat smaller, perhaps, but essentially equivalent."¹² For command and control, Mr. Richardson would have enjoined the Security Council of the U.N., as a body, to "decide in advance what kind of response would be appropriate to what kind of provocation" . . . should the U.N. escort vessels themselves . . ."be subject to some significant attack." At the time he was comparing the proposed U.N. force of frigates with a U.S. Navy force of 38 ships.¹³

Without comparing the proposed and the real-world forces in every respect, and without detailing each action of the Iranians during Operation Praying Mantis, one might characterize Mr. Richardson's proposal as a formula for U.N. disaster. In it he demonstrated a serious lack of understanding of the military problem in the Gulf in 1987-88. He not only underestimated the capabilities of Iranian patrol boats, guided missile frigates, and fighter aircraft, he also underestimated the contributions of U.S. Air Force AWACs aircraft and KC-10 tankers, and particularly the complexities of the command, control and communications problems, especially the positive ID requirement with Soviets and other third parties intermingled.¹⁴ One might also surmise that he had never studied the Falklands/Malvinas campaign to discover how close the Royal Navy had come to sustaining more grievous losses in May-June 1982.

In summary, then, the point of this strategic imperative is to ensure that you send more than enough force to accomplish the mission of enforcing the rights of neutrals, and then measure your response to violations of those rights.

For our last proposition, we would maintain that, in order to keep limited wars limited, it is essential to maintain some distance between the major powers. By this we mean that, almost by definition, we should not allow both the Soviet Union and the United States to become active "enforcers" of neutrality in the same theater of operations - particularly if they were to view themselves as enforcers against one another's clients.

Most recently in the Persian Gulf War, one could easily build a case to support the thesis that both the U.S. and U.S.S.R. leaned (perhaps rather heavily) toward Iraq and away from Iran. So the superpowers did not assume the roles of *opposing* military powers in that case. Nevertheless, as reported in the Naval Institute Proceedings, at one point during Operation Praying Mantis, the U.S. destroyer *Merrill* had a warship closing at 25 knots; it was tentatively

interpreted to be a “possible Iranian SAAM FFG”. As *Merrill* made preparations for a Harpoon missile attack amidst the many other hostile actions that day, a U.S. helicopter investigated the target at closer range, obtaining positive identification on a Soviet *Sovremenny*-class DDG.¹⁵

The circumstances were substantially different in the Indo-Pakistani War of December 1971. O’Connell treats the differences succinctly:

“The naval operations conducted by India against the port of Karachi and in the Gulf of Bengal took no account of international law, which was, indeed deliberately put to one side by the Indian naval staff. The result was that the operations spilled over into the high seas, a naval blockade of Pakistan was proclaimed, and shipping was attacked. In the course of these operations neutral ships were sunk, one with total loss of life. In every sense, the Indian naval operations accepted no limitation as to area or scale. Was this then a case of ‘limited war’?¹⁶

The only limitation seems to have been in the duration of the conflict; it lasted only two weeks. What if it had lasted longer; what if the proclaimed blockade had been prolonged and effective; what if tanker traffic in the nearby Persian Gulf had become involved, while the United States was deeply committed to the Vietnam War?

The important factor, which is often overlooked in considering the Indo-Pakistani War, is that both the United States and the Soviet Union sent task groups to the high seas of the Bay of Bengal, where the aircraft carrier *USS Enterprise* and her escorts took measure of the Soviet group which included some of their most modern cruisers. Even if the mission had only been enforcement of the law of neutrality, what mischief might have ensued?

The Soviet Union and the United States are now beginning to find areas of mutually beneficial, not competing interests. But, for this paper, I don’t intend to limit our definition of “major powers” to those two nations. In terms of naval forces, at least two of our NATO allies can currently be categorized as “major powers”, and we would also include China, and Japan as powers with very sizeable and capable navies. It is important that these powers, as well, do not face off against each other in conflicts started by opposing “client” states.

At the same time, we are faced with a “use it or lose it” quandary: someone will have to protect the rights of nonbelligerents, or the law of neutrality will become non-existent. One would hope that other nations, not parties to limited wars, would actively protect their own rights when capable of doing so, and *not* rely on the United States Navy to do all the dirty work.

Future Wars and Weapons

It does no good to lament the demise of the legality of “war” and the efficacy of the law of war merely because Article 2 of the United Nations Charter outlaws

the use of force in resolving international disputes. It would appear that, in fact, nations continue to fight "wars" in the last half of the twentieth century about as often as they did in the previous one hundred and fifty years. We now have as great a need for the laws of armed conflict and neutrality as we had prior to 1945. For the benefit of belligerents and non-combatants alike - both nations and individuals - it is essential to protect and preserve as much of that body of international law as we can. Without both the law and enforcement of the law, "limited" wars of the future could easily get well beyond the limiting factors that we accepted earlier in the paper: "the theater of operations; the scale of operations and level of weaponry, and the gradation of force and the scale of response."¹⁷ I'll restrict my discussion of the future to that element of limited war to which I was assigned, namely economic warfare at sea. But there are obvious parallels in land warfare which one can easily imagine without their being drawn out here.

The inevitable development I see in the future is the proliferation of the possession and use of more sophisticated and more destructive weapons systems among many more countries. A recession in the arms industries of the Western democracies and others - due to the events in Eastern Europe - is likely to spur brisk competition to satisfy third-world demands at international arms bazaars. Old enmities are not likely to soon fade away. So I would anticipate that these new systems will eventually be employed in limited conflicts, against both belligerents and neutrals, unless the penalties for their illegal use are prohibitively high. The weapons we have in mind are: cruise and ballistic missiles with conventional and chemical warheads; more sophisticated mines at sea; nuclear submarines; precision targeting systems employed with conventional warheads of far greater destructive power; stronger land-based air forces with enhanced capabilities for war at sea; and, in some cases, increased sea-based aviation capabilities.

Iraq's economic warfare against Iran is credited with "the distinction of being perhaps the sole example in history of a successful economic blockade essentially carried out by air power alone."¹⁸ But it does not stand alone as a use of land-based tactical aviation, armed with air-to-surface missiles, employed in war at sea. In the Falklands-Malvinas conflict, Argentina was extremely successful in attacking Royal Navy ships with only five Super-Etendard aircraft and about as many Exocet missiles. These events tell us that we can expect more of the same employment in the future, only with longer-range aircraft and missiles. In the Praying Mantis operation, the U.S. required positive visual identification before permitting ships and aircraft to attack surface combatants with medium-range Harpoon, Walleye, and Standard missiles. This required U.S. helicopters and attack aircraft to risk the first few rounds of SAMs and gunfire as they got close enough for positive identification with the prevailing limit of visibility.¹⁹ Although there are electronic and infrared means of detection and classification

of targets, some countries may not have these means to identify targets from a distance, yet will have the aircraft and missiles to press the attack. Will they hazard themselves to take a quick look-see on the first pass? The answer is probably not unless they can expect retribution for attacking a truly neutral merchantman, or an escorting neutral combatant. Argentine aircraft were flying roughly 350 nautical miles, with inflight refueling, in order to reach their targets. What does that tell us about the future limitation on the extent of the theater of operations?

In both the Indo-Pakistani and the Falklands-Malvinas wars, submarines were used in combat.²⁰ In fact, in the Falklands we had the first use of a nuclear-powered submarine in combat. The ownership of nuclear submarines is spreading to the third-world as India has received the first of possibly four Charlie-class nuclear-powered attack submarines from the Soviet Union.²¹ China builds her own Han-class SSNs as well as Xia-class nuclear-powered ballistic missile submarines. If the U.K. and Germany could impose long-distance blockades on each other in the two World Wars, why could not India do likewise with her Charlie-class submarines in the Arabian Sea and the Gulf of Oman against Pakistan? In fact, if the Argentines had already received their full complements of Super-Étendards and Exocets before war broke out in 1982, and had driven off the British surface fleet, would the next step for the U.K. have been a close blockade of Argentine ports by Royal Navy SSN's?

Write your own scenarios if the ones offered appear too far-fetched. But the weapon systems are proliferating and their capabilities in speed, range, and destructive power are increasing. Many nations are developing ballistic missile capabilities; recent literature suggests that about fifteen nations now have the ability to produce mid-range missiles, and India already has a 1500-mile missile, the Agni.²² Argentina has been working on the Condor missile with Egypt and Iraq. Brazil is investing in the Sonda IV, and Pakistan has its Haft.²³

These may be land attack missiles, but the ability to direct other variants to sea, as was done with the Silkworm, can't be too far behind if these nations so choose. Couple the general market availability of space-based surveillance systems with ballistic or cruise missile delivery systems, and we have a quantum leap in the extension of the maritime battlefield from nations that may not otherwise be rated as maritime powers. We cannot overlook the possibility of chemical warheads for these missiles. Some twenty countries may be producing chemical weapons today.²⁴ But it's more likely that they would be used in land warfare and would have less utility at sea, except against amphibious operations. Neither can we overlook the proliferation of nuclear weapons over the next decade. Five or six nations now have nuclear weapons capabilities and roughly another twenty-five or so may be nearing that capability.²⁵ Their use at sea may be less likely than on land, but they complicate the equations among belligerents

and neutrals alike. If that's not enough, let's further exacerbate the problem by eventually including sophisticated deep-water mines.

That will be enough gloom and doom for now. But these are no longer Buck Rogers cartoons. They will be near- to mid-term realities. Nearly all these weapons will extend the theater and scale of operations. If nations use them from the onset of hostilities, then the responses will not be graduated either. Limited war at sea will have once more become nearly unlimited. Along the intermediate levels of the scale of warfare, it's going to require more than a few NATO frigates, and a set of rules of engagement from the Security Council of the United Nations for the neutrals to stay competitive in the contest for freedom of the seas.

The Challenge for International Law

It would seem that as the proliferation of nuclear and chemical weapons occurs, the "haves" will generally be deterred from their use against each other just as the superpowers have been. The "have-nots" will need alliances with the "haves", or the protection of a much more binding moral suasion than has been operative in the past. The more likely circumstance, in any case, is the use of the more sophisticated conventional weaponry. The U.S. Commission on Integrated Long-Term Strategy framed the military challenge thusly:

"The much greater precision, range, and destructiveness of weapons could extend war across a much wider geographic area, make war much more rapid and intense, and require entirely new modes of operation."²⁶

The challenge for international law will be to keep abreast of technological change. Is that a question of "writing" new law, or of developing new standards of behavior which are accepted as the norms for nations engaged in combat at sea?

From the point of view of the practitioner of the operational art at sea, it would seem that we could have more effective law, that is, greater adherence to the international standards in a rapidly changing military-technological environment if we stuck to the basics, to the principles. The standards of military necessity, proportionality, and humanity can be applied across the entire spectrum of warfare from "lower intensity conflict" to nuclear warfare. The objective should be greater compliance with international law at sea, not a more abundant and more restrictive law of naval warfare to be set aside and ignored at the firing of the first round. The rate of change in technology and weapons, and the rate of proliferation could be too much to keep up with if we are looking for a new set of specific prohibitions each step of the way. The more promising field could be the persuasion of all, or nearly all of the nations of the world to abide by the rules we already have, and to apply them generously.

Of this we can be sure: the future holds the very likely prospect of economic warfare at sea; the hostilities will occur further from the shores of the belligerents and will be more intense and destructive. The extent to which neutral commerce will suffer depends on how effective the non-belligerents are in convincing the combatants, either through pacific means or through military coercion, to abide by the commonly accepted international law of the sea.

Notes

*Captain, USN (Ret.), former Chairman, Naval Operations Department, U.S. Naval War College; currently Professor of Naval Warfare Studies, Naval War College.

1. George K. Walker, *The Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, *Naval Law Review*, 7-13; (Winter 1988); Francis V. Russo, Jr., *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law*, 19 *Ocean Development and International Law* 381-383 (1980); Daniel P. O'Connell, 1 *The International Law of the Sea*, 33-47 (1982). For an interesting approach to *A New Genre in the Study of International Law*, see *International Incidents: The Law That Counts in World Politics*, 3-24, 263-269 (W. Michael Reisman *et al.* eds., 1988).
2. Daniel P. O'Connell, *The Influence of Law on Sea Power* 86 (1975).
3. Yuan Li Wu, *Economic Warfare* 2-10 (1952). See also, James P. O'Leary, *Economic Warfare and Strategic Economics*, 5 *Comparative Strategy*, 179 (1985).
4. Daniel P. O'Connell, 2 *The International Law of the Sea*. 1096 (1982).
5. David Segal, *The Iran-Iraq War: A Military Analysis*, *Foreign Affairs* 955 (Summer 1988).
6. Ross Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, *International and Comparative Law Quarterly* 638-644 (July 1988); Ronald O'Rourke, *The Tanker War*, *U.S. Naval Inst. Proc.* 30-34 (May 1988).
7. Ross Leckow, *supra* note 6, at 960.
8. Daniel P. O'Connell, *supra* note 4, at 1131-37.
9. Michael Vlahos, *The Stark Report*, *U.S. Nav. Inst. Proc.*, 4-67 (May 1988), Norman Friedman, *The Vincennes Incident*, *U.S. Nav. Inst. Proc.*, 72-79 (May 1988).
10. Bud Langston, *et al*, *The Air View: Operation Praying Mantis*, *U.S. Nav. Inst. Proc.*, 54-65 (May 1989); James B. Perkins III, *The Surface View: Operation Praying Mantis*, *U.S. Nav. Inst. Proc.*, 66-70 (May 1989).
11. Cyrus R. Vance & Elliot L. Richardson, *Put the U.N. Into the Persian Gulf*, *N.Y. Times*, October 20, 1987, at A35: 2-6.
12. Elliot L. Richardson, *Conference Report: The Persian/Arabian Gulf Tanker War: International Law or International Chaos*, 19 *Ocean Development and International Law* 312 (1988).
13. *Id.*, at 311-12.
14. Bud Langston, *supra* note 10, at 54-65; and Perkins *supra* note 10, at 66-70. As described by Captain Langston at 56, "Positive identification of Iranian naval and air forces was crucial to the operation as allied and Soviet surface forces were in the area. Omani and United Arab Emirates patrol boats were also operating in the southern Persian Gulf, as well as Omani, United Arab Emirates, Iraq, and Saudi Arabian aircraft".
15. James B. Perkins III, *supra* note 10, at 69.
16. Daniel P. O'Connell, *supra* note 4, at 1099.
17. See *supra* note 4.
18. David Segal, *supra* note 5, at 960.
19. Bud Langston, *supra* note 10, at 58-59. The limit of visibility was reported as 3 to 5 miles.
20. Daniel P. O'Connell, *supra* note 2, at 129.
21. Jane's Fighting Ships, 1989-90, at 91, 253 Richard Sharpe, ed., (1989).
22. Robert H. Morris, *Evolving World Situation* ROA National Security Report 2 (November 1989).
23. Les Aspin, *Missiles, Nukes, Chemicals Threaten Peace*, ROA National Security Report 13 (November 1989). See also *The Global Proliferation of Ballistic Missiles*, *Jane's Defense Weekly*, 1384-85 (December 23, 1989).
24. Robert H. Morris, *supra* note 22, at 1.
25. *Id.*
26. U.S. Commission on Integrated Long-Term Strategy, *Discriminate Deterrence*, Commission Report, 8 (January 1988).

Comments on Hugh Lynch's Paper: Strategic Imperatives: Economic Warfare at Sea

By
Harry Almond *

General Assessment: Economic Warfare at Sea

Introduction - Perspectives.

Approach. Approaches to law that are evolving in a sequence of ambiguous, dynamic situations vary according to the purposes of inquiry.¹ McDougal and his associates have led us to fruitful inquiry by advising that regardless of the tactics of approach, the most productive viewpoint is that of the detached observer. This vantage point provides us with distance from law whose prescriptive strength is tentative. It enables us objectively to sort out the claims among contending prospects for rule in those situations where the certain decisions to be treated as law are still in stiff competition with the claims of policy. This situation prevails with economic warfare where the vague but telling claims of policy, like those of "necessity" or in the vernacular of "extenuating circumstances," are readily raised. States from time immemorial have resorted to fashioning and using strategic instruments of policy, so that it comes as no surprise that the economic instrument used in belligerency will be accompanied by diplomatic and ideological as well as military instruments.²

Klaus Knorr provides a background to the position taken in this paper:³ When modern belligerent states practice economic warfare,

they seek to reduce each other's economic base of military (and economic) power relative to their own. In these cases, economic warfare *supplements* military action as a means to coerce or simply to overwhelm or resist an adversary. But the immediate purpose of economic warfare is then not coercive. It is rather to weaken the economic foundation of the enemy's power. Military action can, of course, be applied toward destroying the economic sinews of the opponent's military strength. Naval blockades can sever trade, and bombing from the air and sabotage on the ground can destroy factories, shipyards, rail transport, etc. [pp. 133-134].

Knorr concludes:

In practice, the effectiveness of economic warfare is difficult, if not impossible, to measure, since the economic policies involved are usually only one factor, and certainly not the weightiest, in determining the outcome of war. Regarding World War II, economic warfare hardly caused the downfall of Germany and Japan, though it contributed to their eventual collapse. And the contribution it

did make surely resulted overwhelmingly from *military* measures of economic warfare, from naval blockade, and especially, in the case of Germany, from aerial bombardment.⁴

The processes of claim, applicable alike to firming policy and law, are operative in state practice during peace and belligerency.⁵ Such processes actively lead to the expected patterns of behavior in warfare.⁶ They have been notably affected by changing attitudes and expectations, changing tolerances, regarding the targets and acceptable destruction of hostilities, and in that sense alone they have led to law that has had a humanitarian character and moderating effect. But from the mid-19th Century, and particularly in recent years, state practice has introduced directly the humanitarian concern with non-combatants. Because so much of this concern has led to new law, and because belligerency itself through state practice is the determinative arena in which new law is applied, the extent to which such moderation has an impact in the law-making sense must await future hostilities.

Accordingly, a variety of approaches can be considered for an inquiry into economic warfare at this time.⁷ Following McDougal it can be comprehensive, and for present purposes, the comprehensive approach already taken by McDougal and Feliciano will be taken as sufficient.⁸ Approaches may in a sense be an attempt at codification, where the inquiry seeks to refine or increase the body of hard law, or it may be concerned with general principles, or operational in the sense that direct "hands-on" advice is proposed to the audience. The approach taken here draws on the operational factor, but is aimed at a primary point of assessment: the inquiry is directly concerned with whether we are witnessing trends, substantially revived during the second World War, of attacking the entire economy of a nation as a strategic, and legitimate, target of warfare.⁹ This trend is bolstered by the recent desert war against Iraq – the attack was launched against the political and working infrastructure of the nation to bring about a quick termination to the fighting, and this meant attacks on targets that were essential to the economy as a whole as well as to the economy of war fighting.¹⁰ Once the target of economic war is the economy, then the measures of economic warfare tend to be blurred, combining the traditional use of economic *measures* and military measures.¹¹ At least part of this trend was signalled by the advancing military technology, and the appearance of submarine warfare.¹²

Perspectives. The traditional instruments of war are designed to coerce others by force or threats to resort to force through arms. The legal regulation of the use of force and of military forces in particular expressed as the law of war is notable for general principles that leave open the emergence of law consistent with the tolerances of states as to what they accept as legally permissible.

While this inquiry addresses economic warfare particularly during the belligerency of states, the grand strategy within which economic instruments are

used to advance policy ultimately must govern.¹³ A nation without long-term goals and perspectives concerning the future of global order stands to suffer and ultimately to decline. A democratic state handicapped by leaders that lack strategic vision and are caught up in the rough and tumble of domestic politics is not readily attuned to the elements of strategy, let alone its critical vocabulary.

The fundamental elements of policy that is dependent upon coercion, lodged in deception, surprise, and the manipulation of the participants in policy have their counterparts both in times of “war” and “peace”, but the resort to these factors, even the resort to covert warfare, is often repugnant to the democratic perspective. Uncertainties over the balance of power and its cultivation, and over equilibrium associated with the element of “peace” are aggravated by such a state in its democratic processes. Because the formulation and promotion of a grand strategy is so difficult, the recourse to economic warfare as an instrument of policy or strategy tends toward a policy vacuum. But this it seems must be accepted as a given.¹⁴

The conduct of warfare amounts to a resort to intense coercion, and among the modalities that have emerged are the attacks that are strategic in nature, aimed at the economies as well as the traditional attacks aimed at the economic activities of an enemy. Armed force symbolizing capability to exert power, capacity to defend, and even in threat, intention to influence is the familiar military instrument, intended to exert coercion of high intensity, and expected to achieve military and political objectives. Hence economic warfare is likely to be accompanied by armed force or conducted in parallel with the use of armed force.

Traditionally, economic warfare imposed through naval forces has relied on blockade, and found it effective in bringing an earlier termination to the war.¹⁵ With the rise of strategic weapons and the tolerances among states relating to strategic warfare appearing in the second World War, naval forces can be expected to serve in future wars with other military forces in conducting warfare aimed strategically at immobilizing an enemy's economy.

The law applicable to economic warfare has therefore developed in the context of the law of war, and against the expectations about future wars.¹⁶ The decades following the second World War have been decades of growing expectations that coercion will be invoked, and once commenced rising to coercion of the highest intensity, and therefore at highest level of tolerance. Law under these conditions is law that adapts to changing methods of warfare, and also to a growing tolerance that makes new methods of economic warfare tolerable and legally permissible. Moreover, because those who use force also rely upon judgmental standards some of which are embodied in the “Principles of War”, these standards show a similar flexibility as states move toward new weapons, methods of attack and military technologies.¹⁷ The fundamental principle is that in which they seek an application of economies in the use of

force. This is in a sense forced upon them, because they are dealing here with scarce resources and costly destruction.

So before commencing war, states that consider their actions with some deliberation also turn toward judgmental standards in which intense, and often costly and high risk coercive measures are not invoked unless persuasive or less intensive coercive actions are first considered or taken. Nevertheless, because warfare is a matter whose outcomes are speculative state practice, founded on state perceptions of the high costs and destruction involved, it is particularly aimed at invoking the coercive and usually forcible instruments at early stages to gain the strategic advantage and tactical features of surprise, shock, deception, and disabling initial attacks. Strategic advantage is sought as a major auxiliary goal because it offers an economy in the use of force, and pursuit of objectives through force.

The policy and policy making of states across the spectrum of their relations with each other thus shift also across the coercive instruments needed exclusively for deterrence [relatively few if these are the major nuclear weapons] to those that will be needed for armed combat, particularly where that may turn out to be combat of long duration, and extensive use of resources.

The design and effective use of the military instrument and the other instruments of war are of great interest to policy-makers and the military commander. The pressure to choose against scarce resources tends in practice to reduce the assets available for blockades, particularly where the enemy states have formidable naval forces on each side to contend with. Hence a crucial test is that of military utility. Additionally, both commander and statesman seek to conform to community standards manifested in international law about the making of war, and about the permissibility in using the instruments of force, because resort to war entails the political element. A strong vision of war must encompass the policies and actions to be taken once the war has terminated. Both commander and statesman seek to have instruments that can operate effectively and speedily, with economy and efficiency. The fundamental objective, reciprocated with rivals and enemies and allies, is to achieve military objects, and ultimately political objectives, with a minimum destruction of values subjected to violence and destruction.

Although the instruments of coercion may also be designed for peacetime use, or invoked in strategies prior to going to war, they are primarily used for conducting war and reaching successful conclusions to war, and also for strengthening law among states, and for achieving policy goals that states must achieve for their own well-being. The framework for inquiry into the instruments of coercion is surmounted by the fundamental claim of all social orders: where all else fails, or where no other instruments are available or at hand, they are compelled to resort to self-help in the extreme cases to assure their survival.

The effectiveness of these instruments is measured by how closely they attain military and political objectives. Accordingly, they must be used within the standards imposed or accepted by the global community. Their effectiveness as instruments of war is largely determined by their efficiency and economy in use, but they are also determined by their operation consistent with community standards. Because the instruments of war are instruments intended for action, their effectiveness is determined by correlation in terms of action, but actions claimed by states are intimately tied to both policy and law. "War," according to Clausewitz, "is simply a continuation of political intercourse, with the addition of other means."¹⁸

The assessment of economic warfare is, necessarily, an assessment that touches the interaction of claims to self help, and in particular self-defense, with the satisfaction of customary international law and United Nations Charter obligations, and the rights and responsibilities of neutrals. It inevitably leads into perspectives about global order. The rise of the peacekeeping and maintenance of order instruments under the United Nations can be attributed to new perceptions about the use of force, to wit, the permissible use or threat of use, or the use of force to counter prospective aggression, all in the context of achieving global order, and shifting toward collective action. But the fundamental assessment involves the perspective regarding self-help – and thus self defense – and the use of force and coercion. Even in the collective forms of action for enforcement or maintenance of public order, states have simply turned to collective self-defense or concurrent or synchronous actions of self defense under another guise.¹⁹

Economic warfare and its instruments are judged by the same standards as are the military instruments, and the use of economic warfare as instruments of coercion are judged under the standards to be found in the law of war.²⁰ Although economic warfare may tend toward low degrees of coercion, a response by way of force [assuming a response directly asserted to economic measures and not to forcible measures] may need to be weighed against whether it would be proportionate to the force used, or force needed to retaliate.²¹ But it is of critical importance that we recognize that the use of retaliatory force is appraised in the context of public order, self-defense, the practice and custom of states, and other indicia of their expectations.²² When states turn to strategic economic warfare, it is evident that circumstances of intensive violence are introduced affecting the attitudes both toward law and leading to the tolerances about the conduct of warfare of that nature. Apart from this, the strategies of economic warfare, and the separate strategies of reaching strategic goals are comparable in most respects to those involving the use of force through military means.²³ Additionally, they are strategies that include the variations employed by other strategies: for example, reprisals, a form of self help, are applied through

economic warfare, and reprisals are adopted both by the belligerents and the neutral states.²⁴

Self-Help and Self-Defense

To assess the emerging law of economic warfare, the overall framework of self-help must be briefly sketched. Self-help, like the overriding conditioning factor of necessity, operates in the primordial relations among states. In warfare under the present military technologies, expectations universally anticipate comprehensive and high intensity violence that is not controllable under law or other social processes under the familiar principles and standards. Moral principles, and the principle of war relating to humanity tend to shift toward a vanishing point when violence is intensified. Violence opposed by violence leads to the naked application of necessity. But the complementary principles that provide controls are intended even in wars of high intensity violence to resonate between the application and mutual moderation of the impact of principles of humanity and necessity.²⁵ These are principles readily adopted by all states, and they are actively operational even in the most violent conflicts.

But the two principles mentioned operate to control the conduct of hostilities themselves. Surmounting the operation of the two principles is the larger, constitutive goal that some states seek more fervently than others. This goal is that of first achieving minimum public order, building on the existing public order in any event, to determine the permissibility or legitimacy of their actions. Some states, as with Hitler's Germany and Stalin's Russia, were committed to public order, but it was intended to be a public order that they would control and dominate. Thus the belligerency may be about the constitutive elements of public order itself: the struggle may be for a public order configured with the values of one belligerent rather than another. These differing perspectives about global order affect the perspectives of the enemy states about the law applicable to their conflict. But in all conflicts, it is evident that the belligerents are involved in a struggle for strategic supremacy – a more limited goal, but ultimately to be fleshed out with a claim for public order, achieved if need be through coercion, or war. They may be involved in a struggle for resources.

The notion that weapons may be distinguished and some identified as “offensive” and some as “defensive” is under the best of circumstances ambiguous, and not a principle that controls the use of weapons. Military doctrine distinguishes offensive and defensive warfare, but the military commander, for reasons of exigency or choice, will use those weapons he believes will achieve the military object. That object involves the military attack, acquisition of enemy positions or territory, or destruction of enemy forces, positions, capabilities or logistics.

Self defense does not escape the element of normative ambiguity: the facts and applicable norms are facts that may be difficult to adduce at the time of action, and norms or law that is expressed in general terms as is found in the United Nations Charter. There are no common law courts to work through a practice and tradition to make these fully manageable either as sources or the control of law. Accordingly, much depends upon judgment and the reasonable exercise of discretion. Rules of engagement, principles relating to the introduction of force, principles concerning the just war, and principles relating to reprisals have in common check points for the commander or decision maker. They are not compulsory but are only aids to the stages employed in exercise of discretion or judgment.²⁶ Acts to use force have decisional components and appear in analysis as a stream or flow of decision; hence going to a court to have it rule with finality about an element in the decision has an element of unreality that ignores the "fog of war."²⁷ It runs counter to the development of law from dynamic situations and aimed at future dynamic situations. Law for such purposes tends to develop against a larger array of facts to some extent similar to those that the legislator must face.

Neutrality, The Public Order and Belligerency

The perspectives of states in their recourse to the use of force fall within the framework of attitudes toward coercion.²⁸ These perspectives have been amply considered by other commentators.²⁹ The fundamental perspective is concerned with the protection of the existing public order, or toward the promotion of public order for the future that will afford greater security. This perspective is adopted in the claims of all participants during belligerency, including neutrals.³⁰ The interaction of the issues of economic warfare with these objectives raise a variety of problems in blockade, contraband, belligerent occupation [for economic purposes as well as for political purposes, or strategic purposes], and the expanding right of angary.³¹ Resort to reprisal, a separate but subordinate instrument of coercion, is subject to the same policy considerations. It is an instrument under which agents of warfare, or methods of warfare, otherwise impermissible, are permitted in response to the first use of such agents or methods by the enemy.³²

The claims relating to neutrality have a direct bearing upon economic warfare: belligerents that claim a right to interfere with or stop the flow of goods from neutrals raise issues as to the neutral behavior of states that are not participating in the conflict. Differences relating to the policy of neutrality have led to qualifications regarding the neutral's position. McDougal and Feliciano refer to a variety of terms, conveying a variety of policy implications, now adopted to refer to neutrality. They mention "non-belligerency," "status of nonparticipation,"

“absolute neutrality,” “differential neutrality,” “qualified neutrality,” “benevolent neutrality,” “permanent neutrality” and so on.³³

States insisting that they are neutral have adopted terms of this nature because they have perceived a change in the nature of belligerency in current practice: states that they believe to be aggressors are not entitled to the full benefits of neutrality, so that they decide for themselves that certain freedoms will be taken with regard to the application of the laws otherwise restraining neutrals in their trade. But the larger impact of perspectives also applies: the neutral states are claiming the inclusive rights of states to all of the freedoms of the use of the seas and perhaps of air space [and in the future outer space], while the belligerents are claiming the exclusive rights to enclose areas of the seas and so on in which they will be conducting hostilities and as to which they will not be responsible for harm or damage caused to those that are not so engaged.

It is evident that the changes in perspectives have an impact upon what is tolerated, and thus upon the emerging law relating to neutrals. So the bases of power of the states involved are significant factors. McDougal and Feliciano appropriately quote from the Norwegian historian, Orvik to this end:

The outcome of the struggle to establish such a *modus vivendi* [between belligerents and neutrals] has at all times been entirely dependent upon the economic and military strength, the strategic position and the perspicacity and persistence of the two sides. In short, the rules of neutrality are products of two forces pulling in opposite directions, the final result being determined by the relative bargaining power of the parties.³⁴

In the comprehensive framework adopted by the two authors, the strategies for asserting and protecting the claims of the two sides, and the conditions under which the claims are made are adduced. Among the conditions mentioned are the differing demands and perspectives about global order and its future, the character and technology of violence, particularly with the appearance of the thermonuclear weapons, and the economic and social values of the various participants that form the major stakes.

Additionally, the context of the claims process is considered. Questions raised include those such as the authority of a minimum order to be shared by all sides and from which authority relating to hostilities and regulation of those hostilities emanates; how minimum order is implemented to achieve international security in the interests of all states in the global community; and questions relating to the expectations of states about the effectiveness of collective security. These questions are important in the context of the applicable law, and in appraising the changes occurring in the “traditional” law. States are believed to share common objectives toward reaching minimum order, and toward minimizing the destruction of values. These perceptions appear in turn in their law, in such concepts as the principle of military necessity.³⁵

In invoking the instruments of war, states, in general, seek to satisfy the law of war. Not only must the instruments satisfy the existing community standards, but because the policies they embody are future-oriented they are likely to contain expectations of an emerging law. The logic of the changing law is to be found in the gradual growth of global public and legal order, so that neutrality is subordinated to the expectations that a public order hostile to aggression will be served. This was the logic adopted by the Attorney-General of the United States in defending the neutrality position of the United States favoring the allies against Hitler:

It is the declared policy of the Government of the United States to extend to England all aid "short of war." At the same time it is the declared determination of the government to avoid entry into the war as a belligerent. . . . Events since the World War [World War I] have rejected the fictions and assumptions upon which the older rule rested [i.e, the rules of the Hague Convention on Neutrality]. To appreciate the proper scope of that doctrine of impartial neutrality we must look to its foundations. Its cornerstone is the proposition that each sovereign state is quite outside of any law, subject to no control except its own will, and under no legal duty to any other nation.³⁶

The United States put forward a new category "in which certain acts of partiality are legal even under the law of neutrality."³⁷ This introduces a new perspective into the law of force. An international breach of the peace under this view is a matter that concerns all states in large measure because they have adopted a global organization and a global process to achieve global order that reflects their community.³⁸ But Jackson's perspective makes it a right of all states to act with force if they can show that they are involved in the maintenance of international peace and security, and that global or collective efforts to do this were unavailing.³⁹ It entails the element of the "just war" - a notion that is linked to the public social and legal order.⁴⁰ Moreover, his is a perspective that contains higher expectations of law, and the legal and global order than we have of the behavior of states and their elites. In any event, his claim can fall back on necessity, the conditioning factor as to all international law, and upon which states are compelled to rely when their order breaks down.

Jackson thus joined those who supported a higher degree of freedom for the policies and decisions of states that claimed they were neutrals, enabling them to take actions that in an early tradition would have made them belligerents.⁴¹ Jackson found that the neutral state must meet the higher law requirements of the public order itself:

A system of international law which can impose no penalty on a law-breaker and also forbids other states to aid the victim would be self-defeating and would not help even a little to realize mankind's hope for enduring peace.⁴²

Additionally, this is a concern with the permissibility or lawfulness in resorting to coercion, whether that coercion be exercised by military measures, or by economic instruments as considered here, or otherwise.⁴³ The naval officers and those in their line of command as servants of their governments have similar concerns. The uncertainties of law and the appearance of law often in a formative stage make the issue of permissibility a complex one, so that all states, belligerents and neutrals alike, traditionally claiming a wide degree of independence, or absolute "sovereignty", particularly during belligerency, tend to claim that the law is controversial and that their actions are lawful.⁴⁴

Secretary of State Kellogg observed in connection with neutrality and the Kellogg-Briand Pact that we would not abandon our claims to self-defense, so that responses to aggression became the basis of global standards regarding the use of force:

There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action. . . . Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.⁴⁵

Kellogg caught many of the main themes of community principle: self-defense was an inherent right among states never to be suspended and preserved under overriding customary international law; definitions of self-defense were self-defeating because the subjectivities of states in their perceptions of aggression targeted against them tend to be overriding yet unique; wars were not eliminated by documents such as the Pact but only shifted to issues of aggression, and so on.⁴⁶

Section 233 of the United States Navy manual, the Law of Naval Warfare, declared that states may relinquish their claims to neutrality when they enter into security agreements:

The right of individual and collective self-defense established by the Charter of the United Nations may be implemented by regional and collective self-defense arrangements. Under these arrangements the possibility of maintaining a status of neutrality and observing an attitude of impartiality depends upon the extent to which the Contracting Parties are obliged to give assistance to the regional action, or in the case of collective self-defense, to the victim of an armed attack. The principal effect of regional and collective self-defense arrangement is to transform the *right* of the parties to assist that State suffering from an armed attack into a *duty* to assist a State attacked.⁴⁷

And the overriding impact of the discretionary element exercisable when threats intensified was noted by the American writer, Hyde:

Realization of the fact that under certain conditions non-belligerent states may be disposed, for good or bad reasons, to ignore what the law of neutrality may normally exact is perhaps of greater importance to the members of the international society than close appraisal of what the law of neutrality as such permits or forbids a neutral to do with respect to the conflict that is waged around it.⁴⁸

Economic warfare strategy partakes of general military and maritime strategy. Reliance on economic warfare to supplement other methods of warfare has been largely vested in the maritime states, but this is likely to change as states turn to strategic bombing for destroying each other's economy. But generally speaking there is a distinction between land and sea powers:

. . . there is an enduring geopolitical difference between land and sea that affects importantly how man thinks about his natural habitat, the land, and an environment that is fundamentally hostile to him, the sea. The natural condition of the land is to be politically controlled. . . . The natural condition of the sea, in sharp contrast, is to be uncontrolled.⁴⁹

The maritime strategy of the United States has evolved over the years with changes in perspectives, in national interests and goals, and in the needs of the nation with regard to its relations with other states, especially allies. But a set of common themes prevail in all of the versions: the major task in command of the sea remains the protection of communications, a defensive task, and maintaining control of the sea for the protection of the nation, an offensive task. The notion, often advanced as propaganda and ideological strategy, that there are differences between weapons, some of which are identified as offensive and some defensive, thus becomes meaningless when states are engaged in actual combat.⁵⁰ The differences are those of the military commander's action and intention, and he may use the same weapon for either purpose:

Elimination of offensive naval force from the National Military Establishment would permit us only a limited use of the seas at the cost of continued, unremitting, defensive efforts, and it would completely destroy the capability which we now possess of using the seas for offensive operations and as an area under our control from which to project and establish elements of the army and air force on the Eurasian continent. The elimination of offensive naval power throws away at one stroke a major component of our greatest strategic asset which is our capability of exploiting the elements of mobility, concentration, surprise, and economy of force.⁵¹

This position was not changed by subsequent reports by authorities in charge of naval forces. Stress was given to new elements such as strategic deterrence,

but sea control and projection of sea power remained, and these are strategies that cross over the strategies of economic warfare. To achieve those ends, a maritime state needed to have superiority in naval force whether for sea control, power projection, strategic deterrence, or combat. It would demand flexibility to reach new threats to the maintenance of stability and to the containment of crises. The forces themselves could not rely on a substantial reserve of forces, hence they required a readiness in being. Admiral Watkins remarked:

Perhaps most importantly, naval forces have unique escalation control characteristics [a major element of deterrence and prevention] that contribute to effective crisis control. Naval forces can be intrusive or out of sight, threatening or non-threatening, and easily dispatched but just as easily withdrawn. The flexibility and the precision available in employing naval forces provide escalation control in any crisis, but have particular significance in those crises which might involve the Soviet Union.⁵²

The strategy of the Soviet Union, according to the Department of Defense, is said by the Soviet spokesmen to be a strategy of military sufficiency. A major shift in Soviet strategy is said to have occurred, because the stress is upon the decision and upon the political dimension and no longer a military strategy [whatever that means]:

Security in the nuclear age must be evaluated differently. Assessing security is more and more becoming a political task. It can only be resolved by political means through detente, disarmament, strengthening confidence, and developing international cooperation.⁵³

Maritime strategy, through rules of engagement and through doctrine, interacts with law and policy, each affecting the others. A nation's strategy, doctrine and statements about the military art might thus be combed for its attitude toward law, particularly because that attitude must determine what the perspective about the legal order itself will be. The United States maritime strategy in its most recent version was placed by Admiral James D. Watkins into the larger context of the national military strategy:

Our national military strategy is designed: to preserve this country's political identity, framework, and institutions; to protect the United States, including its foreign assets and allies; to foster the country's economic well-being; and to bolster an international order supportive of the vital interests of this country and its allies. To achieve these ends, our national strategy is built on three pillars: deterrence, forward defense, and alliance solidarity.⁵⁴

This is a maritime strategy that is to be distinguished from our major rival, the Soviet Union, compelled by geography, military experience and predilection to adopt a land-based strategy. Watkins argues that the navy's importance tends

to grow during times of limited conflicts, providing, as it does, major support to the actions of the nation's strike forces. Hence there is a need for a versatile array of naval forces, and continuous adaptation to new methods of warfare and new targets calls for a navy commensurate with the nation's global interests.

Admiral Watkins' reference in his statement to the preservation of the nation's "economic well being" indicates the expectation that economic strategies of warfare promoting the nation's economic strength and weakening that of the enemy are among those that will be adopted and given major attention. And like the other strategies, effective economic warfare, and the capabilities to exercise such warfare, are aimed at deterrence – a major element in maintaining the well-being of the United States and its allies, and stability with others. Deterrence calls for costly investment in capabilities and readiness, yet it remains the key to what assurance we can have to prevent aggression. We are compelled to conclude that our naval forces call for independent assessment as to needs, missions and capabilities, and unlike most other armaments fail to lend themselves to arms control equilibria or the balancing among equals simply because the states involved have differing interests. It is possible, but subject to speculation, that the rules identified with arms control and which make it effective need to be adjusted.⁵⁵

The law relating to economic warfare emerges from the practice and strategies of states with respect to the economic measures they have adopted, or the attacks they have mounted against the economy of the rival states.⁵⁶ This law is affected by the changing practice and perspectives among states with regard to belligerency and neutrality.⁵⁷ In both World Wars, the appearance of new methods of warfare had their impact upon neutrals, notably in the creation of war zones, the attitude and extent to which minefields were laid, and the claim of belligerents to sink at sight both enemy and neutral ships. With these changes in the law, states also tend to adopt new attitudes toward enforcing the law: reprisals, for example, for violations by belligerents of neutrality or reprisals by neutrals, are determined by the law itself, while reprisals are actions that affirmatively promote the law, and a changing or emerging law makes this a complex policy problem.⁵⁸

Such changes also had their impact upon the judgements of the prize courts, and therefore to the law developed through the application of principles and judgment. But these courts have perspectives of their own, and for a period during the first World War some of these courts, under the leading prize court judges of Britain, attempted to fit the new practices into the existing law, and ultimately these cases facing the realities of change were overruled.⁵⁹ The problem that the prize court judges faced was summed up by Commissioner Nielsen in the *Oriental Navigation Company (1928)*:

Custom, practice and changed conditions have their effect on international law as well as on domestic law. However, . . . a violation of law is not equivalent to a modification or abolition of law. The fact that new instrumentalities of warfare make it inconvenient for a belligerent in control of the sea in a given locality to act in conformity with established rules of law does not ipso facto result in a change of the law or justify disregard of the law.⁶⁰

Economic warfare may involve methods that are accompanied by the use of force, or by the threats to use force, or they may be used with the intention that they are intended to persuade the enemy to take certain actions. During warfare, the economic strategies are usually accompanied by the use of force, and that use is appraised against the standards of military necessity, the responsibility of states to avoid unnecessary suffering, to avoid excess in the use of force, and therefore meet the standards of proportionality. Accordingly, the strategy of economic warfare may be assessed as to the legality of the strategy that does not resort to force or threats of force may be treated as an unfriendly act. In those situations, the state resorting to such a strategy has a far greater freedom to act, and far more discretion than does the state that resorts to force or threats of force.

State practice in World War I shows the impact of belligerent practice in changing the written, conventional or treaty law. The United Kingdom and other belligerents in that war set aside the Declaration of London. And the British Government through a series of Orders-in-Council adopted one that was aimed at justifying reprisals themselves.⁶¹ The "reprisal orders" were said to be a response to German submarine attacks, and though not permissible under prevailing law were justified under special circumstances as an exercise of "an unquestionable right of retaliation."⁶²

The same period provided us with state practice concerning the changes occurring in the prize courts relating to contraband and other issues relating to the modalities or tactics of economic warfare. This practice leads us to the realities of state application of law: belligerent states tend to find the law controversial, and therefore they are eased into interpretations to their own liking, and states involved in wars of highly intensified violence tend to find much of their law inoperative. We might expect that this may occur with the provisions of the United Nations Charter.⁶³

Traditionally, economic warfare is perceived as conduct during armed combat - acts that supplement the military actions, whose law evolves from belligerent practice and hostilities. But such acts, though not usually referred to as economic warfare, occur during peacetime by way of reprisals or retorsion, and though both persuasive and coercive, do not depend upon the use of force. Examples of this kind might be found in the Cuban- Missile Crisis where the quarantine was adopted to avoid the stigma and functional features that would have made up a forcible blockade - prohibited under the United Nations Charter among states in peaceful relations. A further example may be found in the ambiguous

situations currently involving the United Nations stand against Iraq, where the economic sanctions are purportedly those directed by the Security Council of the United Nations, again short of war.

Economic strategies operable in peacetime have received less attention. Although such strategies may not require naval forces, the strategies themselves deserve brief mention. Where a nation's strategic bases of power include its assets and resources, its organizational base and the morale of that base, and the values they prize and commitments to those values, it is evident that economic persuasion and coercion in peacetime may be essential to shape a rival toward comparable values. The strategic element arises because states seek to deter, or to prevent, other states from becoming a threat, and because they can readily see the economic base of power becoming the base for other states to become a rival military power.⁶⁴ This perception imposed upon the current problems of the Soviet Union is recommended as a moderating element in the rush to assist that state before it shows the willingness and ability to shift toward democratic processes and institutions.⁶⁵

Reprisals affecting neutrals invoked by the British during World War I, commencing with the Order-in-Council, March 11, 1915, are illustrative of the actions taken to restrict German trade and commerce. However, as Schwarzenberger has pointed out, reprisals, intended to promote lawful conduct may turn out to be altered when the belligerents take on themselves the standards of application:

In a language which applies as much to the application of indiscriminate reprisals as to the pleas before the British-United States Mixed Claims Commission, Commissioner Pinkney pointed out: "If a belligerent is empowered by the law of nations to seize the property of neutrals upon its own terms whensoever that belligerent shall believe or affect to believe that by such means its enemy may be annoyed or reduced, few nations would choose to remain neuter." Once discretion is exercised so widely, the alleged rule "will be applied in practice upon false as well as mistaken grounds."⁶⁶

This was exactly what happened in both World Wars, and even neutral Powers which went to war for the revindication of the rights of neutrals, as belligerents swiftly changed their tune. Moreover, in both these wars, the major victorious Powers greatly benefitted from the law as they had shaped it and saw little reason why they should champion a return to the traditional law.⁶⁷

Thus, the strategies of states in past armed conflicts, and in "peacetime" as well, have included the economic instrument: i.e., states may be able to reduce the financial or trade flow to rivals through effective measures in such institutions as the GATT or IMF. The strategies may therefore be aimed at either material resources or at services relating to the economic process or both. They may be unilateral or coalition strategies. While the stress here is economic warfare at sea,

particularly upon blockade, the strategies in the larger sense would include a variety of measures intended to weaken the economy.

According to Medlicott in the foremost study to the economic warfare carried on in the first World War, the "official definition" or conception of economic warfare adopted by the British Committee of Imperial Defence on July 27, 1939, extends beyond activities involving the goods or services of trade and commerce to the strategic targets that lie in the industrial base of the enemy, i.e., industrial facilities and even the working population that is employed by them:

The aid of economic warfare is so to disorganize the enemy's economy as to prevent him from carrying on the war. Its effectiveness in any war in which this country may be engaged will vary inversely with the degree of self-sufficiency which the enemy has attained, and/or the facilities he has, and can maintain, for securing supplies from neighboring countries, and directly with the extent to which (i) his imports must be transported across seas which can be controlled by His Majesty's ships, (ii) his industry and centers of storage, production, manufacture and distribution are vulnerable to attack from the air, and (iii) opportunities arise from interfering with exports originating from his territories.⁶⁸

Medlicott noted that economic warfare is broad, expanding and flexible in nature, and includes "all economic activities which directly or indirectly further the war effort of a belligerent," and that this was the usage of the United States after Pearl Harbor.⁶⁹ He then pointed out:

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.⁷⁰

In assessing the effects of the economic warfare, Medlicott noted the staying power of Germany in World War II, its use of resources from captive nations, its ingenuity in finding substitutes, but also the growing gap in production by the allies when production was compared with Germany. Nevertheless,

The picture was of an economy achieving with difficulty the demands of a supreme war effort, with too slight a reserve of human or industrial resources to achieve much more. Raw material shortage seemed to be the main handicap to economic expansion, and certainly the one most vulnerable to economic warfare attack; it was necessary, therefore, to relax none of the existing forms of pressure

on the neutrals, and also to ensure that Germany found no escape from her difficulties by other means. . . .⁷¹

The strategies employed in war are affected by changes in the methods of warfare, the introduction of new military technologies, and by the appearance of new weapons.⁷² These changes all have their effect on the law, because each of these must be assimilated under that law, or the law must render them impermissible. Moreover, neutrality itself has been affected, as is clear from the introduction to this paper, and that has in part been the result of the independent authority among states to determine when war has broken out [hence to determine its neutrality or other relations it might have with the hostile states], and which side might have been acting unlawfully [hence the determination of whether the “neutral” state can refrain from aiding the aggressor, or afford discriminatory and privileged support to its victim].

The strategy of economic warfare as set down by the British government suggests the growing magnitude of the strategy in a major war:

1. To prevent the two enemy dominions [Japan and German] from establishing economic exchange by blockade running; still more, of course, to prevent their opening regular communications by land or sea.
2. To develop the increased possibilities of economic pressure on the neutral border States adjacent to German Europe and on Vichy French colonies to the fullest extent which the military situation permits, with a view both to obtaining supplies and to denying to the enemy resources which are becoming more than ever essential to him.
3. To develop within occupied countries both in German Europe and in the Far East all forms of passive and active resistance to economic exploitation.
4. To develop methods for directing against the increasing weakness of Germany's war potential attack from the air which shall really be effective.
5. To devise combined operations against the most important accessible economic targets in enemy-occupied territory and against his lines of communication.
6. To defend important sources of supply and access to them, including the supplies of South America.⁷³

Further complications arose after the major wars with the United Nations Charter, because the Charter provides for the Security Council to have primary – actually exclusive – authority with regard to matters relating to the maintenance of the peace, or with regard to aggression. Once seized of the matter and once it proclaims the enforcement decisions and actions to be taken, all members of

the United Nations will, unless excepted [which is unlikely], be included in support of the United Nations action.⁷⁴

And other complications arise with the advent of the United Nations with regard to interpretation of critical language, such as that concerning “armed attack” as used in Article 51. Because war is outlawed, but aggression remains a reality, the states have been compelled to shift their vocabulary to fit aggression and self-defense into concepts for a regulatory process, and they have built upon their experience in formulating the laws of war. Here again the determination or appraisal of facts indicating an “armed attack” must be that of the victim state or the state that might be involved in what it claims to be a response by way of self-defense to an armed attack, subject to broad standards as to making that response, and the force that it is using.

Accordingly, we have seen the rise of new claims as to the policy or content of neutrality: non-belligerency, non-participation, and non-alignment, adding further ambiguity, functional in nature and in their differences, and indicating relationships with all or some of the belligerents not to be governed by the traditional rules of neutrality. The impact upon the tactics, or modalities, of economic warfare at sea has been felt, commencing with the renunciation during World War I of the application of the Declaration of London, 1909. Events had by then already indicated that new methods of warfare and new claims of the belligerents overrode the rules laid down in that Declaration. Had it remained in force, it would have led only to confusion about the standards that govern legitimate reprisals, and the tendencies clearly shown in the second World War for states to talk past each other, claiming reprisals and counter-reprisals to cover all of their attacks regardless of target and the force applied.

Changes occurred also in the geographical features that affected neutral states. The global reach of major wars led to the claims of states, separately and as part of the regional groupings, to freeing adjacent seas, extending far into the high seas, from the presence of belligerent naval vessels. This was illustrated in the Declaration of Panama in 1939.⁷⁵

In addition to these political and legal implications, the strategies of economic warfare are determined by whether they rest upon coercive techniques or persuasive techniques, or mixtures of these, and they may be used concurrently or separately. But during wartime, the strategies are imposed primarily through coercive measures that include the concurrent resort to force or threat to use force. The law relating to coercive strategies or strategies that depend ultimately upon the use of force operates through the standards of reasonableness: necessity, proportionality in the use of force, attack on legitimate military objects.

Economic deprivation strategies such as those mentioned here may be refined substantially in the future so that they, operating under the familiar principle of economy of force [or of resources committed to actions against a rival], will become more effective. Further refinements may be expected to arise from

reaching deep into a rival's economy, attacking the industrial base, the logistics and transportation facilities, and even the civilian population engaged in military production. This was the expectation associated with city strikes during the second World War. Hence it is stressed here that these strategies affect the emerging law, giving it content, and they are assessed under the law relating generally to the exercise of coercion.

The "sources" of the law applicable to economic warfare include the customary international law, a law that is dynamic and is responsive to continuing change in state practice; treaties such as the Declaration of London, 1909,⁷⁶ that apply now only to the customary international law they embody; the various instructions and navy regulations;⁷⁷ law of war manuals and rules of engagement which, though not among the formal sources, are the evidence of the law, and reflect the practice of states.⁷⁸ General principles assimilated by the Prize Courts, to wit, the municipal courts designed to resolve issues relating to contraband or other non-neutral conduct of neutral states, may also be included. Documents and a careful inquiry into this subject is provided by such writers as Carlton Savage, with his two volume work for the Department of State extending into World War I.

While definitions of economic warfare have already been given, and none are universally accepted, it is evident that the conception to be usable must be functional. A general conception of economic warfare embodies measures taken to reach the economies of other states, is the outcome of strategies used by states to influence, alter or control the decisions or policies of an adversary or aimed at neutral states that might be providing economic assistance to an adversary. Such warfare, during armed combat, is supported or promoted by military measures, especially by the naval forces. The methods and strategies used are controlled under law, but they also promote or give policy content to the law, operating to make it effective. Whether perceived as a strategy by policy or decision makers in general in pursuing their goals, or as a strategy by the military force and especially the naval forces acting in the operational dimension of hostilities, economic warfare is judged under legal standards of reasonableness and effectiveness.

The law of economic warfare is a continuously emerging law, drawing upon the changes in the relations of states, upon the technologies that affect their war-fighting capabilities, upon the national power that underpins their strength, and upon the changes that are occurring in the conduct of hostilities. The strong trends in this law include the trends reflecting a changing law, changing with the belligerent practice among states, and the changes imposed through technology, and its impact upon the conduct of hostilities. These changing trends have shown their impact upon the law relating to contraband, the doctrines of ultimate voyage and continuous voyage, practice relating to navicerts and other administrative measures, and blockade.

Major studies have been concerned with domestic legislation alone: the history and emergence of neutrality in the United States, the legislation adopted, and the changes to that legislation trace political perspectives that replaced the notions of “neutrality” with “non-belligerence,” “non-alignment,” and so on. Such features as state-trading and the peculiar claim of exemption of such trading from the usual practice and law with regards to neutrals have gradually vanished as naval warfare became a global activity.⁷⁹ Where however the tendency might be to maintain the traditional law on the books, it is likely that the changes will be made either through resort to the claim of reprisals, or through outright violation of the law.⁸⁰

According to Alford, economic warfare is “material resource” warfare.⁸¹ He refers to such warfare as

. . . intentional disturbances of the flow of material resources among people and of the processes by which these resources are used to produce values. Under the rubric “modern economic warfare” are embraced such apparently disparate practices as the preemption of scientific knowledge and skill to deny them to an adversary and interferences with the transport of materials such as nuclear and biological weapons, not regarded as wealth in a conventional sense.⁸²

Julius Stone has pointed out that the economic warfare and the expectations of states that engage in it have changed with the experience during conflict. Napoleon attempted to ruin Britain commercially by attacks on British maritime commerce, and did not succeed. He was faced with British naval power that made his efforts fruitless. The link was made by early commentators between maritime commerce and the need for a navy: Mahan is cited as an authority for the claim that without maritime commerce, there was no further interest for a nation to protect, hence no need for its navy. But Mahan was inconsistent in these views, because he subsequently discovered the need for naval power to reduce a rival’s war fighting capabilities both at sea and in general. Shifts in perspectives ranged from those who claimed that economic warfare was to claim the wealth of a rival, and those who viewed such warfare as a strategic enterprise, affecting its war capabilities.

Some of the military changes appeared with the emergence of submarine and air warfare applied to maritime commerce as well as to its protection. Attempts here, under law to regulate such military actions, led to a general breakdown in the agreements relating to both, and states, though they tried in 1923 to reach a convention for air warfare, were unsuccessful, and none has yet been achieved. The demands of humanity were in large measure overridden by the demands of military necessity, as the attacks on the *Lusitania* and the *Sussex* were to show during the first World War. The Nuremberg Trial of Admiral Doenitz finding violations of law but refusing punishment was unable to clarify the matter. The Court said:

In view of all the facts proved and in particular of an order of the British Admiralty announced on May 8, 1940, according to which all vessels should be sunk at sight 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 on Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.⁸⁴

Alford believes that economic warfare is waged during periods of "general military stalemate." The emerging perception however is that economic warfare may be characterized as a form of economic coercion, and the effectiveness of coercion may arise from the economic "disturbances" alone, or through the parallel or simultaneous exercise of military coercion. But Alford correctly perceives that coercive economic practices may be invoked during the lesser wars or hostilities of violence that has not reached the high intensity of a major war. Moreover, it may be an instrument that can be designed to vary the coercive element. The state invoking economic warfare may be able to avoid escalation in the intensity of coercion, perhaps simply threatening its adversary with military force not invoked. In doing this it has an instrument that may be less costly, more efficient, and more effective especially in terms of political goals that follow the confrontation, and more flexible in terms of the diplomatic or ideological [including propaganda] options available to it. At the time this paper is being written, this is one of the elements still available for the United States and others, acting pursuant to a coalition formed under the auspices and mandate of the U.N. Security Council.

Alford also suggests that if states, like the United States and the Western democratic states, are to have the advantage of the economic instrument of coercion, they must have the appropriate power base within the government to provide for a professional and continuing inquiry into invoking it. This at present is lacking. Like other policy instruments at our disposal, the instrument gains effectiveness through close inquiry and attention to its use, and to inquiry into the use of such techniques by others against us. Alford's text is then an attempt to strengthen the coercive economic instrument through a framework of inquiry addressing a process of claims and counterclaims among states including the working of that process within the government and its own cadres.

The larger context in which the instrument is involved extends to the persuasive economic instrument, so that the nation would seek to persuade allies or friendly states, and even, when the occasion demands, use persuasion with or in place of coercion with regard to rivals. But the usual context for economic warfare is that of the use of a coercive instrument, and its effectiveness is determined by the extent to which the flow of material resources of an adversary have been impaired, the duration of that impairment, and the elements in the economic process that are affected.

The economic sanctions of the Security Council against Iraq [commencing in 1990] were all-inclusive. It was expected that through such sanctions, sufficiently and intensively imposed, Iraq would meet the terms imposed by its adversaries without an outbreak in war. Hence, while the tendency has been to step aside from describing the situation as one of armed combat or war, the use of sanctions are used as if a war had been declared between the parties. It is evident that the use of such measures are permitted through the United Nations Charter without regard to ascribing the element of war, but it is also clear that Iraq has seized the territory of Kuwait through aggression, and that continued possession of that territory adverse to the legitimate government and to the global community at large constitutes a continued aggression. Accordingly, the states involved can invoke collective self defense where Kuwait has called for assistance, and, according to some views, they might claim self defense itself. The claim of self-defense however would require a clear showing that Iraq's action was aggression against their "political independence", "territorial integrity", or against the objects and purposes of the Charter.

The coercive element in economic warfare directs us to the action element, but the design and use of economic warfare techniques lead to modifications in the law. It is evident that with changing methods of warfare and therefore changing tolerances about the attacks that are made and the weapons used, the law will be affected. The law is largely shaped by how states behave in their recourse to coercion. Coercively oriented, the economic warfare is aimed at resources, but more directly according to Alford at creating "psychical disequilibrium in the power elite of the adversary." He cites Liddell Hart as describing this "as the sense of being trapped."⁸⁵ Effective use of economic warfare is characterized by a reaction in the target elite or adversary in which it accepts demands before the situation deteriorates. This of course is the expectation in imposing such sanctions on Iraq in the current crisis. Nonetheless, economic warfare alone is insufficient to force major policy changes: military power is almost always required.

Numerous other correlations of economic warfare tactics and the traditional tactics in the use of military force could be mentioned. These serve us here to freshen our perceptions about the application of the principle of economy of force, of, perhaps, the various law of war principles, applied however to the economic warfare techniques, the need to select target elites with care, and to determine as far as possible the effectiveness of the technique in achieving results. Economic warfare when coupled with the activities of irregular or guerrilla forces, or in the context of limited or regional wars, raises problems that are not addressed in this paper.

The attempts described in this paper to balance out opposing principles, one favoring the command and freedom of the seas, and the other favoring the claims of belligerents to deny commerce with their rivals creates the primary difficulties

for laying down the principles of economic warfare at sea. This balancing of principles is given added complexity under the strategies of states, because economic warfare may only be a strategy to deny a rival belligerent essential goods, or it may be a larger strategy, such as that aimed at opposing its war-making powers or capabilities. In the second perspective, which as shown earlier was adopted in World War II, the larger economic strategy combining military action and the goals of destroying the economy led to strikes at the cities and urbanized areas, at industrial and economic targets, and even the populations that service these targets, as well as the traditional strategies of reaching commerce on the seas.⁸⁶ The economic strategy was thus the underpinning for the methods of economic warfare, one being used to justify the other.

Much of this is put by the commentators at the turn of the 20th Century. Captain Mahan in a familiar passage puts the argument for a strategy of economic warfare that is aimed primarily at reaching commerce and trade:

The history of Sea Power is largely, though by no means solely, a narrative of contests between nations, of mutual rivalries, of violence, frequently culminating in war. The profound influence of sea commerce upon the wealth and strength of countries was clearly seen long before the true principles which governed its growth and prosperity were detected. To secure to one's own people a disproportionate share of such benefits, every effort was made to exclude others, either by the peaceful legislative methods of monopoly or prohibitory regulations, or, when these failed, by direct violence. The clash of interests, the angry feelings roused by conflicting attempts thus to appropriate the larger share, if not the whole, of the advantages of commerce and of distant unsettled commercial regions, led to wars. On the other hand, wars arising from other causes have been greatly modified in their conduct and issue by the control of the sea.⁸⁷

Thus belligerents, under current conditions seek through superior seapower to stop entirely the trade of their rivals with others, ensuring, they believe, that these goods that would serve the war effort once denied will have an important impact upon weakening the capabilities of the rival. But in shifting to the *war fighting* capabilities, they have also shifted their perspectives toward a strategy that acquiesces in targeting economic and industrial targets through air strikes. In the past, their objectives were more materialistic and less strategic, because they then sought to acquire the fruits of that commerce in order to benefit from the goods acquired and not made available to their rivals.⁸⁸ Mahan supports resort to "history" and the past practice of states in naval warfare, but argues that changes in naval warfare are such that "theories about the naval warfare of the future are almost wholly presumptive."⁸⁹ He refers to the shift for example in naval armaments: the "powers to injure an enemy from a great distance, to maneuver for an unlimited length of time without wearing out the men, to devote the greater part of the crew to the offensive weapons. . . ."⁹⁰

Sergei Gorshkov, Admiral of the Fleet of the Soviet Union writing in the middle of the 20th Century, uncovered interests of his country in a naval force. Foremost in these interests he included the resources of the seas, and the traditional uses. But “the main goal” for building the Soviet or communist naval forces lies in building up communism:

For the Soviet Union, the main goal of whose policy is the building of communism and a steady rise in the welfare of its builders, sea power emerges as one of the important factors for strengthening its economy, accelerating scientific and technical development and consolidating the economic, political, cultural and scientific links of the Soviet people with the peoples and countries friendly to it.⁹¹

Building on this theme throughout the book, Gorshkov in the conclusion turns the Western theme back upon the Western states by insisting that it is not they who are expansionist. The imperialists are pressing expansion. The competitive arena into which naval forces must be introduced lead to:

A new stage in the struggle to divide up and take over the oceans for economic and military purposes may now be observed. The World Ocean is becoming the object of a kind of expansion by the imperialist states. It is obvious that in this struggle navies, as an instrument of policy, will occupy an important place⁹²

Admiral Gorshkov has thus proved to be fully capable of handling the political, polemics and dialectics of his civilian counterparts, and thus, presumably, able to woo away sizable funds for the building of the Soviet navy. In two passages of related argument, he noted:

It is reasonable to consider that the totality of the means of harnessing the World Ocean and the means of defending the interests of the state when rationally combined constitute the sea power of the state, which determines the capacity of a particular country to use the military-economic possibilities of the ocean for its own purpose⁹³

McDougal and Feliciano and numerous other commentators have reviewed the tactics and program of economic warfare in detail.⁹⁴ They point out that three tasks are involved. First, the characterizing of the goods and perhaps services to be prohibited or controlled. This activity identifies contraband, involving an appraisal as to the relation of the goods to the military capabilities of the enemy belligerent, and the application of doctrines relating to contraband. [Services might include the commercial provision of information from satellites. Reaching the satellites would require either ground, air or space-based interference, including the use of naval platforms for this purpose]. Second, stopping the flow of commerce that might increase the war potential or fighting capabilities of the rival, as well as the flow of neutral commerce in general. Third,

determining the disposition of the goods and the carrying craft, i.e., through destruction, condemnation, requisition or release [usually through the determination of the prize courts]. The modalities for conducting controls at sea extend from visit and search to certification of cargoes at their point of delivery or source or shipment. The modalities mentioned here tend to change, and significant change has an impact upon the law itself causing the parties to change or adopt differing perspectives about the applicable law. The modalities for imposing economic warfare through coercion at sea are supplemented by the use of aircraft and submarines and these have had a major impact upon the law and leading to frequent change in the applicable rules.⁹⁵

Appraising the impact of these activities, McDougal and Feliciano conclude that both belligerent and neutral states are in a process of claim that is advancing community standards. The primary objective for each is to minimize the destruction of values prized by the neutral and belligerents, and encompassed in the law of war under the principle of economy of force.⁹⁶

Detailed consideration here of the various activities and modalities must be followed in the writing of the commentators. But it is essential to bear in view the changing, dynamic nature of this form of warfare because of the new techniques of warfare, both in application and in weaponry, and the delivery of weapons, and because of the relations of the parties where they may maintain in parallel a considerable array of relations while confronting each other with imminent hostilities [as currently in the Middle East, the Iraqi crisis].

The rapid drawing down on reserves of resources or materials is another dynamic feature: many materials are in scarce supply, but are essential to effective war fighting with advanced technologies; some, like petroleum products, are vulnerable to attack and to denial through blockade, and are rapidly depleted by modern vehicles, aircraft and ships during the conduct of hostilities. Difficulties, and change in perception have arisen with regard to the goods that fall within contraband: early prize cases indicate that even foodstuffs contribute to the warfighting capabilities.⁹⁷

The overall framework of economic warfare is also affected by a change in the violence and extent of the violence: a shift from the major global wars of the first half of the century to wars more limited in every respect may lead to a differing balancing out of the principles, so that the neutral states are favored, and peaceful activities within the public order protected. Blockade is then metamorphosed into other configurations: the term "quarantine" was used for a specific activity of denying Soviet missiles to Cuba,⁹⁸ and the term "interdiction" by the United States and others, including the Security Council of the United Nations, to refer to the interceptions made with ships passing to and from Iraq.

Forcible blockades provide an additional problem: if the view is taken that the blockade may not lead to the destruction of ships, particularly those that are caught within the war zone where the blockade is enforced, then the use of

aircraft and submarines would be shackled.⁹⁹ Here we have a collision in the new methods of warfare with traditional attitudes about the character of the blockade and its effectiveness. Past practice suggests that in warfare the changes in the use of force are the dominant elements affecting the perspectives of belligerents and non-belligerents alike, in some measure because they reflect the changing and intrusion of the new military technologies and new organization of combat units to impose force, including the blockades.¹⁰⁰ Admiral Miller, quoting Lauterpacht, catches this factor:

Measures 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 blockade, namely that the belligerent who possesses effective command of the sea is entitled to deprive his opponent thereof for the purpose either of navigation by his own vessels or of convening on neutral vessels such goods as are destined to or originate from him.¹⁰¹

Of particular interest in the emerging law of economic warfare is the ease with which the belligerents have imposed their perceptions that the law must change with changing modalities or techniques of warfare, so that we find the use of force dominating such perspectives, and leading to change in such instruments as the Declarations of Paris and London. Similarly, national policy regarding the prosecution of the war dictated the attitudes, and affected the law concerning controls. Such law was most often the domestic statutory law, but the impact may be to remove goods from exemptions, or as public enemy property no longer protected by the Declaration of Paris.¹⁰²

The Declaration of London perhaps was weakest in denying Britain its most effective naval tactic in economic warfare. Captain Maurice P.A. Hankey, naval assistant secretary for the Committee of Imperial Defence, observed that this would require repudiation of the instrument, and that otherwise Britain would be unable to refine the notion of blockade toward true effectiveness:

[In the absence of the Declaration] In that case our obvious course, to be adopted as soon as the naval situation permitted, would be to declare a blockade of the North Sea ports, and simultaneously to make a sweeping declaration of what was contraband, including all the principal raw materials on which German manufacturers depend as well as her main articles of export. Neutral vessels would be rigorously held up and examined outside the Cattegat; the doctrine of continuous voyage would be rigorously applied; a system of agents in Swedish, Danish, and Russian ports would apprise us as to how trans-shipment was taking place and measures would be taken to deal with offenders.¹⁰³

Economic warfare is thus conceived as a part of a national strategy, and as aimed at strategic goals. Nations engage upon a strategy, or at times referred to as a "grand strategy" that provides them a framework for national purpose and

the exercise of national power, aimed at the optimization of values that they prize. A crucial element of each nation's strategy is aimed at protecting the nation and its values, and "interests" from the threats or attacks of others.

The United States and its allies cannot forego doctrine and a strategy aimed at countering as well as deterring aggression or threats of aggression regardless of source. For this reason, as well for the others stated earlier, the decline of the Soviet Union is not a sufficient reason for turning attention from the possible threats that might arise, particularly if that state under new elites in the future, or through chaos and breakdown, creates such a threat.¹⁰⁴ Soviet doctrine and concepts of the military art should be appraised to determine Soviet perspectives; rules of engagement, regulations, instructions for the men of the fleet, and so on, are not available, but would prove valuable if they are published. Nevertheless even without a comprehensive inquiry into all of the Soviet directives, it is unlikely that the Marxist-Leninist framework of reference will vanish, or that the United States would find it sufficient to relinquish caution in the future dealings.¹⁰⁵

Perhaps the major reason for avoiding the equalities and "stabilization" anticipated under arms control agreements when controls are to be imposed upon naval forces is that the interests of states that are land-based and those that are the maritime states, or "thalassocracies", differ in substance and need.¹⁰⁶ The United States has interests to protect in peacetime relating to its trade, allies, and interests not matched by the Soviet Union; its interests in the event of armed combat even with states other than the Soviet Union might include a refined development of economic warfare, its modalities, techniques and tactics.

These differences in the larger terms of reference found in the maritime strategy as a whole were raised and considered at the Adderbury Conversations on Naval Strategy and Arms Control July 30-31, 1988, and the United States position summarized in the first statements:

The Americans explained their maritime strategy in terms of the nature of Western forces, the nature of adversary forces and national strategic culture. United States maritime strategy (a) was a defensive deterrent against a threatening land power and (b) emphasizes coalition warfare. Forward positioning of forces was required by both of these factors.. It reduced misperception and contributed to stability as well as economizing on forces. Alternative strategies like direct defence of shipping were more force intensive. Once war begins, the American participants argued, maritime forces must be used offensively to be effective: the offensive was the stronger form of war at sea.¹⁰⁷

Perceived in this sense, a strategy includes the programs, plans and policy framework that provide guidance to the means that are to be adopted or refined to achieve the strategic goals. Tactics are therefore distinguished from strategy and strategies, because they are the instrumental, or operational, means by which

the strategic goals are to be attained. Economic warfare at sea comprises the national tactics, and the methods used are either for enforcement or as policy instruments or policy oriented strategies, subject to refinement and change, to achieve goals.

But why is the law of economic warfare subject to continuing change? Our analysis indicates that this is the result of the interaction of law and the policy instrument. Because the instruments of economic warfare are controlled under law, but they also are the means to strengthen or promote the law. It can be said that the tactics identified with economic warfare both promote the existing law and lend themselves toward shaping the content of the law of the future; the continuing change in the methods and tolerances regarding economic warfare thus leads to a continuing change and refinement in the law that is applicable.

Other factors in the application of the law relating to economic warfare should be mentioned. Recourse to precedents is a traditional factor of legal inquiry, but according to Mahan, of less importance to strategy:

It is not . . . a vain expectation, as many think, to look for useful lessons in the history of sailing ships as well as that of galleys. Both have their points of resemblance to the modern ship; both have their points of essential difference, which makes it impossible to cite their experience or modes of action as tactical *precedents* to be followed. But a precedent is different from and less valuable than a principle. The former may be originally faulty, or may cease to apply through change of circumstances; the latter has its root in the essential nature of things, and, however various its applications as conditions change, remains a standard to which action must conform to attain success. War has such principles; their existence is detected by the study of the past, which reveals them in successes and in failures, the same from age to age. Conditions and weapons change; but to cope with one or successfully wield the others, respect must be had to those constant teachings of history in the tactics of the battlefield, or in those wider operations of war which are comprised under the name of strategy.¹⁰⁸

Precedent in the law, especially when associated with war, has a differing operational position. Mr. Justice Rutledge, dissenting in *In re Yamashita*, pointed out that a war crimes trial, and its appeal in the United States Supreme court, was without precedent, and that the precedent not to proceed was of great importance. Seemingly alluding to the difficulty in the prosecution's getting a grasp on the operational, juridical facts, he noted:

Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution, keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice,

including this one, both in their own judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.¹⁰⁹

Hence the intermingling of precedent, strategy, tactics and an emerging law occurs in a dynamic framework of situations, affected by rapid change in events associated with warfare and its technologies. This perspective has been caught with regard to submarine warfare in general, and is applicable to the development of such warfare for economic warfare:

There is no guarantee that the antisubmarine measures successful in the past will continue to be adequate in the future. A clear understanding of the events of World War II, their reasons and consequences, is necessary, however, as background for any decisions which are to be made in the postwar period. . . . One overall conclusion is clearly evident . . . the introduction of new weapons, gear, and tactics has led to a continual interplay of measures and countermeasures in which no other conclusion retains its validity for very long.¹¹⁰

The changes in strategy affected by changes in methods of warfare are so great that they are likely to have an impact upon the humanitarian element in the law of war, as is evident in the following:

According to an early distinction between strategy and tactics, strategy comprised the set of decisions made and acted on out of sight of the enemy; tactics comprised the rest. The advent of modern weapons, such as carrier-based aviation, has permitted outright battles to occur at greater than visual ranges, and the modern version of the distinction holds that a strategic actor is one who does not have "contact" with the enemy. "Strategic warfare" has come to refer to war made against population [which had been under the care of the Geneva Conventions] or industry, and latterly, to such war waged with nuclear weapons. The term "operational art" introduced by Soviet thinkers but well on its way to adoption by the West identifies a more highlighted layer, between strategy and tactics. A further useful distinction divides strategy and "grand strategy," the latter being the total scheme of national military endeavor, including economic elements.¹¹¹

The "grand themes" of sea powers over the period from the ancient Greeks to the present are described by one commentator in terms of the rise of the thalassocracies, i.e., the states that have either substantially augmented their sea power relative to other states, or have established sea forces as part of the comprehensive maritime state. Great land-powers like the Soviet Union thus would innately move toward sea forces that would provide it with defense, and a reasonable, and sufficient defense would be its goal. The great sea powers seek command of the sea, in part because of their dependance upon that command, calling for the following elements: a superior fighting fleet to maintain exclusive control of the seas; a naval capability to defend against invasion; to protect

maritime commerce; to blockade the enemy coast; to engage in combined activities with other military services; and, to provide under current conditions with strategic bombardment.¹¹²

One commentator recommends that the United States recognize its role as the enforcer of peace upon the seas:

If international agreements on laws to govern the sea finally emerge, or if new defensive treaties are enacted, it will still be American sea power which will enforce them. Even should new agreements not occur, or should they fail, the United States will unilaterally continue to use its sea power to enforce free exchange upon the sea. This is the legal right of any maritime nation - in our case the most powerful nation in history at that - much of whose livelihood is derived from the sea. Happily, most of the civilized world - which profits thereby - is grateful for it.¹¹³

How does this practice bear upon the law of economic warfare? It appears that states involved in coercive actions are not concerned with the "progressive development" of law, or with identifying that law with a larger, constitutive global order as such. Their primary concern is with the freedom to act when they resort to the use of force, but they want for symbolic, prestigious, or even power-oriented reasons, to have the permission to act under law or to be supported by law in their actions.

When states turn to the use of force they are turning to an instrument to promote or strengthen their law, but the law that they are concerned with is at best the law that gives them the support of their actions, and enables them through the collective element that makes up law to draw upon community support. From law they attain a certain degree of economy in their actions, because the costs or burdens in turning to force are either reduced, or some of them are eliminated. And acting "within the law" they have a calculus of permissive actions rather than one of actions that others may condemn as "aggression," or "tortious," or wrongful, and therefore that they may refrain from assisting or supporting.

Strategic Economic Warfare

Economic warfare at sea considered in terms of the objectives or purposes is part of economic warfare in general. Strategies to strangle an enemy's economy are invoked by resort to all of the military capabilities, as well as the non-military strategies. They may be applied during "peacetime" or during "wartime," drawing upon Security Council directives, and so on. Strategic economic warfare thus refers to warfare aimed at the enemy's economy. The modalities of strategic economic warfare have been affected by the advances in military technology, so that submarines are now armed with weapons that can operate

against economic targets, while submarines themselves may engage through their traditional role of destroying sea commerce to achieve supporting objectives.

The operational element in warfare thus has a major impact upon the perspectives of states and their elites. States during wartime claim a freedom to act, or determine the decisions to be taken, because of the necessities involved, and the overriding need of self preservation. Moreover, the necessities in war are affected by new weapons, new technologies, and new means for conducting warfare. All such determinations tend to couple perspectives about force planning, deterrence, strategy, both military strategy and the “grand” or overall political strategy, and national policy.¹¹⁴

Once the legal or policy hurdles that strategic warfare is an attack on the civilian population have passed, states insist that they are acting permissibly under the legal principle of military necessity. They can then claim that as long as they pursue the objectives of reaching the military economy or the economy that supports the military effort they can mount their attacks on cities, the urban population, the entire structure that supports the war effort. They can also justify the use of weapons that are less discriminate, and the line between discriminate and indiscriminate attacks begins to blur, and with this development, the line between protecting the noncombatant under the law of war becomes cloudy as well.¹¹⁵

The economic warfare that is invoked during hostilities has its counterpart in the economic sanctions invoked during peacetime, in particular, the sanctions adopted pursuant to directives of the Security Council of the United Nations. Here there is opportunity to pursue the imposition of coercion in stages, but there is also the probable drawback that attaining the support of states in the Security Council will have retarding impacts upon a war or combat strategy, affecting surprise, deception, and so on, or enabling the targeted state to gain the advantage of breakdown in the coalition it faces, or to secure a more substantial grip on its military forces and capabilities.

The current application of sanctions under Security Council directives and community participation [but with the United States taking the lead] is aimed at the head of the Iraqi government, and, presumably, will be aimed at those who might assume the lead in the event he is incapacitated or removed. But it is also a sanctioning strategy that necessarily must be aimed at the populace, their representatives, other states in the region, and supported by a military, economic, ideological and diplomatic array of threats.

Economic warfare - when we assess it in terms of the targets - draws upon the use of military forces, and may be enhanced by diplomatic and ideological strategies as well. With changes in the military capabilities and weaponry of states, belligerent states adopt new modalities of economic warfare, primarily shaped by the targets of the new weapons. Thus, during the second World War, the belligerent states turned to strategic economic warfare with new weaponry,

particularly through the intensified use of strikes by aircraft. The important feature in economic sanctions, or economic warfare, is that they involve actions usually supported by coercion to achieve their goals and that these actions gain their legality or permissibility through the reaction of other states, and ultimately through community standards. The claim element is of major importance in the process of claim that leads to law when the actions involving coercion are in view. Control, under law, or under social or other processes, upon the resort to economic warfare is thus guided by the general principles in the law of war, or the law relating to coercion, but additional, more detailed controls call for a continuing clarification of state perspectives about such actions, and thus the emergence of what they will tolerate ultimately to be found in the governing law with regard to their behavior.¹¹⁶

State practice in the use of strategic aircraft strikes prepared the way for the doctrinal acceptance, at least, for targeting strategic nuclear weapons on the urban communities, the so-called "counter-value strategy" and the adoption of the newly appearing nuclear weaponry both for offensive and defensive military objectives. Inherent in the "humane" version of this strategy was that it was applicable to threats, but not applicable to the actual use of weapons, but this distinction would be difficult to maintain in belligerent practice. However, with the rise of nuclear weaponry, states adopted military strategies and political strategies, with each drawing upon the other for support, wherever possible. ;

During combat, the military strategy, whose emphasis on the use of force and on using it to strengthen other strategies prevails. During peacetime, the political strategy is adopted. The differences tend to lie around the selection of modalities of intensified violence or force, so that the military strategy is a strategy of using military capabilities while the political strategy though it may invoke such capabilities can operate in a more dominant sense during periods of limited or "low intensity" violence.¹¹⁷

B.H. Liddell Hart couples his readings of military and general history with his understandings from Sun Tzu, close readings of the campaigns of such distinguished generals as Belasarius, reflecting on Clausewitz and other writers on strategy.¹¹⁸ Hart proposes that military strategy, even if it must accommodate other strategies, such as deterrence for example, is a strategy of drawing an aggressor into his attack, and then while he is occupied with this, to pick the points for counterattack. Deterrence policies are open. Military strategies depend upon secrecy:

In strategy..calculation is simpler and closer approximation to truth possible than in tactics. For in war, the chief incalculable is the human will, which manifests itself in resistance, which in turn lies in the province of tactics. Strategy has not to overcome resistance, except from nature. *Its purpose is to diminish* the possibility of resistance, and it seeks to fulfill this purpose by exploiting the elements of *movement and surprise*. [p.337]. (Emphasis by author).

During peacetime we have discovered that the strategies of opposing or rival states are "adversary" in nature, while it seems that the grand strategies they adopt are an amalgamation of all of the components of power to further national purpose and goals.¹¹⁹ The interaction of the political and military strategies is familiar in state practice: the dialectical element in the working out of strategies of rivals tends toward an equilibrium or system of continuously evolving checks in terms of the weaponry, usually leading to the "deterrence" equilibrium where the weaponry that is balanced is perceived as weaponry of intolerable destruction.¹²⁰ It is presumed that the deterrence strategy, shared by the rival states, is dependent upon the will of each, and that the will to invoke the weapons is crucial to the "credibility" of the strategy.¹²¹ However, the actualization of the strategy into conduct, i.e., by way of the use of the weapons, is presumed to depend upon that will.¹²²

Deterrence according to a leading commission that considered our strategic forces may be identified in terms of countering the action of a rival. The extent to which it is applicable with economic sanctions remains uncertain, as indicated in the following expressed here in terms of the Soviet threat:

Deterrence is central to the calm persistence we must demonstrate in order to reduce these risks [of war or military attack] . . . Deterrence is not, and cannot be, bluff. In order for deterrence to be effective we must not merely have weapons, we must be perceived to be able, and prepared, if necessary, to use them effectively against the key elements of Soviet power. Deterrence is not an abstract notion amenable to simple quantification. Still less is it a mirror image of what would deter ourselves. Deterrence is the set of beliefs in the minds of the Soviet leaders, given their own values and attitudes, about our capabilities and our will. It requires us to determine, as best we can, what would deter them from considering aggression, even in a crisis - not to determine what would deter us.¹²³

Distinctions in this context of a "political" strategy of deterrence and a strategy of armed conduct thus tend to arise from the extent to which weapons are invoked. But the differences between "offensive" and "defensive" weaponry long largely meaningless in wartime or armed combat have less meaning during peacetime as well. Weapons in peacetime attain their effectiveness through the threats they impose and may therefore be invoked by the diplomat or ideologist, or for the purposes of propaganda, or to attempt to gain strategic advantage over one's opponent.¹²⁴ The use of the nuclear weapons to back up economic sanctions leads to speculation: it is possible however that the deterrence equilibrium, and the proliferation of these weapons [or the appearance of readily available alternatives such as chemical weapons] will lead to their having little impact upon such sanctions.

The "will" of the nation to act or endure is introduced into its strategies or implied in them as a crucial and necessary component of economic sanctions as well as of warfare in general. The perception of a nation's will by Clausewitz

leads to his assessment of the center of gravity of a belligerent, i.e., the locus of its power to act or decide. Thus, in the war in Southeast Asia this may have been for the United States the element of public support.¹²⁵

There is a direct correlation between solid objectives and what Clausewitz called the "strategic center of gravity." That is the point of decision. National War College students recently applied that principle to Vietnam. The group generally agreed that the strategic center of gravity for South Vietnam always was the people; not body counts on the battlefield, but *the minds of the people*. It took U.S. leaders a long time to figure that out. The primary pressure point for the United States was national will. The enemy found *that* out early, and continually turned the screws. No one determined the strategic center of gravity for North Vietnam. It may even have been in some other country. That is one reason why it was so hard for us to define decisive objectives.¹²⁶

Without the will to carry on a struggle to achieve a clearly-defined goal or objective, even a stronger military force lacks the social will essential to enabling it to endure, persist and win. Hence the notion of economic warfare, turned to peacetime, becomes part of a larger strategy in which targeting is upon a rival's economy, and therefore upon his cities and industrial areas, and, in peacetime, the threats can be imposed by weapons and military capabilities of all kinds. In the economic sanctions imposed under Security Council directives upon Iraq the naval forces are of particular significance for the purpose of blockade and for providing military threats.

Strategic economic warfare, largely the outcome of the second World War when waged with air-borne delivery of weapons to attack the German and Japanese cities and thus the economy of both countries, is likely to continue into future wars. The link between the political objectives and the conduct of warfare stressed as a fundamental principle of Clausewitz is even clearer when we turn to economic warfare in this sense. The arming of naval vessels with strategic weapons makes them an essential element both in the deterrent factor and in the conduct of hostilities should belligerents turn to strategic weapons.

Strategic Economic Goals

Economic warfare, like other measures of warfare, and the law regulating that warfare find their place within the larger strategy of confronting and combatting an enemy or rival, and within the programs instituted under that strategy to attain the policy objectives of warfare. Strategy even as traditionally conceived has a military and political component in common usage.¹²⁷ Strategy is generally identified as the program and plans, and operational guidelines, formulated and tested with regard to specified strategic objectives of states.

Used in the political, or broadest, sense the concept of strategy assimilates the augmentation and application of national power to achieve such goals both

during war and peacetime.¹²⁸ When narrowed to military strategy, the plans and programs and operational elements include the rules of engagement of the military forces for achieving military objectives during combat. The broad use of strategy among states is associated with the larger global policy goals particularly of the major states, and with the actions and operations that might through national power achieve those goals. The actions of states are expected to accommodate international law and community standards, and the perspectives of states that make up their strategy will seek to preserve and promote the values prized by the state.

It is notable that the modalities of economic warfare are readily invoked during wartime and peace, that they may be used in hostile actions, usually backed then by the use of military force, or as an unfriendly action, as in retorsion. Used in wartime with military force they are subject to the community standards generally encompassed under the principle of military necessity.¹²⁹ But this principle leads to judgmental standards such as the principle of economy of force [a fundamental principle of war applicable to the judgment and decisions of the commander]. According to Mahan that principle is best applied through attention to “exclusiveness of purpose.”

. . . [C]oncentration [a principle of war] sums up in itself all the other factors, the entire alphabet, of military efficiency in war. In another way, Napoleon expressed this in a notable saying: “Exclusiveness of purpose is the secret of great successes.” Exclusiveness of purpose means concentration of the will upon one object to the exclusion of others. There is thus a concentration of mental and moral outlook, of resolution, as real as the physical concentration of disposable forces: and when the moral prepossession exists in a military man the physical concentration will follow, as surely as any effect follows upon its cause.¹³⁰

Such “warfare” conceived in the broader sense of including economic sabotage and economic sanctions and actions in general uses methods that can strike at a nation’s vulnerable technologies and economies based upon technology [e.g., communications, computer networks, computer assisted decision processes], and during hostilities can check or interfere with vital lines of communication and instruction to naval vessels, and to the commanders in general of all of the military services. Economic warfare thus can be based upon technologies of peace turned quickly to hostile uses.

Mahan suggests that principles fit comfortably the development of a “strategy,” but the pressure of tactics determines their operation and application. The pressure of tactics is impelled by new attack scenarios adopted by belligerents both in their force and contingency planning, and during combat, the changes in the organizational base for conducting and supporting war [e.g., the massive industrial infrastructure], the resort to the weapons and agents to achieve their immediate military objectives [tactical during combat; strategic in the larger

sense]. Similarly, economic warfare operates as a prelude to hostilities, as in the current Iraqi situation, or accompanied by severe coercion, it is shaped by the attitudes toward violence rather than the attitudes toward more remote economic goals.

Economic warfare undergoing change with changing technologies is thus brought under principles that are primarily affected by the growing content arising from belligerent [and even peacetime] practice of states. Hence,

Based as Naval Strategy is upon fundamental truths, which when correctly formulated, are rightly called principles, these truths, when ascertained, are in themselves unchangeable; but it by no means follows that in elucidation and restatement, or by experience in war, new light may not be shed upon the principles, and new methods introduced into their application.¹³¹

Naval strategy is then like other military strategies dependent upon the objective and the realistic attainment of the objective. The military realities however require attention to readiness and facilities for conducting warfare at great distances. According to Mahan:

It is true . . . that on a maritime theater the navy is the all-important factor; but in these days a navy no more than an army can stretch its lines of communication too far from a strong and extensive base. Its communications must be assured, either by overwhelming control of the sea, making it as it were its own territory; or else, by a well-knit line of posts properly spaced from the home territory.¹³²

But the prevailing policy necessities in democratic states and even in the totalitarian states as they are now evolving demand substantial support by the public of the strategy that may involve war. Economic warfare commencing purposefully at an early stage may thus do two things: it can set the stage for an economic strategy; and it can set the groundwork for moving ahead to more intensive coercion if the less intensive modalities fail, or if persuasion cannot be adopted, and lead to the nation's goals.

Thus, Mahan noted with regard to the Monroe Doctrine the interlocking themes that had commanded social support:

The Monroe Doctrine in its beginnings was partly an expression of commercial interest, directed against a renewal of Spanish monopoly in the colonial system; it was partly military, defensive against European aggressions and dangerous propinquity; partly political, in sympathy with communities struggling for freedom.¹³³

The Chinese strategist has aptly put the fundamental objective that determines the goals of the military commander. With growing linkage between the traditional modalities of economic warfare and the shift toward strategic

economic warfare, these goals are the same whatever the modalities of warfare chosen:

Victory is the main object in war. If this is long delayed, weapons are blunted and morale depressed. When troops attack cities, their strength will be exhausted.¹³⁴

Clausewitz reached the same conclusion, stressing however that the policy element in undertaking war looks to policy objectives beyond those of the military objectives:

Combat is the only effective force in war; its aim is to destroy the enemy's forces as a means to a further end . . . The decision by arms is for all major and minor operations in war what cash payment is in commerce . . . Thus it is evident that destruction of the enemy forces is always the superior, more effective means, with which others cannot compete . . . When we speak of destroying the enemy's forces we must emphasize that nothing obliges us to limit this idea to physical forces: the moral element must also be considered . . . That the method of destruction cannot fail to be expensive is understandable; other things being equal, the more intent we are on destroying the enemy's forces, the greater our own efforts must be.¹³⁵

So Clausewitz too raises the need to achieve an economy, a swiftness, and the shock of military effectiveness in using military forces, but his stress on achieving political aims compels the commander and statesman to combine capabilities toward making war achieve the larger global goals that make the sacrifice of war worthwhile.¹³⁶ Into this crucible of strategy and policy states may invoke the modalities of economic warfare, perhaps before armed hostilities have begun and then during combat. And, if combat escalates, the strategy adopted, and implemented, is likely to turn to strategic economic warfare, coupling the use of strategic weapons to strategic goals that would bring an enemy's economy to a standstill.

Economic Sanctions in Peacetime: Assessment

Economic sanctions are based on economic strategies, and the application of economic instruments of policy, to achieve either the exclusive policy objectives of states or the common objectives among states for achieving global order, or strengthening it.¹³⁷ Economic sanctions may be exercised by states individually or collectively pursuant to directives of the Security Council or of the regional organizations of which they are a member. Where invoked without armed force they would not constitute aggression under the United Nations definition of aggression.¹³⁸

Economic strategies and economic sanctions are available to states to achieve a variety of goals that states may seek for themselves alone, as well as the

far-reaching, inclusive goal of minimum order. They may enable states to prepare themselves for hostilities with potential enemies by weakening the economy, and the will, of their rivals or of states violating international law. This is one of the primary goals of the current economic sanctions directed at Iraq. [1990].

They may also constitute threats with the expectation that the violator will recognize the possibility that the coercion imposed by the sanction may be intensified to the point of hostilities, and the further expectation that the violator may then terminate its misconduct. They may of course be used in association with other strategies both in times of peace and in war, so that ideological, military and diplomatic strategies would then operate to reinforce each other, and give greater assurance of achieving the larger goals of restoring the damage to the global order itself. This too is indicative of the stated goals of states in the Iraqi crisis.

Such sanctions and strategies thus may reduce the bases of belligerent power of an adversary - reaching to weaken his power, his wealth, and even his rectitude or respect within the community. But in mentioning these broad goals and the resort to economic sanctions, the need for analysis and consideration of the effectiveness of the sanctions emerges. States may be able to select between economic sanctions and military sanctions, but then find themselves without adequate assurance that the economic sanction alone is the least costly path to take, or that a prolonged economic sanction will achieve the desired goals, with the expectation being that the costs and burdens, and uncertainties, of hostilities can be eliminated. Or that a prolonged economic sanction might so weaken an adversary that a military blow after the sanction has run a considerable period might be more effective and less costly.

Although there are a variety of impacts that may occur to the violator when a comprehensive economic sanction, or one in which the confinement of the violating state's economy is reasonably complete, is imposed, the primary aim of such a strategy is to reach either the economy or the economic activities. A comprehensive peace-time coalition of states invoking an economic sanction against a state, such as Iraq, is aiming its actions at the economy. Should the coalition turn to the military sanction, the goal of the economic component of their strategy will continue to be the economy but implemented through military or strategic measures. Whether the economic sanction can reach the desired results without escalation to intensified coercion and military force, calls for judgment as well as for adoption of strategies that can be readily corrected if they are not found to be effective.

Monitoring economic sanctions to determine their effectiveness, the assessment of the vulnerabilities of the targeted state, the assurance that a coalition of states will cooperate in imposing a comprehensive sanction, the imposition of other sanctions, are all matters that call for the closest, continuous review. Economic sanctions involving a large number of states are likely to call for

economic assistance and cooperation among the coalition to replace the economic benefits that had been enjoyed before the sanctions were imposed.

The force planner concerned with the use of naval forces in this context must consider the resources he will shift to the economic strategy, and he must balance in his strategic assessment the effective use of the strategic instruments at his disposal. When and how much of his resources are to be devoted to strategic economic warfare, for example, necessarily entails consideration of the costs arising upon termination of the war, assuming victory, to restore an enemy whose economy has been severely damaged by such a strategy.¹³⁹

Economic warfare in general is premised on the expectation that states cannot effectively wage war if the morale of their citizens is diminished or the industrial structure destroyed. The uncertainties of this warfare are brought out by the experience of the British armed forces in the Second World War, and in particular the experience in using the air force as the delivery vehicle for large amounts of explosives and incendiary devices. The naval forces would unquestionably be drawn into such warfare in the future if their long-range missiles or off-shore bombardment capabilities were to be enlisted.

The result of the British experience suggests that economic warfare aimed at strategic targets was not successful in bringing the war to an end. The extent to which it enabled the military actions and activities to achieve success is unclear. It must be emphasized that strategic economic warfare was conducted by military actions, primarily aircraft attacks, on economic targets behind the military lines. But if this warfare was questionable, the effectiveness of economic warfare in peacetime, such as through economic sanctions, remains in doubt. Such sanctions do not have the urge of military force, nor the impacts such force would have on the populace and its place in compelling the termination of hostilities.

With the brief appraisal of British practice in World War II by Professor D.H.N. Johnson in view, we might consider how the British policy for a strategic economic warfare program came about, and how it was applied.¹⁴⁰ The British policy at the beginning of the second World War can be traced to a memorandum of May 2, 1928 by Lord Trenchard. Following Clausewitz, but adding a new dimension, the memorandum declared that force would not be administered exclusively to destroy the opposing air forces, but to 'break down the enemy's means of resistance by attacks on objectives selected as most likely to achieve this end.'¹⁴¹

The attacks on other selected objectives became a matter of controversy, because, under the principle of economy of force, there was concern whether the use of scarce attack resources might better be applied to military forces themselves, or directly to military installations. President Roosevelt addressed an appeal to refrain from attacks on undefended cities, and expected both sides to respect this position. However, as the fighting progressed, the "seven possible targets" for attack drawn up by the Chiefs of Staff in January 1941 included

civilian morale. The others summarized by Johnson were the German air force, anti-invasion targets, transportation, industries, naval objectives and oil, with industries, transportation and 'morale' as convenient secondary targets. Morale was subsequently to be linked to transportation, and then ultimately the economy as a whole. Yet night bombing, favored to protect the attacking forces, necessarily included attacks that might involve a larger area than the specific targets themselves. This led in Britain to debates usually on the grounds of moral principle and humanity. Churchill's own reflections suggesting a principle of reciprocity at work were reluctantly accepted by the military services, stressing that naval blockades during the First World War led to far more deaths or casualties than did the major bombing attacks of the Second World War.¹⁴² Churchill's minute was the subject of much of the controversy:

It seems to me that the moment has come when the question of the so-called 'area bombing' of Germany cities should be reviewed from the point of view of our own interests. If we come into control of an entirely ruined land, there will be a great shortage of accommodations for ourselves and our Allies and we shall be unable to get housing materials out of Germany for our own needs because some temporary provision would have to be made for the Germans themselves. We must see to it that our attacks do not do more harm to ourselves in the long run than they do to the enemy's immediate war effort.¹⁴³

Area bombing, and now "target bombing" refer to attacks on cities or congested populace areas in which the indirect damage to the civilians will be large. But strategic economic warfare, ultimately, was to include the civilians themselves as targets provided they were working in the military effort. In major wars, this would mean the entire community. Concern with such attacks led to the claims of "undefended" places, of non-military objectives such as hospitals and schools, of "neutralized zones" during wartime or zones of protection of non-combatants, and even to the protection of cultural property.

Under Protocol I, Geneva Protocols; 1977, indiscriminate attacks are prohibited. Such attacks are likely to include those practiced in World War II on urbanized areas and aimed at economic destruction. Article 51 declares in para. 5:

Among others, the following types of attacks are to be considered as indiscriminate:

- a. an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects; and

b. an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁴⁴

Strategic economic sanctions, such as those that are currently practiced with regard to Iraq under directives of the Security Council of the United Nations, are also dependent upon naval forces and naval support. The considerable distance to the probable field of land combat dictates the need for an effective naval force, at least to offset attacks that might be land-based, or based on the naval forces of the aggressor, and naval forces would be needed to support such attacks. In this role, the navy and other military forces operate both in a deterrent capacity, where it is sought through the force they threaten, to prevent a war and gain the objectives of war, or should force be invoked to provide attacks that will be effective, economical and swiftly achieve a termination of the war with the enemy's forces destroyed.

Compromises with these objectives or a failure to pursue the political objectives would be inconsistent with the teachings of Clausewitz and others. But experience with economic sanctions in peacetime is minimal: it might be argued that when such sanctions are attempted against a strong nation they may lead to attacks by that nation. It is possible that Japan launched its surprise attack on the United States in the second World War because it lacked resources, and sanctions seeking to prevent it from reaching those resources were viewed as acts amounting to war.

The indicia of effective sanctions are found in performance. Clarification of goals and purpose, and the extent to which these are attained is an important task. The effectiveness of the economic sanctions ultimately depends upon whether the target state can be reached in terms of its economy, i.e., as to the necessities of life, the means of survival, and to some extent as to the morale of its citizens. The ability of Iraq to produce on its own territory adequate foodstuffs or to achieve the flow of foodstuffs and other necessities through smuggling or breach of the sanctions must be considered in appraising the time needed to achieve economic goals. It is unclear whether achieving "economic" goals is enough, or whether achieving them will lead to achieving other social goals as well.

Whether military forces are to be disposed or maintained, or the extent to which this is done to ensure such sanctions, and also to assure that Iraq will not turn to military action is a matter for judgement to be made through those who participate in such things within a given state.¹⁴⁵ Whether other sanctions, ideological, diplomatic or "political" should be imposed is a matter for judgment as well, and resort to them may lead to a more comprehensive set of objectives, and a more refined array of targets than those of the economic sanctions alone.¹⁴⁶

Prospects for the Future

What are the prospects for the future rules of naval warfare, and especially those of economic warfare at sea? These prospects depend in large measure upon the new modalities for exerting coercion - new military capabilities, weapons, and methods of attack. They also depend upon the attitudes of states toward public order: will they continue to struggle over widely differing perceptions about global order, partially guided by the United Nations Charter and international law? Or will they turn in earnest toward promoting global order under the United Nations Charter or otherwise?

But formidable challenges lie ahead. Among these: naval forces are likely to be developed to undertake new and more difficult missions, in which the elements of economic warfare are commingled with those of the direct use of force. The graying of weaponry - submarines and surface ships alike carrying strategic weapons as well as weapons for their own defense, the deployment of submersibles, and so on will have their impact.

Economic warfare short of war is likely to be refined: in the current crisis in the Middle East economic sanctions under the United Nations Charter have been directed through resolutions of the Security Council.¹⁴⁷ These include the use of naval forces, as set forth under Resolution 655 (August 25, 1990):

[The Security Council] *calling upon* those Member States cooperating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstance as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolutions 661 (1990).¹⁴⁸

But economic warfare claimed under the exercise of self-defense against aggression, or by way of reprisals, or in response to unfriendly acts by way of retorsion, or as ordered by the regional organizations may be anticipated. While naval forces operate in peacetime through presence, transit, military exercises, port visits and so on, it is probable that they may be used as in the past for more coercive measures, and that these will be directed at economic targets as well as the traditional military targets.

New methods of economic warfare are likely to appear and be claimed as permissible in the future.¹⁴⁹ The quarantine in the Cuban-Missile Crisis furnishes an example of a method designed to reach Soviet shipments of missiles exclusively, and thereby to escape the more comprehensive program that is associated with the blockade. Such an action has variously been characterized as an act of "self defense," a "quarantine," a "blockade" with a new and differing name, as an offensive act, permitted to affirm certain interests, and so on. Resolutions of the

United Nations General Assembly, as with its “Uniting for Peace” Resolution, can provide recommendations to members to act using economic or military sanctions, and affording legality or permissibility to such actions. These too may assimilate new methods of warfare. Article 94 of the United Nations Charter suggests that enforcement of a judgment of the International Court of Justice may be directed through the Security Council. As seen, this could include economic sanctions, enforceable through naval forces:

[Article 94 (2)]. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Supplementary law such as that from the Briand-Kellogg Pact, coupled with the Budapest Articles of Interpretations, 1934,¹⁵¹ must be gradually assimilated in the practice of states to control the resort to coercive measures.¹⁵² Institutional arrangements must be developed and invoked to ensure consultation and decision-making for the community at large. Regional organizations such as NATO presupposed to be the appropriate check on threats of aggression must remain operative.

However, the trends in law as prescribed and applied have become clear: belligerent actions are shaped through new methods and weapons of warfare, and they, in turn, continually reshape the expectations and law of neutrality, as well as the tolerances relating to all forms of coercion, including economic warfare.¹⁵³ We can envisage future conferences addressing problems of this nature. But past practice and trends suggest that the work and drafts of such conferences will have little meaning unless the law that is drafted into these instruments is closely assimilated to the expectations of the “operators,” i.e., to the decision-makers involved in resorting to the use of force itself.¹⁵⁴ Strong tendencies of such conferences and drafts to rely upon the elegance of law, displayed through the language that is used, and to rely upon the good faith of nations in adapting their practices to a set of rules, and the opposing tendencies of states to seek out how they intend to protect themselves or deter others against attacking them are primary, almost primordial, instincts almost always taking precedence when the war crimes courts meet or when the prize courts determine and apply the applicable law.

States concerned with economic warfare must give closer attention to the implications of economic measures and methods that are used in war, or in peacetime to gain strategic advantage with regard to future wars. Strategic objectives have appeared creating a shift in the perspectives about such warfare, and about the methods to be invoked. The shift has led to an increased tendency to use forcible measures of economic warfare, or, at least, to include under

forcible measures of warfare, the economic targets, or the economy selected as a strategic target. Additionally, states are faced with a form of economic warfare when terrorists shift to targets critical to the economy, or where "low-intensity" conflict erupts with the same tendencies. Attacks by such groups intended to upset a nation's economy by striking, for example, at nuclear power plants, or other facilities essential to the economy are among the future prospects. Similarly, the concerted acts of espionage and industrial theft enable states that practice these activities to gain the economic benefits of their rivals at little or low cost, and also to gain knowledge about vulnerabilities in the economies of those rivals readily exploitable during wartime by military measures.¹⁵⁵

The major conclusion regarding economic warfare at sea relates to the changing content of the perspectives of neutrality. Traditional neutrality has given way in the two World Wars to a point of non-belligerency, characterized by the tolerances of the belligerents and neutrals with respect to how much discriminatory action will be accepted of neutral states, and when breaches are such that the neutral will be treated as a belligerent. To this extent, the traditional perspectives and law remain unchanged. However, under the traditional perspectives there was a clear line between belligerency and non-belligerency, but this has given way to the ambiguities of state practice. Under the traditional law the standards of impartiality and other standards determined with some degree of clarity and objectivity whether the neutral state had crossed the line of belligerency.

Now there are varying degrees of non-belligerency. Moreover, non-belligerency [neutrality in the changing current sense] is subservient to perspectives about global order and practices aimed at global order. These new perspectives give the neutral a claim at least that it can resort to conduct, formerly treated as contrary to its neutral responsibilities, and insist that it remains neutral and in support of the global order. Such a claim would include the argument that other states should take a similar position, i.e., all states are then aligned against the aggressor in behalf of the public order. It would mean, if fully carried out, that the determination of aggression could be widely shared among the states not at war. This is at best an assumption.

However, new perspectives have appeared regarding the use of force under the global organization [United Nations], and with regard to aggression. The participants that are not belligerents have a new role: there is a stronger case for them to resort to force for self defense, collective self defense, or promotion of the global order, and while acting individually claiming their acts to be *erga omnes*.¹⁵⁶

The role of the Security Council is likely to change, if, of course, expectations among states show the willingness to defer to an international organ with the powers it has. These interacting elements show strong trends toward public

order, even when states resort to the immediate threat by way of self defense. Yet the trends are still emerging: states have no compulsion, no globally imposed responsibility to act against aggressors without the mandate of the Security Council. But neutrality becomes important only as a statement of the factual or interactive situation among states during belligerency: states are not belligerents if the belligerents do not treat them as such. Hence the subjectivities of states are the crucial element: the state subjected to aggression is the major starting point for determining aggression. Its actions in retaliation are most likely to be affirmed by the global community. The states claiming neutrality or belligerency are also a point of focus as to their standing, except that competing or conflicting claims and policies are more likely to be raised. The real change in trends is toward the notion of a collective perspective about both public order and the support of public order by “neutrals” in war, or at times of aggression.

Conclusion

The conclusion of this analysis must consider two major issues. First. What can we expect from state tolerances with regard to economic warfare in the future? Second. What are our expectations about invoking economic sanctions, through the directives and resolutions of the Security Council of the United Nations, and about the effectiveness of both such sanctions and economic warfare? The answers to these questions based upon the preceding analysis lead us to conclude that economic warfare is a means of imposing either persuasion or coercion or both aimed primarily at the economies of rival states.

The effectiveness of such warfare will depend upon the impact of the coercion or sanction upon the targeted state, to wit, upon its economy, its economic activities, and its trade and commerce with other states. States with strong domestic economies that are not dependent upon other states supporting their economic base are those most likely to be able to protect that base.

The law regulating and governing economic warfare is an emerging law, reflecting the changing tolerances among states. Focus must be upon the operational element in law, that is the element that links the emergence of law with changing behavior patterns and tolerances associated with new weapons and methods of attack. What this leads us to conclude, in short, is that the law itself including the law of war is affected by the actions of states: new law is established through the tolerances arising with regard to attacks and weapons, old law is strengthened and the actions themselves are instruments both for enforcing and promoting the law in general.

Some of the conclusions in greater detail:

- Economic warfare at sea may be conducted by enemy states either by attacking the means by which an enemy's goods are transported, stored, or produced, or by

other coercive measures; prevailing trends suggest that economic warfare may include the targeting of the economy at large including its industrial base, and the civilian population involved in the production of goods and services essential for the military activities.

- To this end, naval vessels have been designed as platforms for strategic attacks, both with respect to the missiles that can be delivered, and with respect to the aircraft that they carry; such attacks were conducted in the Gulf War.

- Changing perspectives aroused by new weapons, new methods of attack, and the greater destructiveness of weapons affect the military and economic instrument, supporting the trends toward attacking the economic base of rivals, in part through working with the elasticity and the complementary balancing in application of the law of war principles relating to indiscriminate attacks, indirect damage and destruction, proportionality, and necessity. The attempts in treaties and agreements to reach the impact of change, e.g., in the Declaration of St. Petersburg, in the Geneva Protocols of 1977 [regarding attacks, precautions, and so on] have not been tested in belligerency and are likely to remain moribund.

- Economic sanctions against states, established under directives of the Security Council of the United Nations, are largely the creature of the determinations and decisions of that organ, but they may be aimed at a state's economy, or at its economic activities, including transport of goods, or any combination of these.

- As with other areas of warfare, the law and the emerging law of economic warfare have been affected by rapidly changing technologies, improved military organization capable of drawing upon those technologies, access to the plans of the enemy through improved intelligence, and the growing sophistication of the military capabilities and the methods of warfare.

- As with other modalities and instruments of warfare, the means or modalities of economic warfare are not fixed, but are adapted, as needed, with regard to the missions or targets involved, and adapted to the needs or necessities as perceived in the changing military situations; economic warfare is coupled with forcible measures that vary from minor to severe coercion, evidenced by low to high intensity of violence;¹⁵⁷ economic warfare at sea is perceived as a major component of economic warfare in general, and the methods of such warfare are and will be refined in the future in order to improve their effectiveness in achieving policy goals of the participants and those involved.

- Economic warfare at sea has traditionally been warfare through naval forces aimed at blockade, interference or countering the enemy's commerce and trade, including that of neutrals supporting the enemy; submarines and submersibles will be important components of such warfare, particularly in strategic as well as the traditionally economic warfare at sea and over land, and will include air blockades, and perhaps blockades through the targeting of ballistic or cruise missiles, or through electronic warfare techniques. Economic warfare is most likely to be affected by changing perspectives concerning the conduct of warfare, and therefore the operational law is likely to include much that is "soft" law - or law

evolving as belligerency progresses, rather than hard law or rules found applicable without change or affect on the policy involved in such rules. Much of this operational law of economic warfare is applicable to all methods of warfare.¹⁵⁸

- State practice relating to wars in the last two centuries shows that economic warfare has had at best a limited impact upon weakening the enemy. However, this may be attributed to success of the targeted state in producing its goods, or in securing its goods from others. As economic warfare turns toward strategic economic warfare, all of the military services will participate in using strategic weapons to weaken an enemy's economy and for improving the strategic position of the state that invokes economic measures. As economic warfare is expanded conceptually and operationally to include strategic and tactical strikes at an enemy's economy, or involves more effective collective economic sanctions including those marshalled under the Security Council to reach a target state's total economy, the effectiveness of such warfare in achieving military and political objectives, as well as economic [economy-destroying] objectives are likely to increase, and the law relating to such warfare become more settled.

- Economic methods of warfare that operate by persuasion, i.e., by means in which force is not used or threatened, have not been widely used; however, as the economic base and the economies of states become more complex, involving a greater interaction of decisions, and more vulnerable to interferences with their technologies relating to communications, production of goods, transport of goods and so on, the economies will also become vulnerable targets, more readily subject to interference and even lasting damage.

- Law is appraised in the global community through a consideration of the entire context of expectations, including state practice, custom and customary international law, the decisions and policies of public officials, the activities of states and so on; accordingly, the application of law and its interpretation are likely to meet with the ambiguities, changing methods of warfare, changing tolerances among states as to what is permitted as warfare becomes more intense, and to elude the precision and certainty usually sought in the law itself: as states shift toward doctrines of strategic deterrence through threats regarding the industrial base and the industrial population, it is probable that they will make these threats effective in combat. If attacks upon cities and the industrial base are considered part of economic warfare - i.e., where the object of the attack, the economy, defines the method of attack, economic warfare, this would stimulate the present shift from economic warfare as a method operable in itself that is, as the means either short of war or as a non-forcible means during war to a method that embraces forcible means to achieve its goals.¹⁵⁹ This would lead to the unequivocal application of the laws of war and the standards of military necessity to such action.

- The applicable and operational law relating to economic warfare ranges into areas of substantial discretion: hence we can anticipate that as such methods of warfare are more frequently invoked, there will be refinements in economic warfare in which the attacks or methods of warfare are found permissible as the discretionary acts of governments in attacking each other. Further refinements may arise where the resort to force is authorized by the legal authority of the global

community, to wit, through directives of the Security Council, or in conformance with recommendations of the General Assembly of the United Nations.¹⁶⁰

- The differences allegedly arising between offensive and defensive warfare are minimal because during combat, and in the force planning relating to preparation for combat, states employ similar methods of warfare, weapons, and tactics for each. Offensive warfare appears in the form of an assertive action in taking a military object, while defensive warfare assumes a reactive action in defending one, but combat tends to oscillate between the two forms of action. This perspective regarding weapons targeted for deterrence is already clear in the SALT agreements: the United States and the Soviet Union, though they purported to reach controls on "offensive strategic weapons," failed to define the weapons as such except by arbitrary stipulation and targets, and ultimately they were compelled to recognize that such weapons might be used interchangeably by way of tactics and strategy with weapons that counter the offensive weapons [the strategic defense weapons].¹⁶¹

- In adopting strategic ballistically delivered weapons, the United States and the Soviet Union have adopted a military perspective for outer space: transit by such weapons, testing of the delivery systems, and so on is not banned.

- The application of law and the standards from the law of war are imposed on economic warfare where accompanied by the use of force, or particularly where the objectives of economic warfare are achieved through the use of force; where there is a clear separation of economic measures from forcible measures, there is a wide discretion in their use, and their use is largely judged as acts of unfriendly relations or where made in response as forms of retorsion.¹⁶²

- The relation of economic warfare to neutrality is a relation that involves the separation of belligerent and non-belligerent states; but this relation is subject to confusion because the status of war, and the status of neutrality, are matters that are in a continuous state of flux, particularly where the Security Council acts, so that neutrality itself is affected; in policy and in strict terms of law, the law itself is in a state of flux.¹⁶³

- The operational element involving the decisions to use force, or the decisions in how it is used, are of critical importance in forming the policy that each of the states involved in belligerency expects to be the governing policy and source of authority both with regard to warfare in general, and with regard to economic warfare. There are immediate changes in the law that regulates warfare and the use of weapons reflecting changes in the conduct of hostilities.¹⁶⁴

- Economic warfare is a strategy that may draw upon either the economic instrument of policy or the military instrument or both; deterrence of rival states is sought by demands imposed through coercion, and coercion may be imposed by a single state, a group of states, or under the direction of the Security Council to achieve deterrence, prevention, or the restoration or rehabilitation of damage caused by the state that has violated international law.

Economic warfare demands analysis of the operational element - the modalities and changing modalities for imposing coercion, and the prescriptive and normative elements - the authority and control imposed under law upon the policies, strategy and decision of the commander in warfare is in the strategic terms of reference.

As noted above, economic warfare demands analysis of the operational element - the modalities and changing modalities for imposing coercion, and the prescriptive and normative elements - the authority and control imposed under law upon the policies, strategy and decisions of the commander in warfare. Future developments will therefore range into the interaction of law, in part through anticipatory efforts in the adoption of "new" law, with the military operations and activities.¹⁶⁵ The behavior of states during warfare is in the strategic terms of reference either "tactical", involving activities in which states are accommodating and opposing the policies and demands of each other, and "strategic" when they strengthen or add to the constitutive base of the public order.

But analyses of the policies and strategies of states, and their behavior reveal a factor of great importance: strategy with its policies, plans and programs, and its implementing strategies may adopt programs based upon naked power or upon law. But strategy, like deterrence, is policy oriented and policy directed, and expected under law to draw upon effective power, in the context of legal order.¹⁶⁶ Strategy in the operational phase depends upon perspectives at a given time, so that the objectives or principles of strategy may continue to have their impact, but new objectives may arise. Command of the sea thus is displaced by a strategy for strategic economic warfare.¹⁶⁷ Hence states that seek to strengthen law and the global legal order are certain to invoke law and appraise the applicable law in developing their strategy. This is evident in such activities as the drafting of rules of engagement applicable to the use of military forces.¹⁶⁸

We can therefore assume that as states move toward a common legal order their strategy and strategies for using force will draw increasingly upon common perspectives about law, but while we can assume this, it would be incautious to presuppose law by the drafting of agreements or the formulation of resolutions in the global institutions. Law-making in this large and changing context will gain strength only if we recognize that it is law-making of a legislative nature, and that the legislation among states is the continuous application of practice imposed both through treaties and custom, and that the two necessarily interact and in these dangerous realms continuously throw up choices for the policy-makers. The changes considered in this paper particularly as we shift to the awesome area of strategic economic policy involve the situations of choice and the means to correct decisions that have gone awry.

A detailed regulation of economic warfare as such has not appeared in the practice among states. The general principles are those applicable to warfare in

general, relating to legitimate targets, force or coercion proportionately applied [often by the parallel use of military measures], and so on. As this inquiry suggests the reason for this is that the modalities of economic warfare, like that of warfare in general, evolve from the perspectives and tolerances of states about such warfare, and in particular, about the objectives that they are seeking. When they shift from specific identifiable economic targets or economic activities to the economy as a whole, then economic warfare and military warfare tend to merge as they did in the second World War. The participants expect at this stage that the war has intensified and that the stakes have increased. The participants expect greater violence and then exercise it, and the cycles escalate with growing intensity and growing expectations. The participants resort to new strategies and intensify those that they have adopted, especially in terms of the destructiveness of the war they have unleashed.

For this reason, the conclusion is reached in this paper that what we refer to as economic warfare is likely to shift from concepts of identifiable targets to concepts of the entire support structure essential to conducting hostilities, and targets shift to energy sources, railroads, and the infrastructure components of the community at large. This was even recognized at the Nuremberg Trials. Attempts to halt this trend have appeared, to be sure, but these have not established a foothold that would make them secure as the enforceable law. Thus, the provisions in the Geneva Protocols of 1977 to refrain from attacking energy sources and provisions for new protections of the environment and so on have been offered to strengthen the community attitudes toward humanitarian protections.

Economic sanctions, employing strategies of the global community, are aimed at the use of the economic instrument to manipulate the policies of others, to influence their decisions, and to reach community goals, pursuant to community standards. The economic instrument for both the sanctions and warfare may be coercive or non-coercive, as indicated earlier, or states may mix them together, always with the policy objectives in view. Economic warfare leads our perspectives toward the economy as a fundamental or crucial base of power, so that states that seek to destroy that base will tend even as in the wars of Greeks, Persians and Romans to destroy those they conquer, or subdue their inhabitants.

As the Gulf War has shown, our present attitudes reflect the hope that the calculus of risk and benefit involved in resorting to sanctions will be favorable in every sense: the costs will be reduced, human suffering eliminated or minimized, and so on. But economic warfare alone has not appeared in practice to have been effective, unless military measures accompany that practice. And economic sanctions set forth in the United Nations Charter as a strategy to invoke, are subjected to the caveat that if they are not perceived as effective, they will be accompanied by military sanctions. Economic strategies then may be applied before hostilities, during hostilities, and after hostilities, fashioned as

necessary, to achieve desired outcomes. All of these features are illustrated in the Gulf War, and open our inquiry in the future toward clarifying change in such strategies.¹⁶⁹

While we can consider trends – whether they shift toward or away from enlarging warfare by enlarging the economic objectives and hence the measures to be adopted in war – we cannot predict the outcomes.¹⁷⁰ It would be foolhardy to predict the future of state practice in warfare – or in economic warfare – in view of the changing conditions and relations that affect the policies of states. As Churchill said in his eulogy to Chamberlain in the House of Commons, November 12, 1940:

It is not given to human beings, happily for them, for otherwise life would be intolerable, to foresee or to predict to any large extent the unfolding course of events. In one phase men seem to have been right, in another they seem to have been wrong. Then again, a few years later, when the perspective of time has lengthened, all stands in a different setting. There is a new proportion. There is another scale of values. History with its flickering lamp stumbles along the trail of the past, trying to reconstruct its scenes, to revive its echoes, and kindle with pale gleams the passion of former days. What is the worth of all this? The only guide to a man is his conscience; the only shield to his memory is the rectitude and sincerity of his actions. It is very imprudent to walk through life without this shield, because we are so often mocked by the failure of our hopes and the upsetting of our calculations, but with this shield, however the fates may play, we march always in the ranks of honor.¹⁷¹

Notes

*National Defense University – Institute of National Strategic Studies. Georgetown University, National Security Studies Program. This paper contains only the opinions of the author, and they should not be attributed to the United States Government or Georgetown University.

1. Captain Hugh F. Lynch, in his paper on the “strategic imperatives” relating to economic warfare at sea, purposefully limits his inquiry into economic warfare in a warfighting context. This of course is the traditional context, premised on the expectation of strongly armed belligerents with strong navies that they could “reduce the enemy’s warfighting potential” by reaching that part of his economic power involved in his trade and access to goods across national borders. The term “imperative” is used to identify priorities in military objectives. The author has a companion paper to this, see Harry H. Almond, Jr., *An Assessment of Economic Warfare: Developments from the Persian Gulf* 31 Va. J. of Int’l L. 645–672, (1991).

2. See Ken Booth on the diplomatic instrument: Law, Force and Diplomacy at Seas, (1985); for a view by implication that the entire economy gradually verges on becoming a target for warfare, blurring the lines of discriminate warfare, cf M. Shulman, *Learning to Live with Authoritarian Regimes*, 55 Foreign Affairs 325, 337 (1977). Shulman notes that if our goal is to protect the economy, that of the aggressor is to attack it.

3. Klaus Knorr, *Power and Wealth*, 133 *et seq.*, (1973).

4. *Id.* at 136.

5. The changing methods of warfare, new weapons and agents used in attacks and hostilities, and changes in the organization of invoking violence have had their impacts leading to change in perspectives about neutrality as well as economic warfare, and they are indeed interrelated. As Myres S. McDougal and Florentino P. Feliciano have indicated in their *Law and Minimum World Public Order* (1961), the notions of neutrality had already begun to wear under the practice of World War I, and were replaced by qualifications of neutrality: “absolute neutrality,” “qualified neutrality,” “non-participation,” and “non-belligerency” were terms intended

to suggest policies that did not fit easily into the older notions of neutrality. This change, considered in depth in McDougal and Feliciano, was outlined in Lassa Oppenheim's *International Law* (1952) immediately after the second World War.

6. Expected patterns of behavior may be initiated or directed, so to speak, by the adoption of policies regarding coercion. Legal regulation of coercion imposed through economic measures invokes the same general standards as are used with military coercion or force, to wit, the principles associated with necessity, proportionality, and legitimacy of target. These principles are expressed in general language, and they are formulated for precise situations by accommodating to the conditions to which they are applied. Necessity for high intensity use of violence will differ and be less subject to constraint in state practice than situations in which the violence released and the conditions applicable to the use of force are less. Distinctions may also be made between the use of these principles when the time of reference differs, *i.e.*, the principles are under closer constraints at the initiation of aggression and with regard to responses to aggression than during hostilities or warfare. To make states more accountable there have been a number of proposals, enlarging upon the just war principles, to prevent precipitous or unconsidered uses of force, and to encourage a weighing of the factors that ought, by common sense, be assessed, even when the time is short. Speeches by former Secretary of Defense, Weinberger, and former Secretary of State, Shultz, suggest that there is no established policy or standards for making these assessments. Weinberger's six tests for using combat forces lean toward introducing major public participation, and toward making the determination about outcomes and success in achieving them, while Shultz is bent on the timely use of power justified by those uses of force where we are on the side of the good. These positions and debates on them appear in Ernest W. Lefever, ed., *Ethics and American Power* (1985), and the just war component is considered in A. Sabrosky & R.L. Sloane, *The Recourse to War: An Appraisal of the "Weinberger Doctrine"* (1988). The proposals for a checklist for decision makers is found in nearly every manifestation in which coercion or force is to be invoked, or where in on going hostilities new injections of force are intended. *Cf.* Nanda, *discussed in* Richard B. Lillich, *Humanitarian Intervention*, in John N. Moore, ed., *Law and Civil War in the Modern World*, 229, 248 (1974). [For forcible humanitarian intervention, Nanda calls for consent of the government involved; limited humanitarian purpose; duration of mission limited to accomplish limited objectives; limited use of coercive measures; and lack of other means to achieve objectives.]

7. Numerous writers have taken the view that economic warfare is to be broadly construed. See Williams, *15 Economic Intelligence and Economic Warfare*, in publication of ICAF (1954); M. Reder of Stanford University noted:

In any prolonged military struggle, the ability of a nation to survive and prevail obviously depends upon the extent to which it can continue to produce military equipment and sustain its population and armed forces. In the context of such a struggle, economic warfare is simply a matter of reducing the enemy's capacity to survive and preventing him from reducing yours. Reder, *Economic Warfare: Concept and Potential* (1962). [The entire paper pursues this larger perspective]. Of particular interest see Yaun-li Wu, *Economic Warfare* (1952). Wu states that the economic measures of warfare are "those international economic measures that through the play of economic forces could directly or indirectly reduce the economic strength, hence the war potential, of the enemy relative to our own." At 6 he differentiates between economic warfare in terms of the time of relations, *i.e.*, those during military conflict and all others.

8. Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order* (1961). [*hereinafter* McDougal and Feliciano] See especially the chapter on neutrality, of major relevance because economic war and the law of economic warfare, are found from the crosscurrents of perspectives about neutrality, warfare in general, and the specific problems of such measures as blockade, blacklisting, and so on. It is noteworthy that there are examples in history of nations destroying their rivals and leaving no trace. The attack on Carthage and its destruction nearly achieved this in recent history. It is possible that Nazi Germany had such objectives in view, at least with the peoples of some nations.

9. The economy or economic base of power of a nation is in modern warfare one of the targets of attack: though seemingly protected through the "humanitarian" laws relating to prohibitions against indiscriminate attacks against the civilians and civilian objects, the targets of strategic weapons, and the attacks mounted against cities, are clearly attacks intended to disable and breakdown the economy. The overall perspective of what constitutes such an economy, in military terms, is caught by Knorr:

Economic military potential is determined by the composition of resources as well as by their over-all magnitude. The production, maintenance, and use of armed forces require a variety of goods and services. . . . Most demanding are very complex weapon systems . . . which are within reach only of countries possessing the most highly developed technology. As GNP is an index of a country's

aggregate resources, so the composition of output reflects the structure of capacity. The composition of the national product is determined by three conditions of supply – manpower, natural resources, and man-made resources (capital and technology) – and by the structure of demand. Klaus Knorr, *supra* note 3 at 50.

And in 2 *Encyclopedia of Social Sciences* 90 Edwin R.A. Seligman, ed., (1930): “War, notwithstanding its numerous other affiliations, must be considered as a form of economic activity, for most wars or raids among primitive people are waged for the acquisition or retaliatory destruction of property, including the values inherent in human life.” While applied to primitive people, the impacts of this activity in modern warfare remain largely the same.

10. Economic sanctions guided by the U.N. Security Council were imposed upon Iraq in the Gulf War of 1991. In his interview with U.S. Ambassador Gaspie, Hussein pointed out: “There is nothing left for us to buy from America. Only wheat. Because every time we want to buy something they say it is forbidden. I am afraid that one day you will say ‘You are going to make gunpowder out of wheat.’” Citation in Nica L. Sify & Christopher Cerf, ed., *The Gulf War Reader* 128 (1991). [Hereinafter Sify and Cerf] Hussein also referred to Kuwait’s intention to produce oil in excess of OPEC understandings as “some brothers are fighting an economic war against us. And that not all wars use weapons and we regard this kind of war as a military action against us.” *id.*, at 131. His final remarks, though cryptic, suggested that the military option against Kuwait would be imposed on him if Kuwait did not change its policy. *id.*, at 133. The sanctions of the United Nations commencing with Resolution 661, 6 August 1990, were aimed at cutting off trade with Iraq. Various individuals argued that sanctions should be tried, and were even likely to work. See statements by former Chairman, Joint Chiefs of Staff, Adm. William J. Crowe, Jr., in Sify & Cerf, at 234, 236:

In other words, I would argue that we should give sanctions a fair chance before we discard them. I personally believe they will bring him [Hussein] to his knees ultimately, but I would be the first to admit that is a speculative judgment. If, in fact, the sanctions will work in twelve to eighteen months instead of six months, a trade off of avoiding war, with its attendant sacrifices and uncertainties, would in my estimation be more than worth it. (From Testimony to Sen. Armed Services Committee, Nov. 28, 1990.)

Henry Kissinger observed that “the route of sanctions and the military option can be pursued up to a certain point simultaneously,” and then it would be left to the military instrument *cited*, Sify & Cerf, at 241. Brzezinski before the Senate Foreign Relations Committee on December 5, 1990 recommended a phased step-wise approach, but with stress on economic sanctions, and a warning against war *cited* Sify & Cerf, at 251-54; Jimmy Carter on October 22, 1990 recommended negotiation, with King Hussein as the “key leader” in this effort *cited* Sify & Cerf, at 225-27; and numerous other commentators and experts speaking before the Senate and House committees reinforced the views taken with studies purporting to show the effectiveness of sanctions. The attitude toward sanctions and easing Hussein toward the desired results may have conditioned his resolve, according to *The Economist, Kuwait: How the West Blundered*, *cited* Sify & Cerf at 99-106. President Bush stuck mainly to the threat to use military force, and, of course, then resorted to it. See his speech of November 8, 1990, *cited* Sify & Cerf, at 228.

11. The term “economic sanctions” is generally used to embrace “techniques and strategies for supporting public order,” such as those adopted by the Security Council under its mandate in the United Nations Charter to maintain international peace and security. As Reisman indicates: “They [sanctions] cannot be divorced from the sociopolitical context in which they operate because they are integral to it.” Economic sanctions have evolved to become strategies applicable during the entire spectrum of relations among states, and differ during peace and war largely to the extent that in wartime, the economic sanctions may be accompanied by military sanctions. And economic warfare traditionally part of the conduct of hostilities applies similar strategies as those applied in peace time, except for the qualifications arising from the greater intensity of violence: the targets selected, the destruction attempted, and the intensity of the strategies applied are likely to vary. See W. Michael Reisman, *Sanctions and Enforcement*, International Law Essays, 381, 383, 384 (Myres S. McDougal & W. Michael Reisman eds., 1981). The term “enforcement” according to Reisman “particularizes: a public order sanctioning system, *i.e.*, it is a specific assembly of sanctioning programs designed to realize, in value terms, an identifiable authoritative prescription.” *Id.*, at 405.

12. Closer attention to economic warfare and to the strategies of the targeting of the economies and goods of rival states is likely to have its impact upon military and diplomatic strategies, in large part because such attention will have its impacts upon the intelligence capabilities. Intelligence, in the largest perspective, comprises “the gathering, evaluation and dissemination of information relevant to decision-making, and may include prediction based on such information, as well as planning for future contingencies.” For analysis see Myres S. McDougal, et.al., *The Intelligence Function and World Public Order*,

International Law Essays, 287 (1981). It is widely accepted that a substantial element of intelligence gathering is that focused on "economic" and "social" data, their evaluation, and the appraisal of their impact upon a nation's power.

13. Maritime strategy is generally formulated as a strategy of naval warfare, serving in the larger context of hostilities. A more complete perspective would embrace economic warfare, including the enlarged notion suggested in this paper, and the effect of such warfare in an enlarged perspective to deny or interfere with a rival's logistics, the capabilities to provide the material to its military forces, and the extent to which it can protect itself against attacks on its logistics and supply lines. Francis J. West, Jr. observes that a "Maritime Strategy is based upon concepts which transcend naval considerations," and citing Dr. Robert Wood of the Naval War College, states "any deterrence strategy that does not consider how the war will be fought and terminated is a hollow shell." With the shift to conventional wars;

The U.S. naval focus has been on persuading all U.S. Services that the issue is not a force structure debate. Rather, it is concerned with the need to develop a conventional warfighting concept, because the initiation of nuclear war is both militarily insensible and morally bankrupt - especially when rhetorically cited as a reason why wealthy nations do not have to provide prudently for their common defense by conventional means. Francis J. West, Jr. *U.S. Naval Forces and NATO Planning*, Naval Forces and Western Security, 2,8 (1987).

14. For a study of the strategic framework, *see especially* Sun Tzu, *The Art of War* 63-84 (Griffith, trans., 1963, 1976 [pbk]). The subject of strategy is of great importance, but ancillary, to this inquiry. *See* Basil H. Liddell Hart, *Strategy - the Indirect Approach*, (1954). For a general overview of the larger policy arena, *see* Harold D. Lasswell, *World Politics and Personal Insecurity* (1935).

15. Cf. Julian S. Corbett, *Some Principles of Maritime Strategy* 99 (1911) who notes:

Thus it comes about that, whereas on land the process of economic pressure, at least in the modern conception of war, should only begin after decisive victory, at sea it starts automatically from the first. Indeed such pressure may be the only means of forcing the decision we seek . . . [that] interference with the enemy's trade has two aspects. It is not only a means of exerting the secondary economic pressure, it is also a primary means towards overthrowing the enemy's power of resistance. Wars are not decided exclusively by military and naval force. Finance is scarcely less important. When other things are equal, it is the longer purse that wins. It has even many times redressed an unfavorable balance of armed force and given victory to the physically weaker Power. Anything, therefore, which we are able to achieve towards crippling our enemy's finance is a direct step to his overthrow, and the most effective means we can employ to this end against a maritime State is to deny him the resources of sea-borne trade.

16. In the "Crowe Memorandum" issued in 1906 by then Mr. Eyre Crowe from the British Foreign Office (*Reprinted in* Wishy, ed., *The Western World in the Twentieth Century* 1961) noted that ever since the writings of Mahan it was widely recognized among strategists that sea power "is more potent than land power, because it is as pervading as the element in which it moves and has its being:"

Its formidable character makes itself felt the more directly that a maritime State is, in the literal sense of the word, the neighbor of every country accessible by sea. *Id.*, at 74.

The primary thrust of the Crowe memorandum is to support England as the fulcrum to ensure a balancing of power against the outbreak of major hostilities, but he builds England's power upon its strength as a sea power. Crowe's memorandum supports the doctrine that a nation like Britain, to exercise its role, must have power in being: "the only check on the abuse of political predominance . . . has always consisted in the opposition of an equally formidable rival, or of a combination of several countries forming leagues of defense." *Id.*, at 75.

17. For an analysis of the Vietnam War applying for the analytical framework the military principles of war, *see* Harry G. Summers, *On Strategy: A Critical Analysis of the Vietnam War* (1984). Summers lists them under the objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, and simplicity. He also mentions planning, force planning and contingency planning as analytical components of preparations or readiness for war.

18. Carl von Clausewitz, *On War* 605 (Michael Howard and Peter Paret, ed. and trans., 1976). Clausewitz observed that the concept of war is that it is a "branch of political activity" and is "in no sense autonomous." *Id.* The link of policy cannot be severed from action, and the link of law to policy is fully established.

19. States operating under directives of the Security Council of the United Nations, may be directed under Article 42 to:

... take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 41 includes the power to direct actions to disrupt economic relations, communications, and so on.

20. The "principles" of war such as economy of force, objective, offensive and so on are designed to reflect state practice, experience and expectations in resort to the traditional military instruments of war. However, they have their counterparts in resort to economic warfare. See generally U.S. Department of the Navy, Office of the Judge Advocate General, *The Commander's Handbook on the Law of Naval Operations*, (NWP 9) (REV. A) FMFM 1-10, (1989), ch. 5. These principles are largely summed up under economy and efficiency, but they separately provide indicia, and lead in the military literature to "lessons learned", or to rules of engagement, all of vital, operational importance in the conduct of hostilities.

21. Cf. Derek W. Bowett, *Self Defense in International Law* 24 (1958) (hereinafter Bowett).

... there is something to be said for the view that economic or ideological aggression can be detrimental to a state's security and, if illegal, as dangerous a violation of the state's essential rights as the use or threat of force.

Bowett would thus permit, in the appropriate situations, the use of force for "economic" aggression, assuming it meets the standards of necessity, proportionality and relevance of target.

22. For an important assessment of this matter see McDougal & Feliciano *supra* note 8, at 196-202. These are problems that overlap aggression as well as the issue as raised during armed combat. The two authors *citing* Bowett, *supra* note 21, at 202, n.182 observe.

When the delict does not involve force or the threat of force, it would similarly seem arbitrary to deny to the defending state the right to use force in defence of its rights as a matter of fixed principle.

... The use of force as a reaction to a delict not involving force will scarcely ever be "proportionate" but there is no rule of law to say it can never be so. Bowett *supra* note 21, at 24.

The two authors continue in the note:

To accept Dr. Bowett's position is not to open a Pandora's box of real as distinguished from supposed evils. The tests of "necessity" and "proportionality" are not in any greater degree susceptible of abuse here than in other contexts, if the reviewing decision-makers desire to safeguard them from subverting misuse. Susceptibility to abuse is a common property of all legal standards and rules.

Coercion, they observe, is inevitable in state practice; community policy does not and cannot reach it and prohibit it, "without attempting to impose moral perfection, not to mention social stagnation, on humanity." *Id.*, at 197. The expectations of the target state are controlling however, and, in any event, Article 2(4) of the Charter does not exhaust the competence of the global community to intervene itself for police measures. [*Id.*, at 200, paraphrased]. They warn however against adopting such familiar phrases as "substantial" and "extensive" to characterize the coercion and the bright line change to the permissibility of using force. *Id.*, at 199.

23. The strategies of economic warfare must be judged against two categories: the strategy itself may involve an economic measure, such as freezing funds or bank accounts, or it may be an economic objective, later described in this paper as including the enemy's economy, and drawing that into the category of a legitimate military objective. Thus, the base for strategic strikes at the cities could be laid down as a strike for an legitimate object of attack. Expectations thus arose as to such strikes and to future strikes of this nature from the practice in the second World War. The Nuremberg Trials did not condemn such practices as such.

24. Reprisals are introduced to promote public order, and have an enforcing function as well as a punitive or correcting function. Moreover, their existence and their use also carry with them a deterrence function: states do not usually want to suffer a reprisal because the actions taken tend to be by methods of war that are not usually tolerable to themselves or their populations. Reprisals may be invoked at any time, wartime or peacetime. Cf. *Naulilaa Incident, Portugal-Germany, Arbitral Decision of 31 July 1928*, 8 Recueil des Decisions des Tribunaux Arbitraux Mixtes, 409, 422-425. Briggs indicates in a note that reprisals may extend to display of military or naval force, embargo, boycott, pacific blockade, bombardment or military occupation of territory. *Law of Nations* 958 (Herbert W. Briggs, ed., 2d ed., 1952).

25. The "Martens" clause in the Preamble to The Hague Convention No. IV of 1907 refers to the obligation of states to conform with practices expected among civilized peoples including "the laws of humanity and the dictates of public conscience." See also Article 22 of the Hague Regulations annexed to the Convention No. IV. These anticipate that the conduct of hostilities is to be regulated under law, but fail to provide pointers to the maintenance of public order. Such provisions were intended to reach technological developments in warfare that might not have been codified or adopted as customary international law.

26. For analysis, comment and examples see *The Naulilaa Arbitration*, *supra* note 24; Derek K. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 Am. J. Int'l L. 1-3, 10-11, (1972); Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 Am. J. Int'l L. 415, 437-442 (1969); former Secretary of Defense, Caspar Weinberger, Speech to National Press Club, November 28, 1984 (aimed at securing domestic support). If all uses of force under all circumstances are illegal, then a response by way of self help or self defense partakes of the same elements as a reprisal.

27. Friction, according to Clausewitz, is the element that is unclear and unpredictable in war. Hence,

This tremendous friction, which cannot, as in mechanics, be reduced to a few points, is everywhere in contact with chance, and brings about effects that cannot be measured, just because they are largely due to chance. One, for example, is the weather. Fog can prevent the enemy from being seen in time, a gun from firing when it should, a report from reaching the commanding officer. Rain can prevent a battalion from arriving, make another late by keeping it not three but eight hours on the march, ruin a cavalry charge by bogging the horses down in mud, etc.

On War 119 (Peter Paret & Michael Howard ed., 1972). "Everything in war is very simple, but the simplest thing is difficult."

28. The Geneva Protocols of 1977, to wit Protocol I, provide a number of restraints on attacks against the economy, but they are in the context of military attacks. Nonetheless, this would reduce the "economic warfare" that arises from a military attack on the economy as a whole. See Articles 51 and 52 mandating protection of the civilians and civilian objects, and Article 57 relating to precautionary measures with a view to protecting civilians in launching an attack. *Geneva Protocols*, Berne: I.C.R.C. Publication, (1977). The United States has not ratified the Protocols.

29. See McDougal & Feliciano, *supra* note 8, who have devoted a major book to this subject. Some of the features of this inquiry can be found in traditional sources, such as the chapters of *Manual of Public International Law*, ch.12 (Max Soerensen, ed., 1968). See, esp. the bibliography, *id.*, at 844-54. The author of this chapter, Krzysztof J. Skubiszewski, who argues that high intensity conflict, turning to weapons of high intensity destruction, lead to a change in law. With regard to economic warfare, he notes:

Economic warfare, starvation, blockades, obliteration bombing, including purposeful destruction of civilian targets such as residential areas hundreds of miles behind the frontlines, indiscriminate torpedoing of shipping, or use of long distance rockets and atomic bombs against enemy territory without discriminating between targets, are measures of warfare which have put an end to the inviolability of civilians and destroyed the basic distinction of the law of war, namely, the difference between armed forces and civilian population, and between military and non-military objectives. *Id.* at 803.

The existing law remains "in force" but loses its effectiveness: it is simply disregarded.

30. The ebb and flow of belligerent practice accounts for differing perspectives about the effectiveness of the law of war and as to future expectations about moderating its destructive force. Hersch Lauterpacht immediately after the second World War pointed out the limits in seeking to strengthen that law through treaties and international agreements. See, e.g., Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 Brit. Y.B. Int'l L. 360 (1952); Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 Brit. Y.B. Int'l L. 206 (1953).

31. See Soerensen, *supra* note 29, at 831, 839. Angary is a right to destroy or use neutral vessels in case of necessity, and according to some, such vessels may be captured in home waters, on the high seas, or in enemy territory. The right is subject to compensation. Economic warfare at sea is a special instance of economic warfare, fashioned by the conditions imposed by the use of the high seas, and the need to have appropriate naval forces for its effectiveness.

32. See discussion in Soerensen, *supra* note 29, at 753 *et seq.* This discussion, however, tends to ignore the distinction of reprisal from retorsion. The conceptual difficulty with reprisals is making the instrument operate as an instrument to promote public order, and to refrain from their operation as action-reaction measures untouched by the fundamental policy considerations and obligations of the parties. Reprisals and neutrality commenced in early belligerent practice but have been altered with modern practices of war. See George Schwarzenberger, *The Frontiers of International Law*, 104, 114 (1962).

33. McDougal and Feliciano, *supra* note 8 at 384. The discussion that follows in this portion of the paper draws upon the analysis of these two authors in ch. 5 of this book.

34. *Cited in id.*, at 388.

35. As we pursue the quest into minimum order, it is evident that the questions also include the responsibilities of the states participating, the burdens allocated amongst them, their tolerances as to the permissibility of coercion, the impact of such developments as the Covenant of the League of Nations, the Kellogg-Briand Pact (Pact of Paris, 1928), and the United Nations. Such questions raising perspectives among states have their bearing on the changing attitudes toward contraband, and toward opening blockade to long-distance blockades, changing the premises of the Declaration of London, 1909 that were conditioned on actual blockades. See McDougal and Feliciano, *supra* note 8, at ch. 5.

36. Robert H. Jackson, address to Inter-American Bar Association, Havana, March 27, 1941, 35 Am. J. Int'l L. 348, 349 (1941). He also pointed out:

I want the legal profession of this hemisphere to know that [U.S. decisions of policy] are being made in the conviction that the structure of international law, however apparently shaken, is one of the most valuable assets of our civilization. There may be differences of opinion as to some of its particular rules, but we have made conscientious effort to square our national policy with enlightened concepts of the law of nations viewed in its entirety. *Id.*, at 349.

Cf. Ian Brownlie, *International Law and The Use of Force by States*, 402-404 (1963), and *cited in* Marjorie M. Whiteman, 11 *Digest of International Law* 143 (1968).

The classical and positivist conception of neutrality which developed in the seventeenth and eighteenth centuries was one of complete impartiality towards the parties to any conflict unless a treaty of alliance modified the position. The foundation of the doctrine of absolute neutrality was the absolute right of the state to resort to war. With the appearance of categories of unlawful war in the League Covenant the doctrine of absolute sovereignty was modified although this modification took place in the special context of a collective security system.

See generally, Whiteman at 139-143 *et seq.*

37. *Id.*, at 349, 350.

38. See *supra* note 20, at 7-6, which states that with the United Nations, states may be subject to acting in accordance with Security Council directives. However, it points out that states must refrain from aiding states that are the object of such directives citing Article 43 of the Charter. A reading of this Article shows that while this and other provisions establish affirmative responsibilities they do not establish the negative responsibilities to refrain: these would have to be implied.

39. Jackson insisted on his primary claim that the United States was deliberately bending the rules of neutrality because this was justified under the Kellogg-Briand Pact, and because the doctrine of the just war supported his position. Moreover, he insisted that state practice showed that other states had done the same. He even added that the claim to support the United Kingdom on a discriminatory basis could be based upon self defense *supra* note 36, at 357. Moreover,

No longer can it be argued that the civilized world must behave with rigid impartiality toward both an aggressor in violation of the treaty and the victims of unprovoked attack . . . A system of international law which can impose no penalty on a law-breaker and also forbids other states to aid the victim would be self-defeating and would not help even a little to realize mankind's hope for enduring peace. *Id.*, at 358.

Jackson quoted from Elihu Root, a leading public official and lawyer, to the effect that "an international breach of the peace is a matter which concerns every member of the Community of Nations - a matter in which every nation has a direct interest, and to which every nation has a right to object." *Id.*, at 353.

40. Where it is argued that sovereign states are free to claim no control except their own will, they have no "legal duty to any other nation." Hence, "since there is no law binding it to keep the peace, all wars are legal and all wars must be regarded as just." *Id.*, at 350. Hobbes expressed the context:

To this war of every man against every man, this also is consequent: *that nothing can be unjust*. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues.

Hobbes, *Leviathan*, in *The English Philosophers from Bacon to Mill*, 162 (E.A. Burt, ed., 1939). Hobbes elaborates on the just war thesis at length in subsequent pages. For major commentaries on the "just war," see James Turner Johnson, *Just War Tradition and the Restraint of War*, (1981); Paul Ramsey, *The Just War: Force and Political Responsibility* (1968); William V. O'Brien, *The Conduct of Just and Limited War* (1981). An attempt of a distinguished philosopher - Immanuel Kant - to lay down a framework of peace but entailing controls over the resort to force emerged from the earlier works of Abbe de Saint-Pierre, who had the practical experience as an envoy to the Peace Congress at Utrecht in 1712, and from the proposals of Leibniz and Rousseau. Kant's work on "everlasting peace" had six articles calling for peace settlements without secret reservations for a future war, a ban on acquisition of independent existing states, the absolute abolishing of standing armies, a ban on national debt "contracted in connection with the external affairs of the state," a ban on interfering "in the constitution and government of another state," and an undertaking that belligerents shall not engage in hostilities "that would make mutual confidence impossible during a future time of peace." Summarized in H. Trivers, *The Community of Man*, 34-35, (1977).

The arguments between former Secretaries of Defense and State, Weinberger and Shultz, discussed later on the use of force, appear in a policy vacuum: there are no official United States positions that have adopted either view or a combination of the two. One commentator argued that the "debate" was dangerous because it did not state clearly what the United States would do in resorting to force. Others argued that the two positions helped to clarify and lock in the United States policy process. For the arguments and discussions see, generally, *Ethics and American Power*, (Ernest W. Lefever, ed., 1984).

41. Jackson would find some support in the resolution of the Institute of International Law, 1963, cited in Soerensen, *supra* note 29, at 811:

... that there cannot be complete equality in the application of the rules of the law of war when the competent organ of the United Nations has determined that one of the belligerents has resorted to armed force in violation of the rules of the law of nations consecrated by the Charter of the United Nations.

But this is a reflection of action taken by the United Nations, *i.e.*, the Security Council, or the permissive actions recommended by the General Assembly. Nevertheless, it is of interest in a United Nations that is gradually assuming authority as states express and reveal their will to operate under directives of the Security Council as in the Iraqi situation.

42. *Id.*, at 358. Jackson quoted from Grotius, "it is the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war." *Id.*, at 351. Hence Jackson coupled the notion of the "just" war with the legal equality of belligerents under the law of war, indicating that the aggressor may have to shed some of this equality. This of course is an extreme position not widely adopted.

43. See generally, Daniel P. O'Connell, 2 *International Law of the Sea* 1094-1158 (Ivan Shearer, ed., 1988).

44. See generally, Julius Stone, *Legal Controls of International conflict*, (1973); Dietrich Schindler & Jiri Toman, ed, *Laws of Armed Conflict* (1988) provide the best source of the treaty laws and the source references; Edward N. Luttwak, *Political Uses of Sea Power*, (1974) is a valuable study of the resort to naval forces in "peacetime;" and Robert W. Herrick, *Soviet Naval Theory and Policy*, (1988) considers Soviet views as expressed by various Soviet spokesmen. See also, Daniel P. O'Connell, *Influence of Law Upon Sea Power*, (1975); Clark G. Reynolds, *Command of the Sea* (1983); the series published by the Naval War College at Newport, Rhode Island, called *International Law Studies*, are important source materials. The "science" of law is a science of accommodation among claims and claimants, with stress on methodology that must be flexible and able to adapt to changing events and perspectives. Thus, it varies from the hard sciences dependent on mathematical formulae and exactness. Cf. Mark Kac & Stanislaw M. Ulam, *Mathematics and Logic* (1968).

45. 1 U.S. Foreign Relations 36 (1928); quoted in *Law of Nations* 977-978 (Herbert W. Briggs, ed., 2d ed., 1952).

46. See, generally, Whiteman, *supra* note 36, v. 11, at 451 *et seq.* Cf. the Declaration of Panama, 1939, quoted at 451, in which the Latin American republics insisted on their "inherent right" to protect and defend themselves collectively. Other examples are given. The concept of self defense in World War II gradually expanded to counter the threat, so that the United States claimed neutrality even though providing military force to ensure the supply of goods to Britain.

47. Cited in *id.*, *supra* note 36, at 159.

48. Charles C. Hyde, 3 *International Law Chiefly as Interpreted and Applied by the United States*, 2315 (2d rev. ed., 1945), cited in Whiteman, at 474. Guggenheim is cited for the proposition that a belligerent subjected to neutral behavior favoring its enemy with military assistance as being the subject to aggression. *Id.*

It is evident that the Hague conventions and other instruments relating to neutrality are at risk with these changing expectations: many of them are gradually slipping into desuetude.

49. *Seapower and Strategy* (Colin S. Gray & Roger W. Barnett, ed., 1989).

50. A naval report of 1963 declared:

The primary role of seapower in our national military strategy is to contribute to our national readiness to project U.S. power overseas. Sea areas lie between us and any prospective allies. Extensive use of the seas is necessary for support of our allies and for the support of our own military forces on their soil. . . . These factors dictate an offensive naval strategy. Our Navy must be designed to carry the war to the enemy, both at sea and on land. In our early history the navy was frequently forced into a coastal defense strategy. It was only after we shook off the shackles of these defensive concepts that we were able to exploit our full potential and perform our primary mission—control of vital sea areas. *Cited in id.*, at 333.

According to an NSC Report of January 1977:

Sea control is the fundamental function of the navy; it connotes control of designated air, surface, and subsurface areas. It does not require simultaneous control over all waters but is exercised where and when needed. *Id.*, at 336

51. Admiral Louis Denfeld's Report of 1951, quoted in Gray & Barnett, *id.*, at 329.

52. *Id.*, at 345. Sea control, of course, is critical to the assurance of an economic warfare strategy. The expansion of such a strategy and of such control into policing and enforcing security against the international traffic in drugs is a current example of this strategy turned toward the economies so to speak of criminal commerce and trade.

53. *Quoted in Soviet Military Power, 1990, 22–23 (1990)*. It is noted:

This recognition not only heightens the importance of political as distinct from military-technical variables in the security calculus, but places unusual emphasis on threat reduction, unilateral restraint, and collaboration with adversaries.

Past practice with the Soviet Union, however, suggests that such positions can be genuine, or they can be positions based on the elements of deception.

54. Admiral James D. Watkins, *The Maritime Strategy*, U.S. Nav. Proc. 4 (January, 1986). The view taken in the present paper is in the context of a larger, "grand" strategy that includes peacetime strategies, and continuous attention to building, curing peacetime, the economic and related bases of power.

55. *Cf. Manfred Eigen & Ruthild Winkler, Law of the Game (How the Principles of Nature Govern Chance) (1981)*. Though somewhat esoteric, the following observation is relevant:

Everything that happens in our world resembles a vast game in which nothing is determined in advance but the rules, and only the rules are open to objective understanding. The game itself is not identical with either its rules or with the sequence of chance happenings that determine the course of play. It is neither the one nor the other because it is both at once.

If arms control is a "game," then the rules [equilibrium, balancing, deterrence] may be objectively assessed, but arms control in the policy sense then becomes a matter that involves both the rules and the substance. Transformed to naval capabilities, we discover that the fundamental rule—equality of interests among the rivals that conclude the agreements—is not applicable.

56. Recent practice includes the Malvinas/Falklands War between the United Kingdom and Argentina. For a brief review of the maritime exclusion zones, see Robin R. Churchill & Alan V. Lowe, *Law of the Sea 308 (1988)*.

57. The early law relating to neutrality was based, according to Schwarzenberger, on a single premise:

It was that, unless the contrary was established by treaty, all foreign princes and their subjects might be treated as enemies. Whether met on land or sea, they were fair prey. If a foreign prince or his subject were to expect any different treatment, they had to show that they were in a state of amity with the other Power concerned or at least protected by a treaty of truce or special safe-conducts.

George Schwarzenberger, *The Frontiers of International Law*, 12 (1962). The first English Proclamation of Neutrality was issued in 1536 by Henry VIII to reach those who sought to achieve as neutral goods the goods of a state in belligerency with England. [*Id.*, at 13]. For further studies see E. Turlington, 3 *Neutrality, World War Period*, (1976); S.W.D. Rowson, *Prize Law During the Second World War*, 1947 *Brit. Y.B. Int'l L.* A view

of a French authority of blockade during the first World War is that of Louis Guichard, *The Naval Blockade 1914-18* (1930).

58. See for a general assessment George S. Schwarzenberger, *International Conflict* 19 at chs. 52, 53, *et seq.* Cf., also Green H. Hackworth, *Digest of International Law*, § 627, at 134 *et seq.* on reprisals and the change in the tolerances as to the exercise of reprisals during the first World War. For a general survey, see Lassa Oppenheimer, *International Law* (Hersh Lauterpacht, ed., 7th ed., Part III 1952).

59. See James W. Garner, *Prize Law During the World War* (1927). Garner reviewed the jurisprudence of Lord Stowell in connection with his unwillingness to change and reshape prize law. See pp. xlv *et seq.* The prize courts depended primarily upon their municipal directives, *i.e.*, through statutes or legislation, to make their determinations. Garner assesses this practice in ch. 1.

60. Cited by Schwarzenberger, *supra* note 57, at 650.

61. See, generally, Herbert A. Smith, *Law and Custom of the Sea* (1959), reviewing the British position in the first World War, the Orders-in-Council, rejecting the Declaration of London. Smith cites the orders involved. It is evident that the British had turned to long-distance blockades, which they believed critical to their defense, and thus had broken through the restraints of the Declaration that limited blockades to close-in actions.

62. *Id.*, at 246.

63. Cf. Schwarzenberger, *supra* note 57, at 650-651. See also Hackworth, *supra* note 58, at 142 *et seq.* Belligerent states are shown to stumble intentionally over the language of their treaties like the Declaration of London, and over the semantics of language. The matter of blockade is covered by the citation from Hackworth.

64. States adopt among other goals the sanctioning goals of prevention and deterrence. In terms of a peacetime strategy [employing either or both persuasive or coercive measures], Western states alert to the ultimate need for global order must take steps to ensure that the Soviet Union does not become again the awesome threat that it was when its economic base of power was sufficient to amass its present arsenal. For an analysis of the strategies in the coercive context of military force, but with clear analogies to an analysis of strategies other than military strategies, see McDougal and Feliciano, *supra* note 5, at 287-96. The strategic goal in the global arena according to these two distinguished commentators is to establish global public order affording security, preservation of fundamental values, and order among states as a whole, not maintaining public order precariously through competing and contending states.

65. A full discussion of the use of Western funding and subterfuge in doing so for Soviet exclusive and power goals is set forth in Judy Shelton, *The Coming Soviet Crash*, (1989). Shelton shows the linking up of trade and trading links and dependencies, of funding to the Soviet Union, enabling it to maintain, as it currently does, a major military and military related effort, as well as extravagances such as major activities in outer space, and major funding of naval forces, and of commercial ventures. The Western states cannot impose effective restraints upon Soviet uses of funds, nor prevent it from acquiring and augmenting its technologies for strategic and military purposes. This could however be reversed by the adoption of appropriate strategies that should couple such support with clear showing of Soviet progress in democratic efforts, or toward democratic values.

66. By way of comment here: the disturbing element of false allegations is almost treated as permissible act of deception by belligerents in justifying their own actions. False allegations were made in the Korean War of 1950 by the North Koreans and Chinese that the United States had resorted to bacteriological warfare, and "confessions" extracted from prisoners of war, but these ceased when the United States demanded an investigation by the International Committee of the Red Cross.

67. George S. Schwarzenberger, *International Law as Applied to Armed Conflict* 647 (1976). Footnotes and citations omitted. Reprisals and counter-reprisals soon dissociated from the legal framework made up much of World War II practice. Adoption of war zones, extensive mine-fields, and sink at sight practices further reduced the certainty of neutrality and its controlling law. As Schwarzenberger points out:

... all that has happened is that, in two major wars, both sides have done their best to interpret to their liking unsettled and controversial points of law and found it convenient to justify their own action by alleging breaches by the enemy of the same law, now more strictly interpreted. *Id.*, at 651.

Total war, he believes, as did Lauterpacht, would lead to the end of the law of neutrality, and, in effect, of international law itself.

68. William N. Medlicott, *The Economic Blockade*, (1952). The basic principles recognized by the British prize courts follow the rules of the Declaration of Paris, 1856, and Article 2, Declaration of London, 1909, to wit: blockade to be binding must be militarily effective; only a belligerent can establish a blockade; duly declared and notified as to exact geographical limits and days of grace for neutral ships to leave the area; and, limited to ports and coasts of the enemy. *Id.*, at 4. These rules like the others relating to economic warfare were to be stretched during the war.

69. *Id.*, at 2. All measures of belligerency are treated under law as matters awaiting the practice of belligerent and neutral states because that practice determines the tolerances among states as to belligerent conduct. The process necessarily calls for flexibility and adaptation, and for a conception of law that is emerging and readily subject to the impacts of new methods of warfare.

70. *Id.* at 17. Three categories of economic warfare weapons were mentioned: legislative action reaching financial and commercial activities; diplomatic action to reach the neutrals; and military action in the broadest sense. The measures would include (1) interruption of supplies from overseas as contraband; (2) withholding supplies under the control of the U.K.; (3) offers to purchase guaranteed quantities of goods to remove them from the market; and (4) shipping control, and statutory listing, such as the navicert, etc. *Id.*, at 17-22.

71. 2 *id.*, at 11.

72. See generally, Schwarzenberger, *supra* note 58, at 644 *et seq.* Angary is supported by the legal authority of a belligerent to requisition [but pay for] a neutral ship. The requisition of a neutral ship is a form of economic coercion against neutrals. Angary under international practice requires that the taking be limited to the ship and not include the cargo, be taken upon a showing of military necessity or public need, and be covered by full compensation for use or destruction of the ship. *Id.*, at 636. Related legal institutions that might be considered include maritime seizure of all ships providing assistance to the enemy, embargo or prohibition on shipping, requisition under municipal law, thereby avoiding the restraints of international law relating to angary, eminent domain, arrest of princes [*i.e.*, and effective in peacetime as well as wartime], and expropriation, illustrated in distinction to angary by the United States requisition of contracts for uncompleted ships in her shipyards in World War I *Norwegian Shipping Claims Case, 1922. Id.*, at 640-641.

73. 2 Medlicott, *supra* note 68, at 15.

74. For further analysis see Stone, Schwarzenberger, Colombos and Tucker, *op.cit.* It is evident however that the Security Council's resolutions are drafted by the permanent and other members of the United Nations, so that the language can be ambiguous, or be drafted to enable them to avoid actions they do not want to take. Article 50 the United Nations Charter affords states the right of consultation with the Security Council when a member facing preventive or enforcement measures "finds itself confronted with special economic problems arising from the carrying out of those measures."

75. Cited in Whiteman, *supra* note 36, at 451.

76. The applicable law is sometimes divided into the law of war that includes both customary international law, treaty law, and the principles such as the principle of military necessity. The application of the principle of military necessity has not yet been given the refining assessments that are made with the use of force. Belligerents are to refrain from causing unnecessary suffering, using disproportionate force, or striking non-military targets. However, if economic warfare includes forcible actions against cities or other strategic targets involving the economy, or is applied through forcible measures, then these principles and standards are readily applied. See generally, Law of Naval Warfare, in Appendix, at 357 *et seq.*, of Robert W. Tucker, *The Law of War and Neutrality at Sea, International Law Studies* (1955).

77. Article 0605, Observance of International Law, in U.S. Navy Regulations 1973, declares:

At all times a commander shall observe, and require his command to observe, the principles of international law. Where necessary to fulfillment of this responsibility a departure from other provisions of Navy Regulations is authorized. *quoted in* (NWP 9) (REV.A)FMFM 1-10, see *supra* note 20, at 4.

78. Rules of engagement in the United States practice include in those rules directives that are guided by international law. Many remain classified. If they, and the rules of other states can be declassified and harmonized as to policy or content, they would afford an additional and important source of international law, feeding practice and action into the legal regime.

79. Cf. Stone, *supra* note 44, at 411 *et seq.*

80. *Id.*, at 413 *et seq.*

81. Neill H. Alford, *Modern Economic Warfare, International Law Studies*, 1963, (1967). Alford is the source of much of the discussion that follows.

82. *Id.*, at 1.

83. Stone, *supra* note 44, at 600

84. Stone, *supra* note 44, at 607, n.27

85. Cited by Alford, *supra* note 81, at 19.

86. The importance of strategy to the emerging law is readily perceived in the writings of the strategists themselves. See, e.g., Sir Julian S. Corbett, *Some Principles of Maritime Strategy*, (1982); James Cable, *The Diffusion of Maritime Power, International Relations*, Nov. 1982 (considering the appearance of new naval vessels); Michael E. Howard, *The Classical Strategists, from Studies in War and Peace* (1970) (reviewing the appearance of the nuclear weapon, and its use, even for deterrence, to be that of the threat against cities); Aaron L. Friedberg, *A History of the U.S. Strategic 'Doctrine' - 1945 to 1980*, *Journal of Strategic Studies*, 37 (Dec. 1980) (with the interesting observation that strategies depend upon an intended use of weapons, so that

a no-first-use or non-use strategy with nuclear weapons would be meaningless); Fritz Ermarth, *Contrasts in American and Soviet Strategic Thought, Soviet Military Thinking* (Derek Leebaert, ed., 1981).

87. Alfred T. Mahan, *The Influence of Sea Power Upon History*, (1890). Mahan's remarks about the study of history to ascertain strategy and the development of naval tactics points out that "theories about the naval warfare of the future are almost wholly presumptive." The theories offered have not been tested. The practice of states instead suggests the continuing modification of naval vessels, and with the new weaponry, the modification of naval tactics from close-in fighting to fighting that may be distant and between fleets that never see each other. Cf. Ram P. Anand, *Origin and Development of the Law of the Sea* (1983). Anand traces the economic and military strategies and coercion in the Indian Ocean, and in the Far East in general. The rulers subjected to European aggression had practiced freedom of the seas in the Indian Ocean and adjacent seas. *Id.*, at 21. Mahan further observes that the freedom of travel or navigation across the seas has been established over long practice, and this states seek to protect or if need be defend:

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 than others. These lines of travel are called trade routes; . . . *Id.*, at 25.

Hence the wealth of sea-faring nations is to be found in the strengthening of their sea power, and to protect that wealth and access to it, they create their naval forces:

In these three things—production, with the necessity of exchanging products, shipping, whereby the exchange is carried on, and colonies, which facilitate and enlarge the operations of shipping and tend to protect it by multiplying points of safety—is to be found the key to much of the history, as well as of the policy, of nations bordering upon the sea. *Id.*, at 28; see also at 53.

The general theme is picked up by British commentators. See, e.g., Herbert W. Richmond, *National Policy and Naval Strength* (1928); Julian S. Corbett, *Some Principles of Maritime Strategy*, (1911).

88. Much of this development can be traced in C. John Colombos, *The International Law of the Sea*, (6th ed., (1957). § 720.

89. *Id.*, at 2

90. *Id.*, at 4

91. Sergei G. Gorshkov, *Sea Power of the State 1-2* (1979). Imperialism, Gorshkov insists, compels a major naval force, essential to the security of the Soviet Union, and essential for ensuring "its interests" at sea. The imperialists he believes use sea power for aggression aimed at third countries, and aimed at holding their military blocs in check, as well as an instrument to threaten communism.

92. *Id.*, at 280. The change in naval force has led to a change in strategy – and this under one of the themes in my paper has led to a dynamic situation for the emerging law:

The revolution in military affairs has led to substantial shifts in all fields of military theory and practice. It has also brought changes in the organization of the navy, invaded the field of naval theory and touched on the content of naval art from tactics to the strategic use of a navy. This has brought in its train the elaboration of modern naval art, characterized by new categories and a kind of distillation of former concepts and principles. *Id.*, at 281–282.

93. *Id.*, at ix. Gorshkov's perspective is primarily in terms of the American threat, and countering that threat, militarily and politically. This would be deceptive if the view were taken that with the diminishment of the Soviet threat the United States faced neither threats, objectives, nor missions for a large, and varied, navy.

94. See McDougal & Feliciano, *supra* note 8, at 477 *et seq.* The techniques extend from more narrowly constricted war zones, declared and defined in extent by the belligerents, but dependent upon their ability to enforce those zones, to a series of "comprehensive administrative techniques of economic warfare."

95. *Id.*, at 488 *et seq.*

96. *Id.*, at 480.

97. See *id.*, at 484, n. 242.

98. See Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 *Am. J. Int'l L.* 597 (1963).

99. See discussion in McDougal & Feliciano, *supra* note 8, at 494 *et seq.*

100. For several views on this problem see the selections in Lillich & Moore, 62 *International Law Studies* (1980), e.g., S. Rosenne, *International Law and the Use of Force*, 1., laying down a framework of standards for considering the use of force, J. McHugh, *Forcible Self-Help in International Law*, 139, providing some of the traditional views, W. O. Miller, *Belligerency and Limited War* 164, and J. McNulty, *Blockade: Evolution and Expectation* at 172.

101. Miller, *supra* note 100, at 168.

102. Ultimately, the entire law of commerce control becomes one in which the enemy subjected to a superior rival in terms of command of the seas would be unable to trade. This came through military capabilities that could impose controls on export and import of goods, thus combining practices involving the administrative controls over contraband, and blockade, reaching goods whether of enemy destination or enemy sources. See McDougal and Feliciano, *supra* note 8, at 508-509. The authors further review the use of navicert, which, once issued, enabled the neutral to avoid seizure and condemnation, and "rationing" which determined the quotas of the neutral, its needs in material resources, and the undertaking to keep to those quotas, or be subject to the excess being condemned or destroyed. The prize courts applied these administrative measures, giving them the force of municipal law, in an international context. In addition to these, World War II brought "black listing," to identify neutrals engaged in conduct inconsistent with the above measures; economic measures that led to high prices, cutting off sources of supply, sabotage, robbery, and preclusive buying. *Id.*, at 518-519.

103. Quoted, Marian C. Siney, *The Allied Blockade of Germany, 1914-1916*, 10 (1957). Hankey is thus a voice among those who would support regulation of economic warfare largely by customary international law rather than by the more rigid legislative approach of such treaties as the Declaration of London. The Declaration of London though never ratified nor in force contains much that is ascribed to customary international law relating to neutrality, blockade, and economic warfare. For discussions, see *The Law of Naval Warfare 269* [Essay by Kalshoven], (Natalino Ronzitti, ed., 1988); A. Cohen, *Declaration of London* (1911); James B. Scott, *Declaration of London*, including documents and negotiating record, (1919); the text in *International Law Topics*, (1910); and the related materials in Harold H. Martin & Joseph R. Baker, *Laws of Maritime Warfare*, (1918) and in Maurice Parmelee, *Blockade and Sea Power*, (1924).

104. The United States Department of Defense in *Soviet Military Power 1990*, 88 (1990), states:

The Soviet Navy's vital strategic forces, defensively oriented missions and strategy, and exclusion from current CFE [Conventional Force Europe] negotiations, might place it in a better position than the other branches of the Soviet armed forces to weather Gorbachev's program of defense drawdowns. Despite some reductions in operating tempo, out-of-area deployments, and changes in force structure, Soviet naval missions remain virtually unchanged. Current modernization programs, if successful, could make the Soviet Navy a smaller yet qualitatively more capable force while projecting a less threatening image abroad.

The same publication indicates a decline in Soviet naval launchings, but the appearance of higher degree of sophistication and technological standards. *Id.*, at 36.

105. See Harriet F. & William F. Scott, *Soviet Military Doctrine*, (1988), for an assessment and analysis of existing Soviet military thinking, and the interaction of such thinking with communist doctrine. Even if the communist doctrine is eliminated, the military principles relating to correlation of forces, superiority of weaponry, anticipatory or pre-emptive strikes, and so on are likely to remain unaffected should the military forces be called upon to act: much of the discipline, training and theoretical science is too deeply instilled to expect change in the next decades. See *id.*, at 130 *et seq.* The Scotts trace the evolution of Soviet strategic and military thinking, much of which includes the assumption that the Soviet economic base will be sufficient to sustain a major military effort. The laws of war though evolving and being altered to meet changing realities are intended to clarify and lead to economies in decisions, formulating combat operations, and in achieving victory; they are said to "determine the choice of form and methods of military action." *Id.*, at 158. According to the Scotts, the Soviet elites have not changed their political goals or military terms of reference:

They stress that the total correlation of forces - economic, scientific-technical, moral-political, and military - must be kept in their favor. Stability in international affairs is not a desired goal. . . . It would be prudent for Western planners to consider that the real reason for [Gorbachev's] "restructuring" is to ensure that the laws of war are kept in the Kremlin's favor. *Id.*, at 159.

106. According to the inquiry made by Reynolds, thalassocracies means "maritime supremacy." This according to early historians is "the control of the sea lanes and islands by one state to insure its economic prosperity and thus its political integrity." Only six appear in history: the Minoans, ancient Athens, Venice and Florence in the Renaissance, the Netherlands, Britain and the United States. Maritime states are characterized by free enterprise, market economies, individual initiative, technological change, and so on. Clark G. Reynolds, *History and The Sea*, 20 *et seq* ch. 2 (1989). Reynolds argues that unlike Marxian views where economic motivation is primary, the motivation of the maritime states is more complex promoting the shaping and reshaping of business forms and relationships. For a detailed study, see *The U.S. Stake in Naval Arms Control*, (1990).

107. The Adderbury Conversations, in Appendix I, of Eric Grove, *Maritime Strategy and European Security*, 91 (1990). The conversations and the strategic dialogue of November 17-19, 1989 provide a valuable

set of statements concerning the position of both sides. The United States pointed out in the second meetings that:

The Maritime Strategy is not a war plan but a concept of operations for US Naval forces. It reflects the best naval experience and the advice of the responsible theatre commanders covering contingencies from routine peace to global war. Equally it is not a 'go it alone' US Navy strategy but the maritime component of national strategy. It reviewed and restated the explicit thinking of US civil leaders and their tasking to the naval forces deployed (a) to defend US and allied interests, (b) to control vital sea lines of communication with allies and (c) to conduct counter offensive operations, if necessary, in both US and allied defence. . . . [it] emphasized the role of joint and combined forces in the event of war. It recognized from the beginning that navies alone cannot win wars but they can lose them. *Id.*, at 119.

108. Alfred T. Mahan, *The Influence of Sea Power Upon History, 1660-1783*, (25th ed., 1917). Mahan further observes that history has a value in the field of naval strategy, because in large measure the principles of strategy unlike those of tactics reaches to a broader base. Citing a French authority, Morogues:

Naval tactics are based upon conditions the chief causes of which, namely the arms, may change; which in turn causes necessarily a change in the construction of ships, in the manner of handling them, and so finally in the disposition and handling of fleets. *Quoted, id.*, at 10.

Hence,

The battles of the past succeeded or failed according as they were fought in conformity with the principles of war; and the seaman who carefully studies the causes of success or failure will not only detect and gradually assimilate these principles, but will also acquire increased aptitude in applying them to the tactical use of the ships and weapons of his own day. He will observe also that changes of tactics have not only taken place *after* changes in weapons, which necessarily is the case, but that the interval between such changes has not been duly long. *Id.*, at 9.

109. *Dissenting opinion*, In re Yamashita, 327 U.S. 1 (1946).

110. Charles M. Sternhell & Alan Thorndike, *Antisubmarine Warfare in World War II. Operations Evaluation Report #51 xi* (1946).

111. Brian McCue, *U-Boats in the Bay of Biscay: An Essay in Operations Analysis 176-77* (1990). Footnotes omitted in the citation.

112. For a comprehensive analysis see Clark G. Reynolds, *History and the Sea* (1989). In the discussion in this paper, it should be noted that Soviet military doctrine does not call for its forces to act defensively in combat, and in fact the capability of Soviet forces to act either offensively or defensively as needed. See *id.*, at 205.

113. *Id.*, at 85.

114. Force planning is described in detail in Robert P. Haffa, Jr., *Rational Methods, Prudent Choices: Planning U.S. Forces* (1988). Maj. William Huggins in a letter to *Defense News*, 18 (April 20-26) elucidates this interaction:

Deterrence is based on threats: those received and those sent. It demands a force structure based on survivable offensive weapons capable of inflicting unacceptable destruction. The enemy must know we can and will use these weapons. The ability to compel an enemy is based on capability and the sort of flexible, durable, lethal forces that can enter a conflict and win. The debate over threat-vs-capability-based force structures is a debate over deterrence vs. the ability to compel as the basis for a national military strategy.

Huggins thus finds an interaction between deterrence, defense, and effective use of strategy and strategic instruments to assert national power.

115. See Lester Nurick, *The Distinction between Combatant and Noncombatant in the Law of War*, 39 Am. J. Int'l L. 680 (1945). Trends, according to Nurick, are toward breaking down the distinction. Nurick's paper indicates that this has occurred through a widening of the "necessity" in warfare, affected in turn by the changes in technology.

116. The elements of control are to be found in various instruments: concepts, terms relating to the relations involved, and a theory have been described as essential. For a study, see E. J. Meehan, *The Thinking Game* (1988). The paper stresses that these elements emerge from the actions states are taking, and to define them, or even to impose legal standards on those actions *i.e.*, here, the standards of permissibility calls for

institutions with law-making authority in the legislative rather than the judicial sense. Almond has criticized the International Court of Justice as acting *ultra vires* in *The Nicaraguan Military Activities Case Nicaragua v. United States of America*, 17 Cal. W. L. J. 146 (Winter 1987). The case is at 1986 I.C.J. 14.

117. The significant element with respect to deterrence in peacetime is its political character, *i.e.*, it operates through the interaction and interdependence of decisions made by the public officials in charge of foreign policy. Military capabilities serve, but are subordinate to, political objectives and the operation of deterrence is primarily in the hands of civilian public officials. War in this perspective is the breakdown of deterrence. The operational element or that upon which the deterrent effort is focused is that of intentions or expectations of those to be deterred, *i.e.*, the objective is to assure that they will not oppose deterrence, or act inconsistent with the expectations of deterrence. In some of the broader manifestations or notions about deterrence it may be expanded to include compellence, in which others are pressed to act in a certain way and are "compelled" by threats or action if they refuse. Examples might be found in the attempts to compel Iraq to fulfill United Nations Security Council Resolutions.

118. Liddell Hart, *Strategy: The Indirect Approach*, (1954).

119. On these factors, *see generally*, Edward Luttwak, *Strategy: The Logic of War and Peace* (1987), esp. the introductory chapters. Thomas C. Schelling argues that strategy is the outcome of the strategies invoked by the rivals, and that their arena is in a sense a "game." Assuming that the game itself remains in force - *i.e.*, the checks and balancing of deterrence and the principle of equilibrium - then "the best course of action for each player depends on what the other players do. The term is intended to focus on the interdependence of the adversaries' decision and on their expectations about each other's behavior." Thomas C. Schelling, *The Strategy of Conflict* 3 (1960). Considered as claims between the rivals, there is a similarity here to the fundamental process of claim that is found in the emergence of law through the patterns of behavior of those participating in interactions about relations or activities among states [or among states and other entities and individuals in trade and commerce].

120. Deterrence in war differs from deterrence in peacetime: during war, the attempt is to deter attacks or the use of particular weapons; during peacetime, it may be limited to the weapons covered by a specific "arms control" agreement, but it is generally aimed at the broader deterrence: that is, deterrence against a military strike, aggression, or war itself. In his discussion of national maritime strategy, Admiral James D. Watkins remarked:

Our national military strategy is designed: to preserve this country's political identity, framework, and institutions; to protect the United States, including its foreign assets and allies; to foster the country's economic well-being; and to bolster an international order supportive of the vital interests of this country and its allies. To achieve these ends, our national strategy is built on three pillars: deterrence, forward defense, and alliance solidarity. James D. Watkins, *Maritime Strategy* U.S. Nav. Inst. Proc. 4 (January 1986).

This is a version of the "grand strategy," encompassing the elements of national power and national purpose.

121. Thomas C. Schelling illustrates "compellence" and distinguishes it from deterrence in the following example:

Blockade illustrates the typical difference between a threat intended to make an adversary do something and a threat intended to keep him from starting something. The distinction is in the timing and in the initiative, in who has to make the first move, in whose initiative is put to the test. To deter an enemy's advance it may be enough to burn the escape bridges behind me, or to rig a trip-wire between us that automatically blows us both up when he advances. To *compel* an enemy's retreat, though, by some threat of engagement I have to be committed to *move*. . . . The threat that compels rather than deters often requires that the punishment be administered until the other acts, rather than *if* he acts. Thomas C. Schelling, *Arms and Influence* 69, 70 (1966).

122. Deterrence through threats of economic sanctions, or economic warfare, is a tenuous notion, and in any event, untested. In the traditional perspective, deterrence reduces the likelihood of military moves, and is distinguished from defense which reduces an attacker's capabilities to damage his target. Introduced into arms control relationships, there is an interaction of threatened coercion and the assumption that the target state will refrain from using force. One commentator has indicated:

Military strategy has always influenced the character of a period, and particularly the nature of its international relations . . . Strategy has been transformed into the art of non-war, of the prevention of war . . . Prevention of war is achieved by the threat of violence, that is, by the threat of retaliation in response to a provocation. Strategy has changed from the art of employing violence into the art of

threatening violence, which is the art of deterrence. Yehoshafat Harkabi, *Nuclear War and Nuclear Peace* 1 (1966).

This commentator observes that deterrence has long served the international relations among states, always to deter potential aggressors. But deterrence depends upon war making potential, or it is an empty threat. As Harkabi point out "war making potential is intended to validate deterrence," and this of course is a potential in being, not a potential that might be attained, given enough time. The problem thus leads to a shift in the policy making of states from the decisions primarily dependent upon the perspectives of the military commander, and his perspectives, to the civilian officials of government, and theirs. But as Clausewitz has indicated, the public official must seek out and embrace the advice of his military commanders. Without adequate understanding of the needs of deterrence and the urgencies that might be imposed to achieve deterrence capabilities, the public official is poorly served by his advisers, or fails, through his own incompetence to understand the import of their advice. See Glenn H. Snyder, *Deterrence and Defense: Toward A Theory of National Security* 3, 4 (1961); Thomas C. Schelling and Marton H. Halperin, *Arms Control and Strategy*, 20th Century 77 (1961); economic strategies under the GATT and in general in economic relations among states can be followed in J. H. Jackson, *Legal Problems of International Economic Relations*, (1977), and see Abram Chayes, *et al.*, *International Legal Process* (1969).

123. Report of the President's Commission on Strategic Forces, [The Scowcroft Report], 2, 3 (April 1983). See also, generally, *Discriminate Deterrence*, the report of the Commission on Integrated Long-Term Strategy (January 1988).

124. States may seek to manipulate the public opinion of each other particularly where that opinion is an element of public participation in policy or decisions. As to this democratic states are more vulnerable than totalitarian states where public opinion and the means to be informed to participate are closely controlled. For a review of the spectrum of state relations extending from periods of high intensity violence or warfare, or high intensity coercion, to periods where these are minimal, see McDougal and Feliciano, *supra* note 8, ch. 2, at 97 *et seq.* See *id.*, at 106:

The first step [in ascertaining a state of war] we submit toward contact with reality is reference to and careful orientation in, the factual process of coercion across national boundaries. . . . The description we suggest of factual coercion in terms of "process" is intended, however, not merely to convey a sense of the variety in participant, purpose, modality and claim, but also to stress the facts of continuity - continuity in coercive action and reaction and in assertion and counterassertion - and of changing intensities in degree, from the mildest to the most severe applications of coercion. Between the two extremes of "pure" peace and "total" war, the states the world arena may in these terms be observed continuously to engage each other for power and other values, by all instruments of policy in a continuum of degrees in coercive practices, ranging from the least intense to the most intense. [stress by authors; n. omitted].

125. See, generally, Carl von Clausewitz, *On War*, (Michael Howard & Peter Paret, eds., 1976).

126. John M. Collins, *Grand Strategy*, 4 (1973).

127. Strategy, as traditionally conceived, is linked with the traditional methods and weapons of warfare. Even the conception of war remains a matter of great ambiguity, *cf.* McDougal and Feliciano, *supra* note 8; see also Julian Lider, *Problems of the Classification of Wars* (1960); W. V. O'Brien argues that "recourse to armed coercion is a perennial feature of the human condition," and implies that with changes in human attitudes we will see changes in warfare, and the law that regulates it, William Vincent O'Brien, *The Conduct of Just and Limited War* 2 (1981). The O'Brien text is aimed at the attempts made to regulate through the just-war tradition.

128. Power, and effective exploitation of the power process, is not the only value that is sought by states, but it is the value upon which all others depend in periods of competition with others over power itself, or over resources and wealth that may be dependent upon the presence or exercise of power. See, generally, Harold D. Lasswell & Abraham Kaplan, *Power and Society* (1950), and general discussion at xiv-xix, and 74-102. The broad perspectives of these authors identify power as "participation in making of decisions," and therefore establish a comprehensive framework for appraisal of who has power to do what, against whom, and for what objectives. The quest for power establishes both a nation's strategy and the fashioning of strategic instruments intended economically to attain and preserve power.

129. William V. O'Brien cites one formulation of the principle of economy of force as that used by the United States Army in 1964, *i.e.*,

Economy of force is the measured allocation of combat power to the primary task as well as secondary tasks. It connotes the application of force necessary to accomplish the mission and not the application of as little force as possible. To concentrate superior force in the main effort, minimum

necessary force may be used elsewhere. This requires a careful evaluation, particularly where secondary efforts contribute heavily to the main effort. O'Brien, *supra* note 127, at 418.

Economy of force and its relation to the principle of military necessity are discussed by McDougal and Feliciano, *supra* note 8, at 35-36. The pressure on military commanders to achieve economies of their scarce military resources draws them tightly into line to achieve both an economy of force and to reflect the application of military necessity.

130. Alfred T. Mahan, *Naval Strategy 6* (1918). Speaking broadly of principles, Mahan noted their role in naval strategy as broad guidelines but largely immutable:

... for in war the common sense of some, and the genius of others, sees and properly applies means to ends; and naval strategy like naval tactics, when boiled down, is simply the proper use of means to attain ends. But in peace, as in idleness, such matters dropout of mind, unless systematic provision is made for keeping them in view. *Id.*, at 5-6.

Mahan earlier observed that new weapons and new technologies had no effect on principles and found instead a confirmation of the Swiss strategist, Jomini, and his "dictum" that "changes in weapons affect practice, but not principles." *Id.*, at 4.

131. *Id.*, at 2.

132. *Id.*, at 344. This observation apart from the application to this paper bears upon those who are proposing various measures for naval arms control, and the elimination of naval facilities abroad. Such controls would destabilize a global power situation replacing the deterrence inherent in the navy with the uncertainties of future action. They would divorce the ability of the United States to protect interests that demand the protection of the navy, and the assertion of interests that also demand its projection or presence.

Mahan also considers the navy in terms of offensive and defensive use, suggesting a distinction, but a distinction arising from how the forces are used, not on the basis of the weapons they carry:

When war exists between two nations separated by the sea, it is evident that the one which invades territory occupied by the other takes the offensive and that the instrument of offense is the arm which carries on the invasion, that is, the army. The navy preserves, and assures, the communications of the army. That the navy alone makes invasion possible, does not make it the invading force. That it alone make the offensive possible, does not make it the offensive arm. That its own mode of action is offensive does not necessarily constitute it the offensive factor in a combined operation. In the joint action it takes the defensive. That, in pursuit of this defensive role, it takes continual offensive action whenever opportunity offers to destroy an enemy's ships, does not alter the essential character of its operations. It defends by offensive action, wherever its guns reach; but if defends. *Id.*, at 432-433.

133. *Id.*, at 447. He then immediately added, referring first to the necessities of military interest supported by "a widespread, deeply rooted, civil interest:"

To prepare for war in time of peace is impracticable to commercial representative nations, because the people in general will not give sufficient heed to military necessities, or to international problems, to feel the pressure which induces readiness. All that naval officers can do is to realize to themselves vividly, make it a part of their thought, that a merchant shipping is only one form of many which the external relations of a country can assume.

134. From Sun Tzu, *The Art of War*, 73 - para. 3 (Samuel B. Griffith, trans., 1963).

135. Clausewitz *supra* note 125, at 97. A commentator adding a gloss to Sun Tzu also-refers to the costs in scarce resources quickly consumed by war: "Now when the army marches abroad, the treasury will be emptied at home." And Sun Tzu: "when the army engages in protracted campaigns the resources of the state will not suffice . . . For there has never been a protracted war from which a country has benefitted." *Id.*, at 72, 73. And "those unable to understand the dangers inherent in employing troops are equally unable to understand the advantageous ways of doing so." For an analysis of the differing perspectives of strategy see Col. Richard M. Swain, *The Hedgehog and the Fox: Jomini, Clausewitz, and History*, Nav. War Coll. Rev. 98-109 (Autumn 1990).

136. Clausewitz observed that war-making might be either by military forces or by negotiation, stressing that the first affords the means to dictate the terms of termination to the conquered enemy, while the second enables military [and political] compromise, and even anticipates it:

War can be of two kinds, in the sense that either the objective is to overthrow the enemy, to render him politically helpless or militarily impotent or [by appropriate military tactics] for bargaining at the peace negotiations . . . But no less practical is the importance of another point that must be made absolutely clear, namely that war is nothing but the continuation of policy with other means. *Id.*, at 69.

137. In an extensive analysis of the community sanctioning process, McDougal and Feliciano, *supra* note 8, at ch. 4, point out:

Economic strategy seeks to affect all phases – production, conservation, distribution, consumption – of wealth processes. It is concerned with methods of and facilities for managing a flow of capital, goods, and services across national boundaries. *Id.*, at 322.

The sanctioning goals are described as “prevention” [*i.e.*, of conditions harmful to minimum order], “restoration” [of the targeted violator state to become an acceptable member of the global order, and terminate its unlawful coercion], and “rehabilitation” and “reconstruction” [aimed at providing relief for the damage caused by the sanctions]. *Id.*, at 322–329. In an earlier work McDougal noted that though the global order has no “centralized executive organ”, sanctions, *i.e.*, defined as “implementing techniques or available base values”, are at the disposal of states or the general community of states for securing reasonable conformity in the conduct of states to inclusive [or community] prescriptions.

138. Resolution on the Definition of Aggression, reprinted in 12 I.L.M. 710 (1974); such acts are not condemned by the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United States, reprinted in 9 I.L.M. 1292 (1970).

139. The extent to which a victor will assume the costs of restoring or assisting a former and defeated belligerent is a matter of judgment, coupled with the larger policy in imposing the terms of peace. According to Thomas C. Schelling, war is an instrument that involves bargaining, and the bargaining position of the rivals will depend upon the choices made, and the choices forces upon, each side:

If war to the finish has become inevitable, there is nothing left but pure conflict; but if there is any possibility of avoiding a mutually damaging war, of conducting warfare in a way that minimizes damage, or of coercing an adversary by threatening war rather than waging it, the possibility of mutual accommodation is as important and dramatic as the element of conflict. Concepts like deterrence, limited war, and disarmament, as well as negotiation, are concerned with the common interest and mutual dependence that can exist between participants in a conflict. . . . To study the strategy of conflict is to take the view that most conflict situations are essential bargaining situations. They are situations in which the ability of one participant to gain his ends is dependent to an important degree on the choices or decisions that the other participant will make. Thomas C. Schelling, *The Strategy of Conflict* 5 (pbk ed., 1968).

140. The citations and quotations used in the paper come from David H.N. Johnson, *Rights in Airspace* ch. 4 (1965). Professor Johnson provides the citations to the quotations.

141. *Id.*, at 45; *cf.* Clausewitz, *supra* note 125, at 97, who stated that combat objectives were to destroy the military forces of the enemy, but to build upon this outcome to achieve political goals.

142. Johnson cites Sir Arthur Harris to the effect that deaths from Allied bombing of Germany were 305,000 and from the blockade in the First World War were 800,000. Johnson, *supra* note 140, at 53.

143. *Id.*, at 52. Churchill was clearly reflecting the experience of the aftermath of the first World War. Johnson notes that Sir Arthur Harris, in charge of the air command at the end of the war, had so accelerated the attacks on the cities that he was refused a peerage like other Service chiefs, and that the political figures, including Churchill, sought to turn away from him and his actions.

144. Geneva Protocol, I., publication of the International Committee of the Red Cross, Geneva, 1977. Article 51. Other articles in Protocol I are supportive of this prohibition. Reprisals are forbidden. Cultural objects are protected, along with places of worship. See Part IV.

145. See Meehan, *supra* note 116, at 226. Judgment “is somewhat amorphous, difficult to isolate, yet analytically necessary to account for human performance . . . Unfortunately, the only test of judgment is another judgment, and if informed judgments conflict, there is no way to resolve the difference pending further evidence of additional reasoning.”

146. The large number of Security Resolutions with regard to Iraq is an indication of the step-wise movement in the global community in imposing coercion through sanctions; although there is room to claim that the resolutions might permit the use of force, disputes exist between the United States and the Soviet Union as to the correct interpretation. Resolution 669 refers to preceding resolutions 660–662, 664, 666, and

667, all adopted in 1990, but spread over a four month's period. Past experience with the Security Council would suggest that if the use of force is to be directed, it must be expressed in blunt language, and therefore the states in the Council will leave none of the resolution to individual interpretation.

147. The resolutions as adopted are set forth in the recently initiated publication of the Department of State: DISPATCH. See those set forth in Vol. 1, Nos 2, 4. At the time of writing this paper a resolution is being proposed that will permit or direct the use of force against Iraq. The operative language from Resolution 661 (August 6, 1990) Dispatch 75 (September 10, 1990) states:

[The Security Council] 4. Decides that all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payment exclusively for strictly medical or humanitarian purposes and in humanitarian circumstances, foodstuffs.

The expression "short of war" is ambiguous. States exercise a variety of measures applying or dependent upon coercion. When and how they finally go to war has become uncertain in global situations where most states would prefer to correct wrongs by force on an economical basis, but without the costs and incalculable risks of warfare.

148. In U.S. Dept of State, Dispatch, September 10, 1990, p. 76.

149. For an assessment of economic sanctions in general including those of peacetime, see Margaret P. Doxey, *Economic Sanctions and International Enforcement* (2d ed., 1980); *Dilemmas of Economic Coercion* 217 (Miroslav Nincic & Peter Wllenstein, eds., 1983), observing that such sanctions must reach the political base, and the constitutive rules and ideology of a social order in order to be effective. M. S. Daoudi & M. S. Dajani, *Economic Sanctions* (1983), conclude that the sanctions do not work. Doxey summarizing Medlicott's findings states that the five main fields of achievement in World War II were:

1. The drastic limitation of German imports from nonEuropean sources, reduced after November 1942 to the small, desperate contribution of the blockade runners;
2. The creation of encirclement neurosis with marked effect on German political and military strategy;
3. The direct hampering of the Axis armament effort by the creation of raw material shortages;
4. The indirect hampering of the Axis wartime economy by additional strains on transport and manpower;
- and 5. The strengthening of neutral resistance to Axis pressure by economic aid, by the constant evidence of Allied determination, and by threats of retaliation, immediate or delayed. Although the Allied effort in economic warfare undoubtedly had its effect in weakening Germany's war potential and capacity and contributed to her eventual defeat, it is not contended, or generally considered that it was a decisive factor at any stage.

150. *Uniting for Peace Resolution*, November 3, 1950. G.A. Res. 377A(V), 5 U.N. GAOR, Supp. No.20, at 10, U.N. Doc. A/1775 (1951). The General Assembly resolved to make recommendations for "collective measures" including the use of force "when necessary, to maintain or restore international peace and security." The International Court of Justice approved the resolution notwithstanding the provisions of the Charter conferring what amounted to exclusive jurisdiction on the Security Council as to these matters: *Certain Expenses of The United Nations*, [1962] I.C.J. 150.

151. See Colombos, *supra* note 88, at 836.

152. The Budapest Articles of Interpretation, quoted by Robert H. Jackson, *supra* note 36, 35 Am. J. Int'l L. at 355, indicate the shift of the attitudes toward neutrality that had occurred among states that accepted the articles at the time of the Kellogg-Briand Pact. They said in part:

WHEREAS by their participation in the Pact sixty-three States have abolished the conception of war as a legitimate means of exercising pressure on another State in the pursuit of national policy and have also renounced any recourse to armed force for the solution of international disputes of conflicts:

- (1) A signatory State cannot, by denunciation or non-observance of the Pact, release itself from its obligations thereunder;
- (2) a signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact;
- (3) a signatory State which aids a violating State thereby itself violates the Pact;
- (4) in the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things: (a) refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.; (b) decline to observe towards the State violating the Pact the

duties prescribed by International Law, apart from the Pact, for a neutral relation in relation to a belligerent; (c) supply the State attacked with financial or material assistance including munitions of war; (d) assist with armed forces the State attacked; (5) The signatory States are not entitled to recognize as acquired de jure any territorial or other advantages acquired de facto by means of a violation of the Pact; (6) A violating State is liable to pay compensation for all damage caused by a violation of the Pact to any signatory State or to its nationals; (7) The Pact does not affect such humanitarian obligations as are contained in general treaties [naming the Geneva and Hague Conventions].

Though not approved by all states their impact is clear from the number that signed.

153. The Inter-American Maritime Neutrality Convention, signed at Havana, February 20, 1928, in Leon Friedman, 1 *The Law of War* 457 (1972) illustrates the tendency of belligerent practice and diplomatic practice to diverge, because it favors the neutral countries over what the belligerents accept in their practice. Too large a gap between the law of the diplomats and the law that develops in practice leads ultimately to the former, or treaty law, being set aside. Cf. the experience of the arms control agreements where the United States Senate found the agreements were out of step with the perceptions of the State as to what best might assure the security of the United States.

154. Ample examples exist of trends in the past in which treaties and agreements have been drafted and have never come into effect. The Declaration of London, 1909, the Hague Rules on Air Warfare, the numerous treaties and conventions with limited duration, the Geneva Protocols of 1977, the Washington Conferences and the law they attempted to impose, and even in the related area of arms control the SALT and other agreements have provided us with instruments that could be negotiated, even signed, but never ratified. The Harvard Draft agreements on various aspects of force: neutrality, piracy, and so on have been valuable for the study or inquiry into the existing law, but the law itself remains as in the past, largely the outcome of the practice of states.

155. War may require deliberations, preparations and intelligence greater by far than that invoked in the past if the intention is to reduce the costs and burdens that inevitably arise. The Chinese strategist observed:

War is a matter of vital importance to the State; the province of life or death; the road to survival or ruin. It is mandatory that it be thoroughly studied.

Sun Tzu, *supra* note 134, at 63. The gloss on this maxim by another Chinese writer declared:

Weapons are tools of ill omen. War is a grave matter; one is apprehensive lest men embark upon it without reflection.

Sun Tzu subsequently observed that "what is of supreme importance in war is to attack the enemy's strategy," and by this he included the enemy's capabilities, thus providing under modern warfare the opportunities of economic warfare. Should the shift go to strategic attacks on cities, however, it would run afoul of the maxim to refrain from an attack on cities: "Attack cities only when there is no alternative." *Id.*, at 77, 78. Protracted warfare in itself, according to Sun Tzu, is a form of economic deprivation, ultimately undermining the capability of maintaining the offensive or the attack. *Id.*, at 72-74. Hence,

Those unable to understand the dangers inherent in employing troops are equally unable to understand the advantageous ways of doing so . . . Those adept in waging war do not require a second levy of conscripts nor more than one provisioning. *Id.*, at 73.

156. The seizure of the crisis by the Security Council does not waive a state's claim to self defense or collective self defense: these call for separate, often differing perceptions as to threat and response. However, the Security Council's competence has a major impact upon neutrality when it does decide or act. Unfortunately, United Nations practice so far provides us with little in the way of useful content. The current Middle East Crisis indicates the difficulty in reaching appropriate resolutions to curtail the aggression of Iraq.

157. According to McDougal and Feliciano:

A sufficiently flexible test of the crucial intensity and scope [of violence or force under Article 2(4) of the UN Charter] may be reached, we suggest, by considering the impact of the coercion exercised upon the expectation structure of the target state. In these terms, the key effect is creation in the target state of reasonable expectations, as third party observers may determine reasonableness, that it must forthwith respond with exercises of military force if it is to maintain its primary values, customarily described as "territorial integrity and political independence." McDougal and Feliciano, *supra* note 8, at 200.

The widening demand to refrain from economic coercion appears in the guidelines laid down in the "Helsinki Accords," to wit, "To refrain from any act of economic coercion designed to subordinate to their own interests the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind." Final Act of the Conference on Security and Cooperation in Europe, Helsinki, Aug. 1, 1975, *reprinted in* 12 I.L.M. 1292 (1975). Similarly, *see* the duty of states to cooperate in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, *reprinted in* 9 I.L.M. 1292 (1970).

158. On the prospects of air blockade *see* Lt. Thomas A. Varallo, U.S. Nav. Inst. Proc. 19 (December 1990); he considers this modality of attack and also the general article by Adm E. W. Carter, on blockade, *id.*, (November 1990), at 42-47. Varallo argues from an operational perspective that "almost all the economic flow depends on the sea, and this will not change in the near future. Despite modern communications, however, many business transactions rely heavily on air travel. An effective air blockade could indirectly affect a country's economy, although in a less dramatic fashion that [sic, than?] a naval blockade." But he argues that the "more likely scenario" for such an air blockade is during "peacetime."

159. The problem of "strategic deterrence" and ultimately of "strategic defense" is one that embraces both peacetime actions to fend off future conflicts and the possibility of wartime attacks on strategic objectives. Economic methods of warfare might better be identified as affirmative actions or as reactive actions instead of referring to them as "offensive" or "defensive."

160. An interesting problem arises here: who and under what circumstances decides the interpretation and application of the Security Council directives. Ambiguity is inherent in external affairs, created by states, if necessary, where their policies are to be served.

161. The SALT agreements were ambiguous: submarine launched ballistic missiles are included as "strategic offensive weapons," and only the land-based weapons that reach the territory of the other state are included, but this becomes confusing because the agreement then limits such weapons to those with a range of 5000 kilometers.

162. Hence the Western countries were able to consider the espionage and industrial theft by the Soviet Union and other communist countries as unfriendly behavior during peacetime, subject to their criminal law, but are likely to treat such conduct as hostile behavior, subject to reprisals or other actions to counter them during wartime.

163. *See* the prefatory remarks to these conclusion. Discussion in the paper has not extended to the changing face of neutrality in depth. *See* McDougal and Feliciano, *supra* note 8, at ch. 5. The conditions leading to change but not certainty include: (1) a major change leading to community prohibitions against coercion and violence under all circumstances; (2) the organization of the global community such that made the community the objective of protection and limited the neutrality principle of impartiality so that discriminatory treatment could be afforded the victims of aggression, identified as members of a global order that was being impaired; (3) the rising expectations of the involved states as claimants that resort is to be made to collective security, and that security is to be protected from attack. *Id.* at 397-400.

164. Much of this conclusion is to be seen in the decisions at Nuremberg: submarines were not declared even with an open attack campaign as engaged in illegal warfare; strategic bombing of cities and the use of the nuclear weapons were not condemned; substantial burning and destruction of the land under a scorched earth policy were not the subject of indictment. Broad, general principles were pronounced, but the application of principle, directly, or through rule, to the events does not appear. The crimes were vaguely stated: crimes against "peace;" crimes against "humanity;" and crimes of "aggression."

165. The anticipatory law appears in Geneva Protocols of 1977, I.C.R.C., Geneva, 1977, especially in Protocol I where the ratifying states have undertaken to take steps to protect the natural environment, refrain from reprisals against it, to protect their own citizens by isolating them from major military targets, and so on. *See* articles 35, 36, 55, 57, 58. Anticipatory law and general principles of law thus may provide the general guidelines, as was shown in the foremost of the principles that appeared in the deMartens Clause added to the Hague Convention IV of 1907.

166. *Cf.* Myres S. McDougal, *et al.*, in Myres S. McDougal & W. Michael Reisman, Power and Policy in Quest of Law 353 (1985); effective power, made authoritative, is a ubiquitous aspect of all social processes, an indispensable component of law. While naked power rarely rears its head without some relation to authority, its presence and effect on decision must always be taken into account. The important fact is that it is effective power, taken as a whole and commonly comprised of both authority and control, that establishes and maintains processes of authoritative decision, both constitutive and public order, and hence affects the fundamental policies expressed in all law.

167. *Cf.* Julian S. Corbett, *Some Principles of Maritime Strategy* 90 (1972):

Command of the sea, therefore, means nothing but the control of maritime communications, whether for commercial or military purposes. The object of naval warfare is the control of communica-

tions, and not, as in land warfare, the conquest of territory. The difference is fundamental. True, it is rightly said that strategy ashore is mainly a question of communications, but they are communications of the army alone, and not to the wider communications which are part of the life of the nation.

This perspective, though enlarged by strategic economic warfare, based in part on sea platforms, contains an additional perspective: naval arms control for a state dependent upon communications and therefore command of the sea is entirely different from a land-based state like the Soviet Union in its interests and the needs of its strategy. States that have command of the sea dispersing that command to others will be shifting from the stable equilibrium enjoyed to one of instability. Command of the sea is a complex question of targets, missions and responsibilities, weapons and sea platforms. See generally, Corbett, for his discussion of "commerce prevention" (used in place of "commerce destruction") as part of control of communications. But he says that battles are intended ultimately "to exert pressure on the citizens and their collective life." *Id.* at 94.

168. Rules of engagement and operating principles have two features: the commander in the situation demanding action must act consistent with international law [and the rules to this end give him guidance], and that under the peacetime rules he must report immediately to higher authority and seek guidance prior to the use of armed force wherever practicable. See Annotated Supplement To The U.S. Department of the Navy, Office of the Judge Advocate General, Commander's Handbook on The Law of Naval Operations, (NWP 9) (REV. A)/FMFM 1-10, 1987, at para. 3.1. [*hereinafter*, Annotated Supplement] The rules are promulgated by the Joint Chiefs of Staff, see *id.*, at para. 3.11.1. The distinction of peacetime and wartime rules are given in para. 5.5.1:

[Peacetime rules] provide the authority for and limitations on actions taken in self-defense during peacetime and periods short of prolonged armed conflict, for the defense of U.S. forces, the self-defense of the nation and its citizens, and the protection of U.S. national assets worldwide. Wartime rules of engagement, on the other hand, reaffirm the right and responsibility of the operational commander generally to seek out, engage, and destroy enemy forces consistent with national objectives, strategy, and the law of armed conflict.

Cf. J. Ashley Roach, *Rules of Engagement*, Nav. War Coll. Rev. 43-53 (January - February 1983).

And in para. 5.5 it is pointed out that the rules at a national or strategic level are promulgated to guide commanders in the use of force toward the achievement of broad national objectives; at the tactical level are "task oriented and frequently mission-oriented:"

At all levels, U.S. wartime rules of engagement are influenced by, and are consistent with, the law of armed conflict. The law of armed conflict provides the general framework within which U.S. rules of engagement during hostilities are formulated. Because rules of engagement also reflect operational, political and diplomatic factors, they often restrict combat operations far more than do the requirements of international law.

But "a principal tenet of those ROE [*i.e.*, peacetime] is the responsibility of the commander to take all necessary and appropriate action for his unit's self defense." Annotated Supplement, *supra*, at 4.3.2.2.

169. For the use of a cost and risk calculus by Mao in his considerations for intervention to assist North Korea in the Korean War of 1950, see the two telegrams published in the *N. Y. Times*, February 26, 1992, at A8. Mao advised Stalin that "we have decided to send part of the armed forces into Korea, under the title of Volunteer Army, to do combat with the forces of America." Mao insisted that this went to his vital interests, because if the Americans were to occupy all of Korea, it will be a disaster for "Korean revolutionary power." Mao then balanced out the chances and the necessities that would ensure those chances for success in terms of the military forces and equipments needed [he wanted four times the troop strength, and one and half to two times the fire power to oppose the American Eighth Army]. He would then include two backup armies for a "second and third wave of military forces to assist Korea." With these requirements met, "they will assuredly, cleanly and thoroughly destroy the one Army of the enemy." Mao in his telegram to Zhou Enlai stressed the political necessity, *i.e.*, that this "active policy" would be "extremely advantageous for China, Korea and the world." And a failure to do so would be disadvantageous:

In summation, we think we should enter the war, we must enter the war. Entering the war will have great benefits, and the harm inflicted by not entering the war would be great.

170. As noted in the author's paper, *supra* n. 1, the conclusion that is reached is that of evolving law and evolving belligerent practice:

As wars intensify with strikes or continuing attacks at a rival's economy, even these military strikes can be appraised as forms of economic warfare, because they reduce the capacity of the economy to sustain the war effort. But if this is done, such a switch in perspective would lead to new formulations of the conflict's objectives, most likely involving a switch from military to political formulae, and creating a tendency towards vagueness, ambiguity and uncertainty in their formulation. The perspectives of the belligerents would lead away from the military strategies once non-military participants take control of the conflict, and away from the objectives that have traditionally been sought in armed conflict. *Id.* at 670.

171. 1 Winston Churchill, *The War Speeches of the Rt. Hon. Winston S. Churchill* 300 (Charles Eade ed., 1953).

Chapter VII

U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice

A paper by
H. B. Robertson, Jr. *

Comments by
Frits Kalshoven
J. Ashley Roach

U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice

I. Introduction

Throughout the history of warfare it has been clear that the ability of a nation at war to obtain logistic support from overseas sources has been a major factor—sometimes the dominant factor—in its ability to continue the war effort. Few nations have the economic independence to prosecute a war without outside resources, or, at least, without the ability to move their implements of war, provisions, men and material where they are needed. For most nations this requires an ability to operate their merchant fleets in a hostile maritime environment.

During the Napoleonic era, both France and England utilized their differing strengths in an attempt to curtail the other's logistic and commercial capabilities. In the American Civil War, the blockade of the Confederacy was a principal component of the Union's war strategy. The indispensable condition for victory by Japan in its 1905 war with Russia was control of the seas. Without this advantage, Russia could have resupplied its superior land armies from the sea. During the progress of both World Wars, success of the maritime resupply effort of the Allied Powers, particularly Great Britain, was the *sine qua non* of victory. More recently, the conduct of both Iran and Iraq in the Persian/Arabian Gulf Tanker War confirmed the importance to the warring parties of interdicting merchant shipping, even for a localized war effort. If it is true that merchant shipping can be critical to a nation's ability to prosecute a war effort, it is equally true that the opposing power will seek to interdict that supply effort. Tactics, weapons systems and geography are variables that will affect any interdiction effort but the interdiction effort fits neatly with the general principles of war.¹ The conundrum of this situation is that while merchant shipping contributes in a major way to the prosecution of a nation's war effort, traditional law regards merchant ships as civilian objects and merchant seamen as civilians and thus not legitimate targets of direct attack.

The experience of World War I demonstrated that a belligerent whose war effort required it to cut off seaborne logistic support for its enemy would nevertheless target enemy merchant ships. In an effort to protect civilian

passengers from the ravages of war, particularly from the threat posed by the submarine, the London Protocol of 1936 sought to codify a requirement that subjected submarines to the same rules that were applicable to surface warships in their actions against enemy merchant ships. As we are all aware, the practices of the Second World War diverged substantially from those laid down in that Protocol, as did the realities of modern weapons systems, naval platforms and naval tactics. The result is an apparent gap between putative conventional law and state practice. The naval targeting policies of the United States, as reflected in the two naval manuals that have been published by the Navy since World War II—the *Law of Naval Warfare* (NWIP 10-2, 1955) and *The Commander's Handbook on the Law of Naval Operations* (NWP-9, 1987)—have wrestled with this gap between the putative conventional law and state practice. It is the purpose of this paper to examine the nature of this apparent gap and appraise the success of the most recent publication (*The Commander's Handbook*) in bridging it.

II. Conventional Law

Traditional international law distinguishes between enemy warships and enemy merchant ships. Warships are instruments of war and subject to attack and destruction without warning. Merchant ships, even those sailing under the flag of the enemy, are considered as civilian objects and manned by civilian crews, and so long as they maintain their proper role, are subject only to seizure as prize and subsequent condemnation in prize courts of the capturing belligerent. Only in special circumstances² is the capturing power allowed to destroy the prize, and then only after removing the passengers, crew and ship's papers to a place of safety.³

Since the turn of the century, both nations and international law publicists have been concerned with how to reconcile these principles with the realities of the means and methods of naval warfare—particularly the submarine, but also including military aircraft—that have developed since that time. The 1899 Hague Peace Conference wrestled with the issue of submarine warfare but focused more on the unchivalrous methodology of destruction than on its target.⁴ The cruelties of the commerce war at sea sharpened that focus and no doubt contributed to the eventual agreement embodied in the 1936 Protocol. Yet the 1936 Protocol has a broader genesis than submarine warfare, and it is important to review some of the origins of customary and conventional law relevant to targeting merchant vessels.

Four Conventions adopted at the Hague in 1907, Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities,⁵ Convention (VII) Relating to the Conversion of Merchant Ships into Warships,⁶ Convention (XI) Relative to Certain Restrictions with Regard to the Exercise

of the Right of Capture in Naval War,⁷ and Convention (XIII) Concerning the Rights and Duties of Neutrals in Naval War,⁸ dealt in some manner with the status of merchant ships, but none in any way modified the traditional law outlined in the preceding paragraph. The conferees' concern for protecting merchant ships from attack is no better illustrated than in Hague Convention VI, which provided for a grace period for merchant ships that might find themselves in an enemy port at the outbreak of hostilities to exit and make their way to a friendly port without being subjected to attack. For enemy vessels at sea but ignorant of the outbreak of hostilities, the Convention allowed destruction in some cases but only against payment of compensation and provision for the safety of the persons on board and security of the ship's papers.

The London Naval Conference of 1909, which was called by the British Government for the purpose of codifying the Prize Court rules for the International Prize Court contemplated by Hague XII, produced a "Declaration Concerning the Laws of Naval Warfare."⁹ Its only provision respecting destruction of merchant vessels is contained in Chapter IV and deals only with the destruction of *neutral* merchant ships. It authorized their destruction only as an exception to the duty of condemnation as prize in cases in which taking the captured vessel into port "would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time."¹⁰

Following World War I, the 1921-1922 Washington Naval Conference, under the sponsorship of the United States, and with the participation of Great Britain, France, Italy and Japan, made a further attempt to codify the customary law governing attacks on merchant vessels at sea. The resulting draft Treaty,¹¹ in addition to codifying the traditional rule that enemy merchant ships could not be attacked unless they refused to submit to visit and search, contained an absolute prohibition on the use of the submarine in a commerce-destroying mode. Article 4 provided:

The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations, they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto.¹²

This Treaty never entered into force because of the non-ratification by France, but some commentators seem to view the Treaty as an expression of customary law.

The same group of powers that had signed the abortive 1922 Washington Treaty assembled again in London in 1930. At that Conference they signed a

Treaty for the Limitation and Reduction of Naval Armaments,¹³ which contained Article 22 again asserting the applicability to submarines of the traditional rules prohibiting the sinking of merchant ships without having first placed passengers, crew and ship's papers in a place of safety.¹⁴ Although the Treaty was to expire by its own terms in 1936, this article was to remain in force without limit of time¹⁵ and contained an invitation to all other powers to express their assent to the rules. When the signatories of the 1930 Treaty reconvened in 1936, they converted Article 22 into a formal *proces-verbal*, which we know today as the London Protocol of 1936.¹⁶ In addition to 11 signatories, 37 states, including all of the belligerents in World War II except Romania, had become parties to the Protocol before the outbreak of hostilities in 1939. The operative part of the text, in its entirety, reads as follows:

Rules

(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.

Is the 1936 Protocol still alive? In 1971 and 1973 Tonga and Fiji respectively filed documents of continuity for the Protocol, but they are the only nations to have formally become parties to it since January 1939, when Iran became the last previous accession. It is worth noting that each of the Twentieth Century attempts to reduce to treaty form the law applicable to destruction of enemy merchant ships in naval warfare has proceeded from an attempt to codify customary law. Bearing in mind that other papers in this symposium address practice in more detail,¹⁷ it is nevertheless indispensable to review, at least briefly, the practices of nations since the Protocol was adopted.

III. State Practice

It is axiomatic that the actual practice of states is a key element in the creation of international norms. When consistent, long-continued, and acquiesced-in by other states, and when combined with the element of *opinio juris*, such practice may be said to *be* international law. This is true of the international law of armed conflict as well as the law of peace. But in trying to draw inferences from state

practice in the area of the law of armed conflict, it is important to be cautious not to draw sweeping conclusions from incomplete or ambiguous evidence.

The first post-Protocol test of the rules established by the Protocol occurred almost immediately in the Spanish Civil War. In that conflict, neutral merchant ships were sunk without warning. The world's reaction was predictably one of outrage. The leading European powers (less Italy and Germany, which were actively supporting the Franco regime) adopted the Nyon Agreement, which provided that submarines which attacked neutral ships contrary to the rules of the Protocol should be "counter-attacked and, if possible, destroyed."¹⁸ The Council of the League of Nations condemned the attacks as "in violation of the most elementary dictates of humanity underlying the established rules of international law [as set forth in the 1930 London declaration] . . ." and declared "that all attacks of this kind against any merchant vessels are repugnant to the conscience of the civilized nations which now find expression through the Council."¹⁹ Obviously, the parties to the Nyon Agreement and the members of the Council of the League who voted for the Council resolution considered the Protocol to express the governing rule of law.

The Protocol was put to its severest test in World War II. The practices of states in this conflict are dealt with in detail in other papers presented at this symposium²⁰ and will not be discussed extensively herein except as necessary to serve as a predicate for examining the rules stated in the two post-World War II manuals published by the U.S. Navy. Suffice it to say that in that War the surface ships, aircraft and submarines of both Allied and Axis powers attacked enemy merchant ships (and in some cases neutrals) without warning and without making any effort (in most cases) to make provisions for the safety of the passengers, crews, or ships' papers as required by the Protocol. Both sides justified these practices either on the basis of reprisal (which in itself is an admission that absent the first violation by the other side, the practice is illegal under international law) or on assertions that the other side had incorporated its merchant fleet into the combatant force by mounting offensive weapons on the ships, convoying them, requiring them to report enemy submarine sightings, and ordering them to take offensive action against surfaced submarines (*e.g.*, ramming), thus taking away their character as "merchant" ships within the meaning of the Protocol. These justifications imply that the parties to that conflict regarded the 1936 Protocol as continuing in effect, although not applicable to the circumstances then existing.

But the most significant World War II and post-World War II indication of an international consensus concerning the continuing validity *vel non* of the Protocol is found in the Nuremberg Tribunal's judgement in the case of Admiral Doenitz, who was charged with waging unrestricted submarine warfare in violation of the Protocol. The Tribunal found Doenitz not guilty of conducting unrestricted submarine warfare against *enemy* armed merchant ships but guilty

of sinking *neutral* ships and of failure to carry out the warning and rescue provisions of the Protocol. The Tribunal stated its reason for its not guilty finding as follows:

Shortly after the outbreak of war the British Admiralty . . . 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.²¹

Even as to its guilty findings, however, the Tribunal declined to assess sentence against Admiral Doenitz “on the ground of his breaches of the international law of submarine warfare” 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 sight [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.²²

The latter statement by the Tribunal has been interpreted in differing ways with respect to whether the 1936 Protocol remains in effect. One of my Navy colleagues, Alex Kerr, in an article in the *Naval Institute Proceedings* in 1955 stated, “the Protocol is no longer law; its provisions are obsolete; it is defunct.”²³ In 1956, in a lecture celebrating the publication of the predecessor to the current *Commander's Handbook*, I took a contrary view. I stated:

The Court was merely exercising its power to mitigate the sentence in view of its interpretation of the extenuating evidence produced before it. . . . That the court condemned the action of the defendant is made absolutely clear by its findings of guilt. On the other hand, the Court's interpretation of the actions of the British (and American actions under what the Court supposed were similar circumstances in the Pacific) were factors which could be considered by the court in determining a sentence appropriate to the offenses committed by Doenitz. Viewed in this light, therefore, the failure of the court to sentence Doenitz with regard to his breaches of the law of submarine warfare does not in any way detract from the previous findings [of guilty] of the court.²⁴

Which of these views is correct? Is the humanitarian law of armed conflict served by continuing statements giving lip service to an aging treaty that remains on the books but has been almost totally ineffective in bringing about the practices it was intended to ensure?

We have no contemporary practice of states with respect to submarine warfare, since submarines have not been used as commerce raiders in any of the

conflicts since World War II. We do have, however, some suggestions from the recent Iraq-Iran Tanker War that states will use whatever means they have available to disrupt an enemy's ocean commerce and will, to a large extent, ignore the rules laid down in the 1936 Protocol.

Both Iran and Iraq depended on the oil trade for economic sustenance during the conflict. Both had a strong desire to curtail the other's ability to sell oil and thus finance the war effort. But the military capabilities and vulnerabilities of the two warring states were different.

From the outset, Iraq had no surface or subsurface warfare capability but did have a capable, if small, air force. Iran had a strong surface warfare capability but a weak air force. Iraq's oil exports were primarily through pipelines, largely inaccessible to Iranian military targeting. Iran's oil exports were carried by merchant tankers through the Persian Gulf, but to all intents and purposes they were immune from any surface threat because Iraq had no viable naval surface forces.

Iraq, early in the war, commenced an air-interdiction campaign against tankers of any nationality carrying Iranian oil. Because of the great distances involved, Iraq used its air force frugally, flying one or two aircraft at a time, low-level, down the western side of the Gulf before turning eastward to attack merchant tankers plying the oil trade with Iran. At a predetermined point, the aircraft would come to altitude, acquire radar contact with a "large naval target" on the Iranian side of Iran's declared exclusion zone and fire missiles. The distance from base and the lack of supporting surface forces, coupled with the inability to loiter, made it impossible for Iraq to follow the 1936 Protocol, if, indeed, the Protocol is applicable to aircraft attacks. In addition, it is arguable that these attacks were indiscriminate, violating one of the most fundamental of the humanitarian rules of armed conflict.

Iranian attacks on merchant shipping on the western side of the Gulf were clearly indiscriminate. Iran frequently attacked merchantmen known to be carrying cargoes neither destined for nor containing exports from Iraq. It seems clear that these attacks were not undertaken as a means of attacking Iraqi merchant vessels, or merchant vessels destined for or leaving Iraq, since there were no Iraqi vessels operating in the Gulf and all sea access to Iraqi ports had been totally curtailed, but rather as a means indirectly to coerce the Gulf states to stop supporting Iraq and through them to pressure Iraq to cease its attacks on tankers serving Iran.

When diplomatic efforts by a number of states failed to stop attacks on neutral vessels by Iran, some "neutral" states, including the United States, resorted to escorting their merchant vessels through the Gulf to and from ports in uninvolvement Gulf states. The charges and counter-charges between warring and "neutral" states during this conflict make it difficult, at this early date, to assess

whether the practices that were followed will have any effect in shaping the law of targeting of merchant vessels.

IV. Bridging the Gap

A. *The Importance of Manuals*

In a paper published in the immediately preceding volume of the Naval War College Blue Book series, Professor Michael Reisman and William K. Lietzau, have stated that military manuals and handbooks on international law have two important functions:

First, they are the indispensable modality for disseminating normative information to those whose behavior is the target of the norms in question. Second, they are an essential component in the international lawmaking process, often the litmus test of whether a putative prescriptive exercise has produced effective law.²⁵

In other words, the *Commander's Handbook* serves not only as the United States government's means of telling naval personnel at all levels of command what rules they will follow in carrying out their military mission but also as a statement of the United States government's interpretation of what the law is or is becoming.

In his seminal book, *Legal Controls of International Conflict*,²⁶ Professor Julius Stone addressed at length the question of attacks on enemy commerce by submarines and aircraft. He concludes one section of his analysis with the following remarks:

The immediate task is to regulate the future of naval warfare in which submarines and aircraft will join in the attack on enemy commerce; for it is regrettably clear that no rule purporting to exclude them from this role, however well grounded in humanity, will be brooked. And in any such regulation, the aptness of submarines, aircraft and mines for destroying enemy commerce, their need for surprise and secrecy for effective and safe operation, the importance in modern war of the industrial economy which such destruction undermines, all of these as well as the claims of neutral commerce to immunity, and the demands of humanity, are factors for consideration . . .

It is idle to seek to reduce this matter to a *cri de coeur* of humanity. War law, even at its most merciful, is no expression of sheer humanity, save as adjusted to the exigencies of military success, a truth as bitter (but no less true) about attacks on merchant ships, as about target area saturation bombing. And it is also quite idle for Powers whose naval supremacy in surface craft enables them to pursue the aim of annihilating the enemy's seaborne commerce without "sink at sight" warfare, to expect that States which cannot aspire to such supremacy will refrain from seeking to annihilate the commerce by such naval means available to them as submarines, aircraft and mines. To refuse to face this will save neither life nor ship in any future war; and it will also forestall the growth of real rules for the mitigation of suffering under modern conditions.

The resort of British and American forces in the Second World War to “sink at sight” action against merchant ships only underlines the present view. And the consequent refusal of the International Military Tribunal to visit punishment upon Admiral Doenitz for breach of the treaty rules as to submarines, earnestly challenges the publicists of all nations to rethink their positions. *Only thus can some part of the humanity which now enters this sphere on paper only, reenter the field of war practice controlled by law.*²⁷

Does the formulation for attacks on merchant vessel, both neutral and enemy, contained in the *Commander's Handbook* reflect this rethinking urged by Professor Stone, or does it merely perpetuate a “paper only” entry of humanity into this field of warfare?

B. The Predecessor Manual (NWIP 10-2)

Before looking in detail at the provisions of the 1987 *Handbook*, it might be appropriate to take a brief look at the *Handbook's* 1955 predecessor, *The Law of Naval Warfare* (NWIP 10-2).²⁸ This manual's provisions with respect to destruction of enemy merchant vessels prior to capture are contained in one succinct subsection as follows:

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.²⁹

It is to be noted that the stated rules make no distinction as to whether the attacking unit is a surface warship, military aircraft or submarine. In a note to this section, it is stated that the rules of the 1936 Protocol are deemed declaratory of customary international law and “have been interpreted as applicable to belligerent military aircraft in their action toward enemy merchant vessels.”³⁰

In a Naval War College Blue Book written contemporaneously with the publication of NWIP 10-2, which is essentially an exegesis of NWIP 10-2,

Professor Robert W. Tucker, the author of both publications, justifies the section 503b(3) formulation as follows:

It is believed that this provision does not substantially depart from the requirements of the traditional law, although it does focus attention upon those recent practices of belligerents which serve, and have always served, to deprive belligerent merchant vessels of immunity from attack.³¹

In further explanation of “those recent practices” which serve to deprive belligerent merchant vessels of their immunity from attack, Tucker explains that they were not, as some contended, the arrival of the submarine and aircraft on the scene, with their effectiveness as commerce raiders and their inability to follow the traditional rules of visit, search and capture, but rather the integration of merchant vessels into the military effort of the enemy, thus destroying the assumption upon which the traditional rule was based—*i.e.*, that there was a clear distinction between enemy merchant vessels and enemy warships.³²

In essence then, the 1955 U.S. naval manual affirmed the continuing validity of the 1936 Protocol but adapted its application to the conditions that might exist in a conflict in which the enemy incorporated its merchant vessels into the military effort, thus essentially converting them into naval auxiliaries. It did not, however, allow submarines any special exemptions based on their particular operational capabilities and limitations or their vulnerabilities when surfaced.

C. Rules Applicable to Surface Warships

The 1987 manual, *The Commander's Handbook*, appears to follow a pattern similar to that of NWIP 10-2, although with some interesting variations. Instead of treating all naval platforms in one section, it divides the rules between three sections, one applicable to surface ships, one to submarines, and one to military aircraft. The provisions applicable to surface ships are found in paragraph 8.2.2.2, entitled “Destruction,” which provide in pertinent part:

Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice of belligerents in World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, 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 summoned to do so
3. Sailing under convoy of enemy warships or enemy military aircraft

4. If armed
5. If incorporated into or assisting in any way, the intelligence system of the enemy's armed forces
6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces
7. If integrated into the enemy's warfighting/war sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

The first six of these conditions parallel the conditions set forth in NWIP 10-2. The only departure of substance is the omission in condition 4 of the statement, "and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy." The *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations* explains this departure from the NWIP 10-2 version as follows:

In light of modern weapons it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively against an enemy or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination.³³

The seventh condition is new and was added, according to the Annotated Supplement, to cope with the deficiency in condition six, perceived by Professor Mallison, that a possible interpretation of this paragraph might prohibit destruction of an enemy merchant ship carrying cargo of substantial military importance but is not a "military or naval auxiliary" because it is not owned by or under the exclusive control of the armed forces.³⁴

Two comments concerning this statement of the rules applicable to surface warships are appropriate. The first is that the explanatory part of the paragraph justifies the departure from the strict rules of the 1936 Protocol in the first place by advances in technology ("including satellite communications, over-the-horizon weapons, and antiship missile systems") and only secondarily on the customary practice of belligerents that evolved during and following World War II. This justification was specifically eschewed by Tucker in framing the exceptions in the 1955 naval manual. The Annotation does not explain this departure, but it is consistent with Julius Stone's comment, quoted earlier, that the "aptness of submarines, aircraft and mines for destroying enemy commerce" is a factor for consideration in framing regulations for the future of naval warfare.³⁵

The second comment is that nowhere in the *Commander's Handbook* is there a statement as to who has the authority to make the determinations required by conditions before destruction may take place. On this latter point, the first two conditions, which are stated in the 1936 Protocol itself, would appear appropriate for determinations by the on-scene commander, whether he is on the surface, in the air or in a submarine. Conditions three and four are capable of objective determination by the on-scene commander in most cases. But conditions five, six and seven are, and more appropriately should be, for determination at the policy level of government and implemented by a service-wide directive.

Finally it would appear that the ultimate effect of the formulation of the rules in paragraph 8.2.2.2 is to apply the London Protocol constraints only in those circumstances in which the enemy merchant vessel is totally defenseless and its destruction without warning offers no clear military advantage to the attacker.

D. Rules Applicable to Submarines

The *Commander's Handbook* treats submarines in paragraph 8.3.1, which states initially that, “[t]he conventional rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of armed conflict.” This statement standing alone is perplexing. The real question facing those who must implement the rules is whether the “conventional” law has been so modified by desuetude or the development of superseding customary law that the “conventional” law has been rendered defunct.

The initial sentence does not, however, stand alone. The text goes on to acknowledge that the London Protocol “makes no distinction between submarines and surface warships with respect to the interdiction of enemy merchant shipping.” It states further that, “[t]he impracticability of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping.” It acknowledges, however, that these practices were justified as reprisals or because the enemy had integrated its merchant marine into its war-fighting/war-sustaining effort. Then, stating explicitly that the rules stated are a synthesis of those contained in the London Protocol of 1936 and “the customary practice of belligerents during and following World War II,” the paragraph states that submarines must:

provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel unless:

1. The enemy merchant vessel refuses to stop when summoned to do so or otherwise resists capture.

2. The enemy merchant vessel is sailing under armed convoy or is itself armed.
3. The enemy merchant vessel is assisting in any way the enemy's military intelligence system or is acting in any capacity as a naval auxiliary to the enemy's armed forces.
4. The enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

The *Annotated Supplement* to this section of the *Commander's Handbook* states that, "[t]hese exceptions are identical to those applicable to surface warfare."³⁶ If so, why are they listed separately? The *Annotated Supplement* does not explain. In fact, there are minor, but perhaps significant, differences.

The first is in the chapeau to the listing of circumstances authorizing destruction. In paragraph 8.2.2.2, which is applicable to surface warships, the chapeau reads in part that "enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances: . . ." In paragraph 8.3.1, which is applicable to submarines, the corresponding language reads as follows: "[the applicable law] imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of any enemy merchant vessel unless: . . ." In the case of surface ships, unless one of the circumstances applies, a surface ship may not attack and destroy. In case of submarines, the right to attack and destroy seems to be assumed, but not without first providing for the safety of crew, passengers and ship's papers. Further, there is no mention in this paragraph of what is meant by providing for the safety of crew, passengers and ship's papers. By referring back to paragraph 8.2.2.2, the commander can find a reference to the 1936 Protocol and its statement that the ship's lifeboats are generally not considered a place of safety, but the amalgamation in the discussion part of the two paragraphs of the rules of the 1936 Protocol and the practices of World War II may leave some doubt in the commander's mind—as it does in mine—as to whether the *Commander's Handbook* intends that the constraints stated in paragraph 8.2.2.2 are equally applicable to submarines.

The second difference between the statement of the rules applicable to submarines and those for surface warships is the omission of "actively resisting visit and search" in the listing of circumstances applicable to submarine attacks. This omission is apparently a tacit admission, not acknowledged in the 1955 Manual (NWIP 10-2), that it is impossible for submarines to carry out the traditional form of visit and search—a fact obvious to naval planners since the integration of the submarine into maritime commerce warfare prior to World

War I but papered over by negotiators who formulated the rules developed at each of the principal naval conferences of 1930 and 1936.³⁷ The *Commander's Handbook* thus accepts the fact that visit and search will not be attempted by submarines. In light of this omission, it is strange that the listing includes refusal "to stop when summoned to do so or otherwise resists capture." To suggest that a submarine might risk its safety by surfacing and signalling an enemy merchant vessel to stop and then to capture it seems just as unlikely as to expect it to carry out a visit and search. Nevertheless, the removal of any reference to visit and search in the submarine section seems to bring a greater sense of reality to the rules.

Whether this greater sense of reality comports with international law remains unresolved. In the McDougalian frame of reference, it is a "claim" put forth by the United States "which other decision-makers, external to the [United States will] weigh and appraise . . . and ultimately accept or reject."³⁸ The manuals of other naval powers will provide evidence of whether this "claim" by the United States has been accepted or rejected, but only the crucible of actual conflict, and the outcome thereof, will provide the final test.

E. Rules Applicable to Military Aircraft

Just as in the case of submarines, the rules applicable to military aircraft are formulated separately from those applicable to surface warships. Paragraph 8.4 provides in pertinent part:

Enemy merchant vessels . . . may be attacked and destroyed by military aircraft only under the following circumstances:

1. When refusing to comply with directions from the intercepting aircraft.
2. When assisting in any way the enemy's military intelligence system or acting in any capacity as auxiliaries to the enemy's armed forces.
3. When sailing under convoy of enemy warships, escorted by enemy military aircraft, or armed.
4. When otherwise integrated into the enemy's warfighting or war-sustaining effort.

Neither the text of the *Commander's Handbook* itself nor the *Annotated Supplement* indicates the derivation of the rules made applicable to aircraft attacks on enemy merchant ships.³⁹ The 1936 Protocol does not apply, and no other explicit conventional rules exist. Some publicists have suggested that the 1936 Protocol rules are a part of customary international law applicable to aircraft, but the basis for such a conclusion certainly cannot be found in the practices of

belligerents in World War II. The authors of the *Commander's Handbook* seem to have applied the humanitarian considerations underlying the 1936 Protocol, as well as the basic principles of humanitarian law concerning the distinctions between military objectives and civilians, to derive a set of rules similar to those applicable to surface ships and submarines.

The basic rules are similar, with modifications made necessary by the limitations inherent in aircraft. The inability to visit and search or to capture is recognized. For conditions depending on resistance to these actions, the *Commander's Handbook* substitutes refusal to comply with directions from the intercepting aircraft. The rules do not mandate an obligation to provide for the safety of passengers and crew, this being a practical impossibility, although a subsequent paragraph does require, "[t]o the extent that military exigencies permit," that the aircraft search for survivors and report their location to units that might be capable of rendering assistance.

Of the four conditions which allow for attack by aircraft, the last three are essentially a restatement of conditions three through six applicable to surface ships. The reasons for the variation in wording and arrangement are not apparent. As in the case of attacks by surface ships, whether a particular merchant ship has been integrated into the enemy's war-fighting or war-sustaining effort is a question which seems beyond the competence of the on-scene commander and should be addressed at the national level. Whether the vessel is under convoy, refuses to comply with the directions of the aircraft, or is armed may be the subject of individual determination at the scene, but the aircraft may subject itself to substantial risk in determining whether its target is armed before making its attack.

Just as in the case of surface ships, the conditions stated are conditions precedent to attack. Unlike the situation with submarines, the right to attack is not assumed.

V. Assessment

Any of today's navies that attempt to prescribe rules for conduct of sea warfare against commerce face the same dilemma that faced the authors of *The Commander's Handbook* in trying to walk a fine line between the conventional law as set forth in the 1936 Protocol and the actual practices of states that occurred in World War II and subsequent conflicts. The 1936 Protocol is still on the books, and has not been renounced nor formally repudiated by any state that is a party to it. The practices of all parties that took part in World War II bore no resemblance to those required by the Protocol. But these practices were justified not by repudiation of the Protocol but rather by justifications that purportedly rendered it inapplicable to the particular circumstances under which the conflict was carried out. The rationale for the Nuremberg Tribunal's acquittal of Admiral

Doenitz of the charge of unrestricted submarine warfare against enemy merchant fleets gives further credibility to the claim that the 1936 Protocol was not defunct but was merely inapplicable.

The *Commander's Handbook* seems to accept the continued viability of the Protocol but assumes that, just as in World War II, the practices of states in future conflicts will be such as to make it inapplicable in most circumstances. Recent practice in those few instances of post-World War II conflicts in which the warring states carried on commerce warfare would seem to justify that conclusion.

Notes

* Professor of Law (Emeritus), Duke University School of Law; Former Charles H. Stockton Professor of International Law, U.S. Naval War College, Newport, R.I.; Rear Admiral, Judge Advocate General's Corps, U.S. Navy (Ret.)

1. For example, some generally accepted principles of war are:

- (1) Objective: every military undertaking must have a clearly defined objective and all activity must contribute to that goal;
- (2) Concentration (Mass): concentrate superior forces at the decisive place and time and in the proper direction to sustain superiority;
- (3) Economy of force: use no more—or less—effort than necessary to achieve the objective;
- (4) Surprise: create unexpected situations to achieve maximum object from minimum expenditure of effort;
- (5) Unity of effort: focus all efforts on a common goal or objective.

Applying these principles of war, interdicting the enemy merchant supply effort can easily be seen to contribute to the general prosecution of a war effort.

2. The usual special circumstance was the impossibility or extreme inconvenience of sending the prize into port for adjudication. Robert W. Tucker, *The Law of War and Neutrality at Sea*, at 56, 106 (1957).

3. *Id.*

4. One agenda item proposed the prohibition of submarine warfare altogether, but the conference could not agree on the proposal. See *The Proceedings of the Hague Peace Conference: The Conference of 1899*, at 367-68 and *passim* (James B. Scott ed., 1920). At that time the submarine was viewed as a coastal defense platform rather than as a commerce destroyer on the high seas.

5. The Hague, October 18, 1907 [hereinafter Hague Convention VI], reprinted in *The Laws of Armed Conflict: a Collection of Conventions, Resolutions and Other Documents 791-96*, (Dietrich Schindler & Jiri Toman eds., 3rd ed. 1988).

6. The Hague, October 18, 1907 [hereinafter Hague Convention VII], reprinted in Schindler & Toman, *supra* note 5, at 797-802. The United States is not a party to this Convention.

7. The Hague, October 18, 1907 [hereinafter Hague Convention XI], reprinted in Schindler & Toman, *supra* note 5, at 819-24.

8. The Hague, October 18, 1907 [hereinafter Hague Convention XIII], reprinted in Schindler & Toman, *supra* note 5, at 951-96.

9. Proceedings of the International Naval Conference, held in London, December 1908-February 1909, Declaration Concerning the Laws of Naval War 381-393 (1909) (French Language) [hereinafter London Declaration], reprinted in English in Schindler & Toman, *supra* note 5, at 845-56. There were no ratifications of this Declaration and it did not enter into force.

10. London Declaration, *supra* note 9, at art. 49.

11. Conference on the Limitation of Armaments, November 12, 1921 – February 6, 1922, Treaty Relating to the Use of Submarines and Noxious Gases in Warfare 1605–11 (1922) [hereinafter 1922 Washington Treaty], reprinted in Schindler & Toman, *supra* note 5, at 877–79.

12. *Id.* at article 4. Article 3 declared:

that any person in the service of any Power who shall violate any of [the rules concerning attacks on neutrals and noncombatants at sea], 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.

Although this provision has been interpreted by some as equating violation of the rules to piracy, the negotiating history of the provision makes it clear that the intent of the provision was to create universal jurisdiction over the offenses as is the case for piracy. See Howard S. Levie, *Submarine Warfare: With Emphasis on the 1936 London Protocol*, *herein* at 28.

13. Treaty for the Limitation and Reduction of Naval Armaments, art. 22, reprinted in Schindler & Toman, *supra* note 5, at 881–82.

14. *Id.* at article 22.

15. *Supra* note 5, article 23.

16. Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth In Part IV of the Treaty of London of 22 April 1930, 173 League of Nations Treaty-Series 353–57 (1936), reprinted in Schindler & Toman, *supra* note 5, at 883–85.

17. See, Howard S. Levie, *supra* note 12; L.F.E. Goldie, *herein* at 2; Sally V. Mallison & W. Thomas Mallison, *herein* at 87, George Walker, *herein* at 121.

18. The Nyon Agreement, September 14, 1937, 181 L.N.T.S. 137–152, reprinted in Schindler & Toman, *supra* note 5, at 887–90.

19. League of Nations, Council Document c. 467.1937.VII, Official Journal, December 1937, at 944–45.

20. See especially the paper presented by Sally V. Mallison & W. Thomas Mallison, *The Naval Practices of Belligerents in World War II: Legal Criteria and Developments*, *herein* at 87.

21. International Military Tribunal, 22 Trial of the Major War Criminals 558. It is interesting to note recent decisions by the U.S. Department of Defense and Veterans Administration which determined that members of the U.S. Merchant Marine who served during the period December 7, 1941, to August 15, 1945, constituted active military service in the Armed Forces of the United States for purposes of all laws administered by the Veterans Administration. See 53 Fed. Reg. 92, 16,875–76 (May 12, 1988).

22. International Military Tribunal, 22 Trial of the Major War Criminals, *supra* note 21, at 559. There is some dispute as to whether the phrase “sunk at night” should read “sunk at sight.” Marjorie Whiteman in her Digest, cites documents concluding that the phrase “sunk at night” is correct. See 10 Marjorie M. Whiteman, Digest of International Law 663–64 (1968), citing letter from the Assistant Registrar of the International Court of Justice (Aquirone) to the Second Secretary of the American Embassy at The Hague (Heyniger) (Oct. 22, 1962), enclosed in letter from the Counselor of the American Embassy at The Hague (De Palma) to Assistant Legal Adviser Whiteman, (Nov. 2, 1962), (MS. Department of State, file 360/11–262).

23. Alex Kerr, *International Law and the Future of Submarine Warfare*, 81 U.S. Nav. Inst. Proc. 1110 (October 1955). In his paper prepared for this symposium, Professor Howard Levie summarizes the conflicting views on the continuing efficacy of the 1936 Protocol. See Levie, *supra* note 12, at note 171 and accompanying text; see also Mallison & Mallison, *supra* note 20, at 99 *et seq.*

24. Horace B. Robertson, Jr., *Submarine Warfare*, JAG J. 3, 8 (November 1956).

25. W. Michael Reisman & William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, 64 The Law of Naval Operations 1 (Horace B. Robertson Jr. ed., 1991).

26. Julius Stone, *Legal Controls of International Conflict* (2d imp., 1959).

27. *Id.* at 606–07 (Emphasis supplied; footnotes omitted). Unfortunately, Professor Stone gives no suggestions as to how this can be done.

28. U.S. Department of the Navy, Law of Naval Warfare (NWIP 10–2) (1955), reprinted in Appendix in Tucker, *supra* note 2, at 357–422.

29. *Id.* at sec. 503b(3).

30. *Supra* note 22.

31. Robert W. Tucker, *supra* note 2, at 70 n. 54.

32. *Id.* at 68–69.

33. U.S. Department of the Navy, Office of the Judge Advocate General, Annotated Supplement to The Commander's Handbook on the Law of Naval Operations (NWP 9) (Rev. A) FMFM 1–10 (1989) [hereinafter

Annotated Supplement] par. 8.2.2.2, n. 49 (1989). One wonders if, without any criteria to determine whether a vessel is "armed," even the carrying of small arms could be used as justification for attacking an enemy merchant vessel without warning.

34. *Id.* n. 51 and n. 52, citing W. Thomas Mallison, *Studies in the Law of Naval Warfare: Submarines in General and Limited War* 123 (1966). The note in the Annotated Supplement adds that "[a]lthough the term war-sustaining is not subject to precise definition, 'effort' that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term." *Id.* This appears to be a substantial broadening of objects of direct attack with a consequent narrowing of persons and objects who are not subject to direct attack.

35. See Stone, *supra* note 26.

36. Annotated Supplement, *supra* note 33, annotation to par. 8.3.1, at n. 75.

37. The 1922 Conference did not paper over the issue but met it head on by explicitly prohibiting the use of submarines as commerce destroyers. See *supra* note 13 and accompanying text.

38. Myres S. McDougal, *The Hydrogen Bomb Tests*, 49 *Am. J. Int'l L.* 356, 357 (July 1955).

39. It is interesting to note that the U.S. Air Force manual covers air attacks on enemy merchant ships in a historical context, noting the traditional rules limiting action to capture and prize proceedings except under special circumstances. It then states: "[t]he extent to which this traditional immunity of merchant vessels, still formally recognized, will be observed in practice in future conflicts will depend upon the nature of the conflict, its intensity, the parties to the conflict and various geographical, political and military factors." It then concludes by quoting verbatim paragraph 503(b)(3) of NWIP 10-2. Department of the Air Force, *Air Force Pamphlet 110-31: International Law—The Conduct of Armed Conflict and Air Operations (APP 110-31)* par. 4-4c (1976).

Comments on H. B. Robertson's Paper: U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice

By
Frits Kalshoven *

Enemy Merchant Vessels as Legitimate Military Objectives

Introduction

Professor Horace Robertson's paper on "U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap between Conventional Law and State Practice" provides a most helpful analysis of the problems U.S. policy makers have to face in dealing with this particular aspect of warfare at sea. In discussing the most recent product of their efforts in this area, viz., the *Commander's Handbook*, (NWP-9, 1987) he has not spared the drafters his criticism, thus providing a fertile basis for today's debate. In order to save time and paper, I may just state at the outset that I entirely agree with his critical remarks.

The publication, in 1987, of the U.S. *Commander's Handbook* was a welcome event. It was evidence that a major naval power was prepared to take a fresh look at the many aspects of the display and use of naval power, in situations both of peace and war. The U.S. is not the only one to show such a renewed interest: a similar tendency may be noted in several other countries. In particular where naval warfare is concerned, this development was long overdue: as Prof. Robertson rightly notes, the last effort at international law-making dates back to 1936, and both the 1974-1977 Diplomatic Conference and the UN Conference on the Law of the Sea had wisely avoided (or miserably failed according to one's preferences) to take up the subject, with the many delicate problems inherent in it.

To some extent, the first-mentioned Conference may nonetheless have provided the source of inspiration for the recent efforts. With the adoption of the Additional Protocols, the gap between the thoroughly updated law of land warfare (including sea-land and air-land warfare) and the venerable, if not superannuated, law of war at sea had become so glaringly obvious that it could not be ignored any longer. At all events, the very text of the *Commander's Handbook* betrays the efforts the drafters made to remain close to the language of Protocol I, the non-ratification by the United States notwithstanding.

For another reason too, the 1974-1977 Conference and its results may be relevant to the present discussions. I for one am firmly convinced that the law

of warfare at sea, no matter how distinct from other areas of the law of war, does not exist in isolation. It is not just the text of a recent instrument like Protocol I that should be taken into account in any attempt at rewriting the law of naval warfare, but the motives behind the text as well.

The recent Round Table on "The Military Objective and the Principle of Distinction in the Law of Naval Warfare," (November 1989) at Bochum, Federal Republic of Germany, had the benefit of an introductory report by Commander William Fenrick (Canada) covering the whole spectrum of targeting in naval warfare. The comments I presented on that occasion focused mainly on the criteria determining whether an (enemy or neutral) merchant ship may be regarded as a legitimate military objective and attacked as such. The text below stems in part from these sources.

Law and practice

My first comment concerns the question of law in relation to practice. Prof. Robertson regards the interdiction of merchant shipping as an activity that "fits neatly with the general principles of war." The first such "generally accepted" principle requires, in his definition, that "every military undertaking must have a clearly defined objective and all activity must contribute to that goal." Applying this and other principles of war, "interdicting the enemy merchant supply effort can easily be seen to contribute to the general prosecution of a war effort." At the same time, and in contrast with this military logic, he states that "traditional law regards merchant ships as civilian objects and merchant seamen as civilians and thus not legitimate targets of direct attack" (p. 338). Further down, he concludes that the *Commander's Handbook* "seems to accept the continued viability of the [1936] Protocol but assumes that, just as in World War II, the practices of states in future conflicts will be such as to make it inapplicable in most circumstances" (p. 353).

Leaving for the moment on one side whether "traditional law" really regards merchant ships and their crews in the manner he describes (in terms strongly reminiscent of Protocol I), the point is that the rapporteur appears to accept a situation where state practice deviates so completely from the law that the latter is "inapplicable in most circumstances", or in other words, has for all practical purposes become a dead letter. In this respect, it may be of interest to quote Commander Fenrick, who notes in his report (p. 37) that,

It is not essential that international law, to be valid, should always be compatible with state practice. If, however, the law of naval warfare is to have an impact on the conduct of warfare, there should be a crude congruence between law and practice so that it is marginal, extreme conduct which is condemned, not activities which are routine operations of war.

Repeating my earlier comment, this may sound plausible enough from a military point of view, and the second sentence may even be read to apply to customary international law in general, as, for obvious reasons, customary law tends to keep fairly close to practice. On the other hand, it may just be an instance of begging the question: over time, “routine operations of war” and the military thinking on which they rest may have come to deviate so completely from what can be tolerated even in war as an unavoidable encroachment on human values that a correction is urgently required.

These remarks were originally made in a discussion about the status of neutral merchant shipping. They may be even more relevant in the present context of the targeting of enemy merchant shipping: as between opposing parties to the conflict, the possibility of non-protest in the face of conduct that cannot “be tolerated even in war as an unavoidable encroachment of human values” and, with that, of an ostensible acceptance of practice setting aside law, is all that much greater.

Rather than accepting the gap between law and practice as unbridgeable, I would therefore favour a re-examination of the situation, with a view to determining whether perhaps not only the law but practice as well stands in need of some adjustment.

Principle of Distinction

In Prof. Robertson’s quoted statement, “traditional law regards merchant ships as civilian objects and merchant seamen as civilians and thus not legitimate targets of direct attack,” I wonder whether this may not be an overstatement of the law as it stands, especially where enemy merchant ships are concerned.

With Commander Fenrick in his report to the Bochum meeting, I find my point of departure in “[t]he principle of distinction [as] a fundamental aspect of the law of naval warfare.” Even though it is not “explicitly addressed in any treaty text applicable to naval warfare,” it is as implicit in the law of naval warfare as it is in all other parts of the law of war, as the basis for the protection of the civilian population and civilian objects. Resolution XXVIII of the XXth International Conference of the Red Cross (Vienna, 1965) reaffirmed it in no uncertain terms as one of the four “general principles of the Law of War” to be observed by “all Governments and other authorities responsible for action in armed conflicts.” The UN General Assembly subsequently lent it the weight of its authority when it unanimously adopted Resolution 2444 (XXIII) of 19 December 1968.

No state has since denied the validity of the principle, nor is it suggested anywhere that as a principle of law it would apply only to certain theatres of war, to the exclusion of other ones. As reaffirmed in 1977, and paraphrasing Art. 48, Protocol I, it requires parties to the conflict to distinguish at all times between

civilians and combatants and between civilian objects and military objectives, and to direct their operations only against combatants and military objectives.

Another matter is the manner in which the principle is elaborated for the different theatres of war. It is fairly evident that the particular set of rules embodied in the 1977 Additional Protocols, with its strong focus on land operations and protection of individual persons, cannot simply be transplanted to the theatre of naval operations.

The High Seas: A Different Theatre of War?

In the past, land and sea warfare may have been very different affairs in that land warfare was first and foremost a struggle for territory, whereas war at sea usually had strong economic warfare overtones. The distinction lost much of its edge, though, with the introduction of the submarine and the air arm. As for the latter, the possibility of attacks from the air on objects situated deep in the enemy hinterland allowed economic warfare to henceforth be conducted against the enemy's land-based industrial capacity and infrastructure.

Aerial attacks on ground targets are by definition destructive. Economic warfare at sea, on the other hand, does not necessarily entail the destruction of ships: there exist other, less destructive and economically more profitable ways of dealing with ships, such as visit and search followed by capture as prize, rerouting, etc. The fact, however, that especially submarines in their attacks on targets at sea behaved much like the air arm did in its actions against targets on land, largely removed the distinction. In effect, the actions of submarines were not only destructive: they rapidly turned indiscriminate as well.

In this respect too, the air arm behaved little better, with their attacks on ground targets also becoming increasingly indiscriminate - intolerably so, in effect. When the law was finally brought up for revision, the international community was no longer prepared to tolerate this extreme behavior as a militarily unavoidable encroachment of human values, and the practice was outlawed by the rules on the protection of the civilian population embodied in the 1977 Additional Protocols. It may be noted in passing that these rules have never been intended to outlaw all air-land operations: in conformity with the general principle of distinction, they basically permit all those attacks that are directed against a specific military objective, as defined in the Protocol.

The Merchant Ship as a Military Objective

Any object may in given circumstances come to be regarded as a military objective, i.e., a legitimate object of attack. Whether this is the case depends on the characteristics of object and situation in correlation with the accepted definition of "military objective." It should be noted that "acceptance," in this

context, cannot simply signify the views of one single state, no matter how powerful. What is meant is the definition as accepted by the international community; and acceptance can come about in the shape of express agreement to a treaty text (as in Protocol I) or by any other process in accordance with international law.

These considerations apply without reserve to all theatres of war. Only when it comes to elaborating the principle into more detailed rules, account must be taken of relevant differences between the various theatres. For our purposes, the main feature distinguishing sea warfare from land operations may be that at sea, human beings are not primarily encountered as individuals (and then, specifically, as combatants or civilians) but as the crew or passengers on board a ship (i.e., an object). Hence, the first question to be answered is not so much the status of given persons but, rather, whether a ship constitutes a military objective and may be attacked as such. Here as in other areas of the law of armed conflict, the answer to this question depends on the characteristics of the situation set against the applicable definition of military objective.

One thing is beyond doubt: in the context of naval warfare, the notion of military objective, no matter how defined, includes the warships and naval auxiliaries of the adverse party, as military objectives "by their nature" (as in Art. 52(2) of Protocol I). As the rapporteur notes (p. 339): "Warships are instruments of war and subject to attack and destruction without warning." He goes on to state that according to traditional international law, "[m]erchant ships, even those sailing under the flag of the enemy, are considered as civilian objects and manned by civilian crews, and *so long as they maintain their proper role*, are subject only to seizure as prize and subsequent condemnation in prize courts of the capturing belligerent." The italicized words already suggest that when it comes to an enemy merchant ship, the question of whether it constitutes a military objective has no straightforward answer. It may be noted in passing that the quoted phrase qualifies to some degree the rapporteur's earlier statement that "traditional law regards merchant ships as civilian objects and merchant seamen as civilians and thus not legitimate targets of direct attack."

As with land warfare, two steps are required to determine the status of a merchant ship: its characteristics must be determined, and these must be set against the rule of international law defining the "military objective" in the context of naval warfare. Obviously, here one does not find the definition in a recent treaty or similar authoritative text. It must therefore be derived from other sources.

Any number of characteristics may make a merchant ship a significant element in the conduct of the war. *E.g.*, activities carried out on board (guns being fired, information being transmitted, etc.); the way it is sailing (under enemy convoy, or on a ram course with an investigating warship); the cargo it carries (troops, young people destined to enter the enemy armed forces, military supplies, raw

materials indispensable for the production of weapons of war); or, indeed, the mere fact that it sails under enemy flag, or imports or exports merchandise (say, bales of cotton) in which the adverse party has some financial interest, so that the ship may be deemed to contribute to the enemy war effort. However, whether any such factor also turns the merchant ship into a military objective depends, once again, on the definition of "military objective" as applicable in the context of naval warfare.

"Contribution to the War Effort" Not Sufficient Ground

In this search for the applicable definition, the most important point to my mind concerns the claim that the mere fact that a merchant ship may be said to make a contribution to the war effort is sufficient to turn it into a military objective: a claim that is made nowhere with such insistence as in the *Commander's Handbook*.

This brings us back to Prof. Robertson's introductory chapter, where he states (on p. 338) that "[i]f it is true that merchant shipping can be critical to a nation's ability to prosecute a war effort, it is equally true that the opposing power will seek to interdict that supply effort." Yes, but by what means? And specifically, by sinking all ships that are suspected of contributing to the enemy war effort?

Commander Fenrick in his report to the Bochum Round Table examines four recent manuals. Neither the Australian nor the French manuals list contribution to the war effort as a separate criterion. The Canadian draft manual does use the term, but only with respect to enemy merchant ships and as part of the requirement that they are "*incorporated into the belligerent war effort*" (italics added). Whether or not enemy merchant shipping is deemed to be so incorporated will be decided at the governmental level. The list of "indicators that all enemy merchant shipping is incorporated into the belligerent war effort" shows clearly that the Canadian draft manual envisages a situation where the enemy completely and effectively controls all merchant shipping under its flag. The first indicator mentioned requires "state control over merchant shipping to ensure that only items essential to the war effort are imported or exported." The fourth manual, the *Commander's Handbook*, appears to be the most permissive in that (except for one further condition to be mentioned below) it merely requires integration of the enemy merchant ship into "the enemy's war fighting/war sustaining effort" – an ostensibly somewhat more refined, but essentially more elaborate way of saying "war effort". Prof. Robertson notes that this (seventh) condition did not figure in the previous U.S. naval manual, and that it:

was added, according to the Annotated Supplement, to cope with the deficiency in condition six, perceived by Professor Mallison, that a possible interpretation of this paragraph might prohibit destruction of an enemy merchant ship carrying

cargo of substantial military importance but is not a "military or naval auxiliary" because it is not owned or under the exclusive control of the armed forces.

It is worth noting that "contribution to the war effort" does not constitute an element peculiar to the present deliberations about naval warfare: it was likewise of major importance in the recent discussions about war on land and from the air. It is, in effect, an age-old problem, witness the cotton bales of the American Civil War. And the assertion, for instance, that "interdicting the enemy industrial or agricultural output, or eliminating the enemy labour force, can easily be seen to contribute to the general prosecution of a war effort," sounds as reasonable as Prof. Robertson's earlier quoted comment on "interdicting the enemy merchant supply effort."

It was in particular the increased recourse to aerial bombardment of industrial and other targets in the enemy hinterland that made the question of the role of the civilian population as a contributor to the "war effort" acute. In this regard, it may be recalled that in 1969, at the very first meeting of experts organized by the ICRC after the adoption of U.N. General Assembly Resolution 2444:

the experts generally (agreed that) persons not taking a direct part in hostilities, even if they were indirectly contributing to the war effort, could not be attacked as quasi combatants. As an expert rightly pointed out, this would open the door to every abuse and would take any sense from the prohibition formulated in Resolution 2444. . . . But if civilians are on the site of a military objective or in its immediate proximity, they expose themselves to the particular risks resulting from an attack directed against that objective. (*Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts*, report submitted by the ICRC to the XXIst Int. Conf. of the Red Cross, Istanbul, Sept. 1969; Geneva: May 1969, p. 69).

In the framework of land and air-land warfare these views have since been vindicated with the adoption of the rules in Protocol I elaborating the distinction between civilians and combatants, and civilian objects and military objectives, and the protection of the former. It is submitted that in naval warfare too, "contribution to the war effort" is too broad and vague a notion to serve as a determinant for the decision that even an enemy merchant ship may be attacked as a military objective. I regard it as a significant fact that of the four recent manuals Commander Fenrick quotes in his report, two do not include contribution to the war effort as a separate criterion. As for the Canadian manual, I for one would accept the quoted first indicator with two slight changes: delete the reference to export, and read instead of "items essential to the war effort," "items necessary for the military effort."

The *Commander's Handbook* adds to the "war effort" criterion the further requirement that "compliance with the rules of the 1936 London Protocol would, under the circumstances of specific encounter, subject the surface

warship [the submarine] to imminent danger or would otherwise preclude mission accomplishment.” In my submission, this amounts to hardly any restriction at all but rather encourages giving prevalence to the security of the attacking ship and mission accomplishment over humanitarian considerations. Arguments such as the security of a party’s forces or “mission accomplishment” appear to have become popular as recent, very vague and very broad versions of the age-old argument of military necessity. As such, they are valid considerations as long as they are thrown into the balance with the other values involved; not when they are simply used as an argument overriding all other considerations. They should not, in other words, degenerate into a “license to kill.”

*Professor of International Humanitarian Law, University of Leiden, Netherlands.

Comments on H. B. Robertson's Paper: U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice

By
Ashley Roach *

As usual, Professor Robertson has challenged us all. I will limit my comments to addressing some of his suggestions for improving NWP 9A and its annotations, and conclude with some observations of my own.

Professor Robertson correctly notes the conundrum of our topic. While civilians and civilian objects are normally not legitimate objects of attack — and we are dealing with civilian merchant ships with civilian crews — many of these merchant ships contribute in a major way to the prosecution of the war effort of their country.

It is my sense that there has been a shift in the balance of interests since 1920; merchant ships were smaller and in greater numbers then; hence a larger number of civilians were at risk, particularly in an age when search and rescue at sea was primitive at best. Today's merchant fleets are generally made up of fewer yet larger ships with smaller crews, ships which are more easily tracked and which can have on board vastly better survival equipment (I refer here to the kind of equipment kept on off-shore drilling platforms). Certainly the military importance of the cargo carried on board, whether it be revenue-raising exports or imports of war materiel, is no less than before.

In the land warfare context, we know that noncombatants may not be used to shield military objectives from enemy attack and that the presence of noncombatants within or adjacent to a legitimate target does not preclude its attack. Indeed, a party to the conflict has an affirmative duty to remove noncombatants (over which he has control) from the vicinity of targets of likely enemy attack. (NWP 9A, para. 11.2). We also know that civilian objects become legitimate military objectives — and thus subject to attack — when, by their nature, location, purpose or use they effectively contribute to the enemy's war-fighting or war-sustaining capability and when their total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. (NWP 9A, para. 8.1) Anti-shipping operations are undertaken against that kind of maritime commerce for the very reasons stated in the rule. So it must be unquestioned that you can attack merchant shipping — fitting that criteria — since they lose their protection as civilian objects and the civilians on board must be considered to have assumed the risks associated with attack, such as becoming shipwrecked.

I suggest therefore that the protections due civilian crew on board enemy merchant ships are too rigidly stated in the 1936 Protocol.

Let me now respond to a few of Admiral Robertson's comments.

First, the decision to treat attacks on enemy merchant ships by category of warfare specialty was driven in part by the audience for whom NWP 9 is intended: the line officer who has one of three distinct warfare specialties: surface warfare, aviation, or submarine. We also felt it necessary to take into account the military differences between their platforms of attack, and the necessity to accommodate the legitimate need to provide protection to civilians consistent with the legitimate military objective of sinking enemy merchant shipping that was supporting the enemy's war effort. We will consider very carefully Admiral Robertson's suggestions as to the implications — intended or not — of the differences in the formulation of the rules applicable to surface, air and submarine warfare.

Second, regarding the effect of arming a merchant ship on its immunities from attack, I took the view that, while the crew may view its weapons as "defensive," the enemy is not likely to be able to make that distinction if it sees weapons on board that can cause it harm. Light individual weapons such as the hand gun and the shotgun — permitted medical personnel and chaplains for self protection and for protection from marauders (see NWP 9, para. 11.5) — would not in my view constitute arming the ship, unless of course they were aimed at the overflying aircraft or submarine. The real concern is necessarily with larger caliber weapons, including crew-served weapons, and weapons mounted topside that are intended for non-human targets. If the merchant ship is a legitimate military target by virtue of its cargo, it certainly may be armed with such weapons. But if its cargo does not make it a legitimate enemy target, the ship ought not be armed lest the enemy think otherwise. That is the military reality, and our formulation of the rule reflects that view.

Third, Admiral Robertson rightly points out that NWP 9 does not identify what levels of command may determine whether the conditions exist that would authorize destruction of an enemy merchant ship. He suggests that some may be best made by the on-scene commander, while others involve policy decisions best made at higher levels of government and "implemented by a service-wide directive." I agree with the former, but would note that the latter would be promulgated down the operational chain of command, not the administrative chain. The existing system for making those decisions, and where I would expect to find them reflected, is in the rules of engagement promulgated for the operation or campaign. As is well known to many of you, rules of engagement are the implementation of the interaction of the relevant factors: the applicable law, the military/operational considerations, and the policy goals established by the civilian leadership.

I do believe Admiral Robertson has overstated the effect of the formulation of the rules in paragraph 8.2.2.2 (pp. 347-348). I have already pointed out what I think are the legitimate exceptions to the arming criterion, and I believe the principle of proportionality reflected in the stated definition of a military objective is not nearly so open-ended as "no clear military advantage to the attacker" as stated by Admiral Robertson. I think there is a reasonable and realistic balance reflected in Chapter 8.

While Admiral Robertson questions how a submarine might itself signal a merchant ship to stop, I suggest that integrated operations may see the torpedoes come from beneath the waves toward the ship which does not stop when radioed to do so by the P-3 or the frigate, or by the submarine who transmits the order by satellite relay.

Finally, I take a different view of the modern viability of the Protocol. As a nation we have not renounced very many treaties — it is very hard to do. But if the Protocol continues to reflect accepted values, and I believe it still does, then we have to apply its concepts to the modern maritime world and cannot usefully say its a dead letter while refusing to abrogate it or claim desuetude. I think it is misleading — and mischievous — to suggest that the Protocol exists but is ignored in practice. It has not lapsed into desuetude, but must be understood to be not applicable across the board as some would have it. We cannot afford to have law which is ignored all the time. That leads to disrespect for the rules. Rather, we need law which will be followed most of the time.

*Legal Advisor, Department of State; Captain, Judge Advocate General's Corps, U.S. Navy (Ret.).

INDEX

A

- Aerial bombardment, of industrial targets, 362
- "Agency principle," 126, 143
 - See also United Nations Charter
- Aircraft, 309
 - air-interdiction campaigns, 344
 - blockades and, 9-10
 - blockades using, 9, 10, 260
 - civilian, targeting of, 224
 - economic warfare and, 260, 288
 - London Protocol of 1936 and, 240, 241n.9
 - rules of attack by, 176
 - sea to air engagements, 224
 - strategic strikes with, 295
 - three dimensional warfare at sea, 5
 - used for targeting, 238
 - as weapons platforms, 239
 - See also Military aircraft
- Air-interdiction campaigns, 344
- Altmark* incident, 4
- Amerada Hess Shipping Corp. v. Argentine Republic*, 15-16
- American Revolution, submersible boats in, 28
- Analogy, in international law, 223
- Anglo-German Naval Agreement of 1935, 73
- ANS missiles, 243
- Anti-submarine warfare (ASW) vessels, 252
- Arabic*, sinking of, 35
- Arab-Israeli conflicts, 121, 133-141
 - blockades in, 188
 - Egypt-Israeli peace treaty, 138
- Area bombing, 302-303
- Armed conflict
 - economic. See Economic warfare, force accompanying
 - future. See Future conflicts
 - humanitarian obligations of, 4
 - rules of, 223
 - theatres of, 359-360
 - three dimensional, at sea, 5
 - totalitarian, 11-12
 - UNCLOS and, 156-157
- Arms limitation agreements, 73-75
 - inequality of, 290
 - See also Nuclear weapons
- ASW (anti-submarine warfare) vessels, 252
- Attack without warning, 68n.143, 166
 - Arabic*, sinking of, 35
 - Civil War, Spain, 7-8
 - Defense of Merchant Shipping Handbook and, 90-91
 - and Persian Gulf "Tanker War" (1980-1988), 174
 - by submarines, 9
 - See also Indiscriminate attack
- Automatic submarine contact mines, 179-180

B

- Ballistic weapons, 311
 - See also Missiles
- Baltic Sea, 254
- Battle of the Bismark Sea, 97-99
- Battle of the Bismark Sea, killing of survivors, 97-99, 112
- Battle of Trafalgar, 3-4
- Belgrano*, 14
- Belligerents
 - behavior as acceptable practice, 226
 - changing definitions of, 272-273
 - merchant ships of, 3
 - and World War II naval practices. See World War II, Naval practices of belligerents
 - See also specific conflicts
- Black Sea, 254
- Blockades, 188, 309-310
 - Civil War, China, 128-129
 - Civil War, U.S., 235
 - Cuban quarantine, 305-306
 - and economic warfare, 266
 - effectiveness of, 289
 - Indo-Pakistan War, 144
 - Korean armed conflict, 126-127
 - starvation and, 18-20, 33
 - Vietnam Conflict, 145
 - World War I, 33
- Bochum Roundtable, 184-186, 228, 357
 - enemy merchant vessels as military objectives, 79
 - non-belligerent merchant vessels and, 81
- Booby-traps, 152-153
 - See also Mines
- British Moving Defensive Area ("Bubble") concept, 13, 14
- Budapest Articles of Interpretations (1934), 306
- Bushnell, David, 28

C

- Capabilities, of naval platforms, 235-236
- Capture. See Visit and search
- CDZ (Critical defense zones), 124
- Chemical weapons, 242, 261
- Civil aircraft, as transports, 224
- Civilians, 150-151
 - aircraft with, targeting of, 224
 - economic warfare affecting, 279, 282
 - economic warfare targets, 279, 302
 - merchant ships as civilian entities, 339
 - morale of, economic warfare and, 302
 - shipping by, and submarine attacks, 10-11
 - vs legitimate targets, principle of distinction, 358-359
- Civil Wars
 - Algeria, 141, 143
 - China, 121, 128-130
 - Spain, 7-9, 47, 342
 - U.S., 28-29, 60n.4, 235

- Claims, 265, 270–271
 - relating to neutrality, 270
- Coastlines, submarines for defense of, 28–30
- “Code of Hardness,” 3, 19, 20
 - See also Doenitz, Admiral Karl
- Code of International Armed Conflict. See *Levie Code*
- Coercion, instruments of. See *Economic warfare*
- Colombos, C. John, 140
- Commander’s Handbook on the Law of Naval Operations, 56, 189
 - Bochum Roundtable and, 79–80
 - conditions for attack, 174–177
 - disclaimer clauses in, 121–122
 - and Falklands (Malvinas) Conflict, 153
 - importance of manuals, 345–353
 - on London Protocol of 1936, 51–52
 - reprisals and, 124
 - on small coastal and fishing vessels, 130
 - and state practice, post-World War II, 224–225, 228
 - and U.S. Naval targeting policies, 339, 356–366
- Command responsibility and law of armed conflict, 150–151
 - decision matrix for, 239–240
 - objectives for modern warfare, 234
- Commerce. See *Economic warfare*; *Submarines, as commerce destroyers*
- Communications
 - lines of, 251, 254
 - See also *Intelligence networks*
- Confederates. See *Civil Wars, U.S.*
- Conference on the Limitation of Armament (1921), 41–42
- Conferences on Law of Naval Warfare (1987–1989), 177–187
- Conqueror*, 14, 20
- Constantinople Convention, 161
- Contact mines, 179
- Contextual interpretation, of naval law, 99–102
- Contraband, 3, 33, 134
 - absolute vs conditional, 18, 228
 - starvation blockades and, 18
 - Indo-Pakistan War and, 144
 - See also *Economic warfare*; *Visit and search*
- “Contribution to the war effort”, merchant ships and, 361
- Conventional law vs state practice, 337–353, 356–366
- Conventional warheads, 242
- Conventional Weapons Convention (1981), 152
- Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (GWSEA), 131
- Convention of Mannheim, 18
- Convention on Maritime Neutrality, Inter-American, 40, 45
 - See also *Neutral ships*; *Neutrals/Neutrality*
- Council of the League of Nations, 48
- Crew, safety of. See *Safety, of passengers and crew*
- Critical defense zones (CDZ), 124
- Cruise missiles, submarine launched (SLCMs), 237
- Cuban quarantine, 141–142, 305–306
- Cultural property, 132
- Customary international law, 224
 - vs treaty law, 87

D

- David*, 28-29
- Davisian incident*, 97
- Declaration of London (1909)
 Entente Powers and, 18
 and law of economic warfare, 289
 and submarine warfare, 31-32
 and World War I, 33, 34
- Declaration of Panama (1939), 281
- Declaration of Paris (1856), 38
 British disregard of, in World War I, 34
 and law of economic warfare, 289
 and valid blockades, 15
 and World War II, 49, 89-90
- Defense of Merchant Shipping Handbook (1938), 48, 90-91
- Defensive "bubble," 13, 14
- Deterrence, 267, 276, 295-296, 328n.122
 See also Nuclear weapons
- Diplomacy, campaigns against submarine warfare (1922-1936), 5-7
- Diplomatic Conference
 (1974-77), 356-357
- "Distinction", principle of, 358-359
- Doenitz, Admiral Karl, 44, 49
 "Code of Hardness" and, 3, 19, 20
 IMT statements regarding, 54, 106-108
 IMT testimony of, 52-53
 memoirs of, 49, 51
 not punished for violations, 283-284, 343
 trial of, 91-93
 unrestricted submarine warfare charges, 10, 114
- Dover Castle*, 23n.39

E

- Economic limitations on war, 17
- Economic sanctions, 143, 285, 294, 309, 316n.10-11, 328n.122
 in peacetime, 300-305
 See also Economic warfare
- Economic targets, 235
 future conflicts and, 231, 232-233, 235, 305-308
- Economic warfare, 17, 18, 250-263, 264-314, 329n.122
 balancing of principles - belligerents vs freedom of the seas, 285-288
 British government strategy, 280
 chain reactions from economic disruptions, 256
 continuing change of, 291-293
 economic deprivation strategies and, 281-282
 economic sanctions in peacetime, 300-304
 economy as target, 265
 entire support structures affected, 313
 force accompanying, 277, 285, 288, 294-296, 300, 304-305, 312
 future prospects for, 305-308
 and future wars and weapons, 259-262
 in global conventional war, 251-253
 goals of, 264-265, 297-300
 and law changes imposed by belligerents, 276, 289-290
 law of, 282-283

- limited conflicts and, 254-259
 - national strategy and, 290-291
 - and neutrality, public order and belligerency, 270-293
 - neutrality and, 306-308, 311
 - new methods of, 305-306
 - "official definition," 279
 - sources of law regarding, 282-283
 - strategic, 268-269, 293-297
 - strategic economic goals, 297-300
 - submarines as commerce destroyers, 32
 - timing of, 284
 - violence levels affecting, 288-289
 - Economic zones, exclusive (EEZ), and Korean armed conflict, 128
 - Economy, as target. See Economic warfare
 - Economy of force, principle of, 288
 - EEZ (Exclusive economic zones), 128
 - Egypt. See specific conflicts
 - Egypt-Israeli peace treaty, 138
 - Energy devices, directed, Diplomatic Conference on Humanitarian Law and (1974-77), 356-357
 - Environment
 - considerations for, in limited conflicts, 245
 - preserving and protecting, 156
 - Environmental Modification Convention (1977), 147-148, 156
 - Espionage, 307
 - Exchange ratios, maximization of, 253
 - Exclusion zones, 77, 115-116, 130, 139
 - in Falkland conflict, 12
 - See also Maritime exclusion zones; Total exclusion zones
 - Exclusive economic zones (EEZ), Korean armed conflict, 128
 - EXOCET missiles, 233, 245
- F
- Falklands (Malvinas) Conflict, 20, 153, 187, 188, 261
 - limited conflicts and, 12-16
 - and "Red Cross box" neutral zone, 153, 189
 - state practice, post-World War II, 153-158
 - submarines in combat and, 261
 - targeting issues, state practice on, 121
 - and Total exclusion zones (TEZ), 179
 - False flags, 82
 - See also Re-flagged ships
 - Fishing vessels, small coastal, 140, 187, 225
 - carrying weapons, 187
 - and Commander's Handbook on the Law of Naval Operations, 130
 - exempt from attack, 129-130, 165
 - misuse of protection, 146
 - Nanval* exception, 155
 - Flags, of convenience, 125
 - Follow On Forces Attack (FOFA), 254
 - Food, attacks on vessels carrying, 225-226
 - Force, use of
 - and economic warfare at sea, 277, 285, 288, 294-295, 300, 304, 312
 - economy of force principle, 288
 - neutrals protected, 257

372 Index

- self-defense and, 75-76
 - “sufficient” force, in limited conflicts, 257-258
 - Forrestal*, 246
 - Freedom of the high seas, 156, 227
 - in future conflicts, 247
 - Fuehrer’s Directive No. 5, 50-51
 - Fulton, Robert, 28
 - Future conflicts, 11-12
 - economic targets and, 232-233, 235
 - limited nature of, 231-232
 - models of, 233-234, 243-248
 - technology advancements and, 233, 242-243
- G
- Gas weapons, 44, 147
 - Geneva Agreement (supplement to Nyon Agreement), 8-9
 - Geneva Convention (1949), 131, 185, 190
 - Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare (1925), 147
 - Geneva Protocol I Concerning International Armed Conflicts (1977). See Protocol I
 - “Genuine link” concept, 139, 141, 172, 174
 - Global conventional war, economic warfare and, 251-254
 - Global Positioning System (GPS), 246
 - Gorshkov, Admiral Sergei, 287
 - Great Britain. See specific conflicts
 - Grenada conflict, 232
 - Gulf Maritime Exclusion Zone, 159-160

H

- Hague Convention (IV), 223, 224, 226
- Hague Convention (VI), 179, 339-340
- Hague Convention (VII), 36-37, 127, 179, 339
- Hague Convention (VIII), 179, 181
- Hague Convention (IX), 182, 223
- Hague Convention (X), 98-99
- Hague Convention (XI), 339-340
- Hague Convention (XIII), 36, 181, 340
- Hague Cultural Property Convention (1954), 132, 176
- Hague Peace Conference (1899), 29-30, 339
- Hague Peace Conference (1907), 30-31, 339-340
- Harpoon missiles, 236
- Havana Convention on Maritime Neutrality (1928), 181
- Helicopters, for visit and search, 162
- Hercules*, 15
- High seas, as different theatre of war, 359-360
- High Seas Convention (1958), 141, 157, 172
 - and freedom of the high seas, 138-139
- History
 - and law, 110-118
 - London Protocol of 1936 and historians, 111
 - of submarines, 28-32, 72-73
 - of submarine warfare, 2-3, 29-41, 48-55
- Holland, John Phillip, 2, 29

Holland boats, 2-3
 Hospital ships, 140, 187
 Humanitarian law and values
 obligations of war, 4
 San Remo Roundtable, 177-184
 submarine warfare and, 5, 31
 See also "Code of Hardness"; Safety, of passengers and crew
 Human powered submersibles, 29
 Human suffering, minimizing, and law of armed conflict, 110

I

Iceland-United Kingdom Cod War, 141, 143
 IIHL. See International Institute of Humanitarian Law (IIHL)
 Incendiary weapons, 152
 India. See Indo-Pakistan War
 Indiscriminate attack, 151-152, 344
 economic, 303-304
 See also Attack without warning
 Indo-Pakistan War, 12, 187, 261
 blockades and, 188
 and high technology weapons, 233
 law of neutrality and, 259
 limited conflicts and, 12
 state practice, post-World War II, 143-145
 and submarines in combat, 261
 Industrial base, economic warfare affecting, 279, 282
 Industrial targets, aerial bombardment of, 362
 Industrial theft, 307
 Innocent passage, 138
 Intelligence networks
 and communications, 236, 237, 245, 246
 Inter-American Convention on Maritime Neutrality, 45
 Inter-American Treaty of Reciprocal Assistance, 141-142
 Interdictions and diversions, miscellaneous (1956-1966), 141-143
 Inter-Governmental Maritime Consultative Organization (IMCO). See
 International Maritime Organization (IMO)
 International Institute of Humanitarian Law (IIHL), 170, 177-187
 International law
 challenges for future conflicts, 262-263
 definition of, 104-105
 as form of morality, 105
 innocent passage and, 138
 naval armed conflict and, 99-102
 rules of, 6, 8, 223
 submarines vs surface vessels, 32
 "soft" interpretations of, 108
 sources of, since WWII, 122-187
 violations, 173
 See also specific conflicts
 International Law of the Sea, 157-158
 International Maritime Organization (IMO), 139
 International Military Tribunal at Nuremberg, 9-11, 55, 106, 226
 Doenitz, Admiral, trial of, 49-50, 91-93, 114, 283-284, 343
 London Protocol of 1936 and, 58
 International Military Tribunal for the Far East, 54, 91-93, 96
 Iran. See Persian Gulf "Tanker War" (1980-1988)

374 Index

Iraq. See Persian Gulf "Tanker War" (1980-1988)

Israel. See Arab-Israeli conflicts

J

Japan. See specific conflicts

Jean Nicolet incident, 96

Joint Operational Targeting System (JOTS), 237-238

K

Kellog-Briand Pact, 75, 273, 306

Korean armed conflict, 121, 125-128, 195n.44

blockades and, 189, 195n.44

Kranzbuhler, Flottenrichter Otto (Doenitz's lawyer), arguments by, 113-116

L

Laconia incident, 53-55, 112

Laconia Order, 54-55, 70n.162, 93-97

See also Doenitz, Admiral Karl

Law of armed conflict

ambiguity of, 281

current need for, 260

economic warfare and, 266

fundamental principles, 175

humanitarian, 226-227

human suffering minimized, 110

legal criteria and developments, 87-102, 104-118

new laws established, 308-314

state response to, 272

tribunals and, 93-97

violations of, 44

Law of Naval Warfare, 56-57, 181, 273-274, 339, 346-348, 350

cargo vessels as military objectives, 117-118

general treaty on, 190-191

and merchant ship safety, 32

state practice 1945-1990, 223-228

submarine compliance, 34

war crimes trials and, 91-97

See also specific tribunals

Law of Neutrality, 170, 180, 256

adherence to, 256

current need for, 260

Neutrality Act, 52

See also Neutrals/Neutrality

Law of the Sea Conference (1958). See UNCLOS

Laws of war. See Law of armed conflict

League of Nations, 48

Lebanon, 138

blockades and, 188

Legal criteria, belligerent naval practices, World War II, 87-102

Levie, 171-172, 179, 181-182

Limitations

of naval platforms, 236-238

in scope of war, 12

See also Limited conflicts

- Limited conflicts, 231-232, 255, 259
 - characteristics of, 244-245
 - economic warfare at sea and, 255-259
 - environmental considerations, 245
 - targeting enemy ships in, 246
- Llandoverly Castle*, 10-11
- Logistical strategies, oil exports and, 16-17
- London Naval Conference of 1930. See London Naval Treaty of 1930
- London Naval Conference of 1935-1936, 6, 72
 - submarine warfare and, 46-47
- London Naval Treaty of 1930, 6, 53, 171-172, 226
 - and arms reduction, 340-341
 - and merchant vessel attacks, 8, 57-58
 - and naval targeting, 89
 - and Root's Resolutions, 43
 - and submarines, 6, 45-46
- London Protocol of 1936, 6, 9, 43, 48, 59, 89, 239, 241n.9
 - and aircraft attacks, 239, 351
 - and Doenitz, Admiral, 108
 - effectiveness of, current, 78-84, 238-239, 343-344
 - European opinion on validity today, 78-84
 - future viability of, 341-345
 - and historians, 111
 - and operational definitions, 112
 - rationale for, 240
 - relevance in current times, 238-239
 - and rules of attack, 171-172
 - submarines and, 27-59, 72-84, 91, 226
 - surface naval powers favored, 116
 - and targeting law, 339
 - and unrestricted submarine warfare, 226
- Lusitania*, 283

M

- Madrid meeting, 184
- "Man killing", "Ship killing" vs, 20
 - See also "Code of Hardness"
- Manuals, importance of, 345
- Maritime exclusion zones (MEZ), 12-17, 81-82, 153-154
 - See also Exclusion zones; Total exclusion zones
- Maritime Patrol Aircraft, 252
- Maritime strategy,
 - and national military strategy, 274-276, 299
- Maritime warfare, rules of. See Law of Naval Warfare
- Martens clause, 223, 319n.25
- Mayaguez* incident, 146-147
- Mediterranean challenge (1937), 7-9
- Merchant ships
 - arming of, 36-41, 48, 76-77, 81
 - as belligerent vessels, 113, 117-118
 - capture, rules for, 130
 - as civilian entities, 339
 - conditions for attack on
 - Bochum Roundtable, 79, 185-186
 - Commander's Handbook on the Law of Naval Operations, 174-177
 - as military objectives, 79-81, 359-361

376 Index

- as pirates, 7
 - submarine warfare and, 78-81
 - surface vessels attacking, 56
 - as warships, 36-41, 48, 76-77, 81
 - See also specific conventions; conflicts
 - See also surface vessels
 - Merrill*, 258-259
 - MEZ. See Maritime exclusion zones (MEZ)
 - Military aircraft
 - industrial targets, aerial bombardment of, 362
 - rules for, 351-352
 - See also Aircraft
 - Military tribunals. See International Military Tribunal at Nuremberg;
International Military Tribunal for the Far East; National military tribunals
 - Mines, 152-153, 161, 164, 179, 195n.44, 228
 - contact, automatic submarine, 179
 - Missiles, 236, 245-246, 309
 - ANS, 243
 - silkworm, 165, 261
 - warheads for, 242
 - Moehle, trial of Karl-Heinz, 11, 95-96
 - Monroe Doctrine, 299
- N
- Narval* incident, 155
 - National military tribunals, 93-97
 - See also International Military Tribunal at Nuremberg
 - See also International Military Tribunal for the Far East
 - NATO, 166, 259, 262, 306
 - critical defense zones (CDZ) and, 124
 - and general war scenarios, 251-254
 - global conventional war and, 251-254
 - and Persian Gulf "Tanker War" (1980-1988), 257
 - war scenarios and, 243-245
 - Nautulus Company, 28
 - Naval bombardment, 182
 - Naval platforms, 235-238, 309
 - Naval vessels, as platforms for strategic attacks, 309
 - Naval warfare
 - future rules of, 305-308
 - land warfare principles and, 227-228
 - two-dimensional, 4-5
 - Naval Warfare Publication (NWP). See Commander's Handbook on the Law of
Naval Operations
 - Navigation, rights and freedoms regarding, 156
 - Necessity, principle of, 80
 - Battle of the Bismark Sea and, 98
 - Neutrality Act, 52
 - Neutral ships, 92-93
 - attacked, 228
 - interference with, 134
 - unlawful interference with, 17
 - in war effort, forced participation, 90
 - See also Law of neutrality; Neutrals/Neutrality; Visit and search

- Neutrals/Neutrality, 314n.5
 - changing definitions of, 272-273
 - claims of, 281
 - conventions on, 40, 45
 - escorting merchant vessels, 344
 - future conflicts and, 254
 - hostile military action in, 182
 - impracticality of, 272
 - Levie code and, 171, 172
 - perspectives on, and economic warfare at sea, 270-293, 307-308
 - relation to economic warfare, 311
 - reprisals affecting, 278
 - rights of, 257
 - vs non-belligerency, 307
- See also Law of neutrality; Neutral ships
- 1936 London Submarine Protocol. See London Protocol of 1936
- Non-belligerency, vs neutrality, 307
- Nuclear powered boats, 11-12
 - See also Nuclear powered submarines
- Nuclear powered submarines, 244, 252, 261
 - See also Submarines
- Nuclear threshold, future conflicts and, 251
- Nuclear weapons, 76, 242, 251-252
 - strategic, targeting with, 295
- Nuremberg tribunal. See International Military Tribunal at Nuremberg
- NWP (Naval Warfare Publication). See Commander's Handbook on the Law of Naval Operations
- Nyon Agreement, 8-9, 47-48, 342

O

- Oil tankers
 - re-flagged, 162, 165
 - as targets, 16-17, 148
- Operational zones, 50, 53, 92, 108, 115-116
- Operation Praying Mantis, 257, 258-259
- Order-in-Council of November 27, 1939, 49
- Outer space, military perspective of, 311
- Over-the-horizon weapons systems, 245-246, 253

P

- Pakistan. See Indo-Pakistan War
- Pan American Union, and maritime neutrality, 40
- Passengers, safety of. See Safety, of passengers and crew
- Peace
 - economic sanctions during times of, 300-304
 - interests in, global nature of, 231-232
 - times of, state strategies during, 278-279
 - treaties for, 74
- Pearl Harbor, 279
- Peleus* Case, 11, 95-96
- Persian Gulf "Tanker War" (1980-1988), 12, 16-17, 121, 187, 188, 189, 255, 257, 258-259
 - blockades and, 188
 - civil aircraft of belligerents and, 224
 - and contraband, 228

378 Index

- economic warfare at sea and, 250
- interrupted commerce and, 344-345
- limited conflicts and, 16-17
- and sanctions, 313-314
- and self-help enforcement, 257
- state practice, post-World War II, 158-170
- strategic attacks and, 309
- as "War of the Cities," 233-234
- Piracy, 66n.98
 - in Root's Resolutions, 43-44
 - submarine warfare as, 7-8
- "Plain meaning" interpretation, of naval law, 99-102
- Platforms
 - naval vessels as, for strategic attacks, 309
 - weapons and capabilities, 230-240
- Polar shipping route, 254
- Ports, restrictions on use, 52
- Preliminary Roundtable of Experts on International Humanitarian Law (1987), 177-184
- Principle of "distinction", United States policy and, 358-359
- Prior warning, 82
 - See also Attack without warning; Indiscriminate attack; Visit and-Search
- Prisoners of war, 28
 - treatment of, 4
- Prize Courts, 276-277, 282, 306
- Proces-Verbal*. See London Protocol of 1936
- Prohibited war zone, in Iran-Iraq war, 17
- Proportionality, principle of, 80, 225
 - See also Law of armed conflict
- Protocol I, 148-152, 176
 - and Bochum Roundtable, 184-186
 - and the Commander's Handbook, 356
 - and energy sources attacked, 313
 - and indiscriminate attacks, 303-304
 - land vs sea, applicability to, 223
 - marine environment, protection of, 156
 - starvation warfare and, 19, 148-149
 - and war at sea, 182-183
- Protocol II, 152-153
- Protocol III, 152
- Protocol of 1936. See London Protocol of 1936
- Protocols (1977), 191, 359

Q

- Quarantine, 141-142, 143, 188-189, 305-306

R

- Raeder, Admiral Erik, Nuremberg tribunal judgments against, 10, 44, 106-108
 - Re-flagged ships, 162-163, 165, 228
 - false flags, 82
 - flags of convenience, 125
- Refugees, evacuating, 145
- Restatement (Third), Foreign Relations Law of the United States, 171, 172-174, 224

Revolution, American, 28
 Rhodesian interdiction, 142-143
 quarantine and, 188
 Rickover, Admiral Hyman, 32
 Rio Treaty, 141-142
 Root, Elihu, 42-44
 See also Root's Resolutions
 Root's Resolutions, 42-44, 88-89
 Roscoe, Theodore, 111-112
 Russo-Japanese War (1904-1905), 30-31

S

Safety
 of non-combatants, 7
 of passengers and crew, 7, 57, 83, 130, 224, 241n.9
 conventional law and, 339-340
 Inter-American Convention on Maritime Neutrality, 45
 London Protocol of 1936 and, 32, 35
 of ship's papers, 339
Sanctions. See Economic sanctions
San Remo Roundtable, 177-184
Satellites, targeting and, 237-238
SDI (Strategic Defense Initiative), 242
SDZ (Sea Defense Zones), 127
Seabed Arms Control Treaty, 147
Sea Defense Zones (SDZ), 127
"Sea denial" zones, 252
Sea lines of communication (SLOC's), 251, 252, 254
 See also Intelligence networks
Sea to air engagements, 224-225
Selected objectives. See Target bombing
Self-defense, 189, 268, 281, 305-306
 Cuban quarantine, 142
 economic warfare and, 269-270
 Mines for, 163
 principles of, 123-125
 State's inherent right of, 123-124
 UNCLOS and, 147
 use of force in, 75-76
 See also Self-help
Self-help, 267-268
 economic warfare and, 269-270
 Persian Gulf "Tanker War" (1980-1988), 257
 See also Self-defense
"Ship killing" vs "Man killing," 20
 See also "Code of Hardness"; Safety, of passengers and crew
Silkworm missiles, 165, 261
Six Day War, 136-137
SLCMs (submarine launched cruise missiles), 237
 See also Missiles
"Smart-weapons," 236
Soviet Union, 14-15
 strategy of, 275
 See also specific conflicts
SSN's. See Nuclear powered submarines

380 Index

Stand-off weapons, 236

See also Missiles

Stark, 243, 257

Starvation blockades, 18-20, 33

State practice

1945-1990, 121-192, 223-228

conventional law vs, 337-353, 356-366

Strategic attacks, naval vessels as platforms for, 309

Strategic Defense Initiative (SDI), 242

See also Nuclear weapons

Strategic economic warfare, 268-269

Strategic imperatives, 250-263

economic warfare at sea and, 264-314

Strategic objectives, of nations, 306-307

Strategy

long term, 266

in operational phase of economic warfare, 312

Submarines

abolition of, 29-30, 41-42, 45, 72, 75, 88, 116

armaments on, 237

as commerce destroyers, 116

history of, 28-32, 72-73

Nautulus Company, 28

nuclear armed, 76

nuclear powered, 11-12, 244, 252

in combat, 261

operation of, training of naval personnel for, 74

as "private navy," 75

rules for, 349-351

surface vessels vs. rules of international law and, 32

as underwater barge-trains for cargo, 19

See also Submarine warfare

Submarine warfare, 56-57, 62n.34, 171, 176, 238-239, 339-341, 366

aircraft versus submarines for blockades, 9-10

anti-submarine warfare (ASW) surface vessels, 252

belligerent rights of, 6-7

for coastal defense, 28-30

commerce destroyers and, 32, 34-35, 74

conduct of, 1920-1936, 72-77

cruise missiles and, 237

and Declaration of London (1909), 31-32

diplomatic campaigns against, (1922-1936), 5-7

economic warfare and, 288

enemy merchantmen, actions against, 78-81

and Hague Peace Conference (1899), 29-30

and Hague Peace Conference (1907), 30-31

history of, 2-3

humanitarian values and, 5

Indo-Pakistan war, 261

intra-war period (1919-1939), 41-48, 88-89

London Naval Conference of 1935-1936 and, 46-47

London Naval Treaty of 1930 and, 45-46

London Protocol of 1936 and, 27-59, 72-77

enemy merchantmen, actions against, 78-81

European opinion on validity today, 78-84

false flags, 82

Proces-verbal, 63n.50

non-belligerent merchant vessels, actions against, 81

- prior warning, 82
- war zones, special situations in, 81-82
- non-belligerent merchant vessels, actions against, 81
- Nuremberg tribunal judgments, 10-11, 52-55
- Nyon Agreement, 47-48
- Post-World War II (1948-to date), 55-58
- preparedness for, 74-75
- rules for, 349-351
- special situations in war zones, 81-82
- state practice 1945-1990, 121-191, 223-228
- strategic weapons and, 305
- three dimensional warfare at sea, 5
- Treaty of Versailles and, 41
- unrestricted, 9, 32, 91
 - Nuremberg tribunal and, 10-11, 53
 - starvation blockades and, 18-20
 - in World War I, 36, 87
 - Washington Naval Conference (1921-1922) and, 41-45
 - and World War I, 32-41, 87
 - and World War II, 48-55
 - See also World War II, naval practices of belligerents
- See also Submarines
- Submersible boats. See Submarines; Submersible torpedo boats
- Submersible torpedo boats, 2-3, 28
 - human powered, 29
 - See also Submarines
- "Sufficient" force, in limited conflicts, 257-258
- Surface ships, strategic weapons and, 305
- Surface vessels, 5
 - anti-submarine warfare (ASW) vessels, 252
 - gunfire of, versus torpedoes, 87
 - London Protocol of 1936 favoring, 116
 - merchant ships, attacked by, 56
 - rules for warships, 347-349
 - vs submarines, rules of international law and, 32
- Survivors
 - murder of, 10-11, 53-54, 95-98, 101-102, 112
 - See also Battle of the Bismark Sea; Laconia order; Safety, of
 - passengers and crew
 - protection of, 101-102
- Sussex*, 283

T

- Taiwan, 128-130
- Tankers, oil. See Oil tankers
- Target bombing, 302-303
- Technology advancements, 246
 - future conflicts and, 231, 233, 242-243, 309
- Territorial Sea Convention (1958), 139
- TEZ. See Total exclusion zones (TEZ)
- Theatres of war, 359-360
- Third-world nations, Future conflicts and, 255
- Tiran, Straits of, 134
 - See also Arab-Israeli conflicts
- Total exclusion zones (TEZ), 14, 154-155, 179
 - See also Exclusion zones; Maritime exclusion zones

382 Index

“Totalitarian” wars, 11-12, 19

Trade

suppression of, as war strategy, 16-17

See also Economic warfare

Training, for submarine operation, 74-75

Treaties

moribund, 309

peace, 74

as sources of state practice, 121-191

Treaty for the Limitation and Reduction of Naval Armaments, 340-341

Treaty of Versailles, 5, 41, 73

Trial of Eck. See *Peleus* Case

Trial of Helmuth von Ruchteschell, 11, 97

Trial of Moehle, 11

U

UNCLOS, 121, 138, 189, 191

and “genuine link” concept, 189

and Restatement (Third), Foreign relations, 172-173

rules of armed conflict and, 156-157

self-defense principle and, 147

United Nations Charter, 75, 191, 280-281

Article 51, 14, 76, 122-125

Article 52, 122-125, 142

Chapter VII, 19

United Nations General Assembly, 311, 358

United Nations Security Council

Arab-Israeli conflicts and. See Arab-Israeli conflicts

and economic sanctions, 285, 294, 309

force authorized by, 311

and Persian Gulf “Tanker War” (1980-1988), 17, 160-161

Rhodesian interdiction, 142-143

role of, 308

and rules of engagement, 262

United Nations Ship Registration Convention, 156

United Nations War Crimes Commission, 9-10

United States

policy, conventional law vs state practice, 337-353, 356-366

See also Specific conflicts

United States Navy manual. See Law of Naval Warfare

United States Submarine Operations in World War II (1949), 111-112

“Uniting for Peace” Resolution (UFP), 128

Unrestricted submarine warfare. See Submarine warfare, unrestricted

Utility, military, and design of instruments of war, 267-268

V

Vietnam conflict, 121, 145-147

fishing vessels carrying weapons, 187

mining of harbors, 188

quarantines and, 188-189

Vincennes incident, 224, 244, 257

Visit and search, 4, 9, 57-58, 132, 141, 143, 247

helicopters used for, 161

of noncombatant ships, 33

von Ruchteschell, Helmuth, 11

W

- Wahoo* incident, 112
- Walther boats, 2-3
- Warheads, 242
- Warning, attack without. See Attack without warning
- "War of the Cities," 233
- Warsaw Pact, 243-244
 - global conventional war and, 251-254
- War zones, 33-34, 131, 155
 - special situations in, 81-82
- Washington Naval Conference (1921-1922), 5-6, 41-45, 53
 - customary law of attack, codification of, 340-341
 - and submarines, abolition of, 72-74, 88
- Weapons
 - ballistic, 311
 - destructive capabilities increasing, 260
 - future conflicts and, 242-248
 - future proliferation of, 260
 - incendiary, 152
 - indiscriminate, 151-152
 - offensive vs defensive, 269, 274-275
 - platforms and capabilities, 230-240
 - rules of war and, 32
 - "smart," 236
 - stand-off, 236
 - See also Economic warfare, force accompanying
 - See also Missiles
- World War I, 43, 53, 58, 62n.34
 - arming of merchant ships in, 36-41
 - naval practices of belligerents, 87
 - starvation blockades during, 18-19
 - and submarine warfare, 32-41
- World War II, 48-55, 342-344
 - naval practices of belligerents, 87-102, 104-108, 110-118
 - Battle of the Bismark Sea, 97-99
 - intra-war period (1919-1939), 88-89
 - intra-war practices continued into WWII, 89-91
 - London Protocol of 1936 in context, 99-102
 - post WWII war crimes trials, 91-97
 - Nuremberg tribunal and, 9-11
 - starvation blockades during, 18-19
 - submarine use during, 2-3, 48-55
 - unrestricted submarine warfare during, 18-19
- World War III, 253
 - See also Future conflicts

Y

Yom Kippur War, 137

Z

Zones, 59