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Studies in the Law of Naval Warfare: Submarines in General and Limited Wars

W. T. Mallison, Jr. (Editor)

The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. government, the U.S. Department of the Navy or the Naval War College.

CHAPTER I

SUBMARINE WARFARE AND INTERNATIONAL LAW

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

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

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

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

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

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

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

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

A. THE SUBMARINE IN NAVAL WARFARE

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

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

1. The Dual-Powered Submarine

a. PERFORMANCE CHARACTERISTICS

Other than its submergibility, the most striking characteristic of

⁴ See Potter & Nimitz 2.

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

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

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

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

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

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

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

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

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

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

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

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

b. COMBAT CAPABILITIES

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

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

On the German side were some 178 submarines. On the British side the forces in use to overcome these 178 submarines included approximately:

277 Destroyers	49 Yachts
30 Sloops	849 Trawlers
44 "P" Boats	867 Drifters
338 Motor Launches	24 Paddle Mine-sweepers
65 Submarines	50 Airships
68 Coastal Motor-boats	194 Air-craft
	77 Decoy ships

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

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

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

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

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

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

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

¹⁸ *Ibid.*

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

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

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

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

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

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

²¹ See generally Potter & Nimitz 462.

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

²³ Anderson, *supra* note 16 at 881.

²⁴ *Id.* at 887.

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

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

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

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

2. The Nuclear-Powered Submarine

a. PERFORMANCE CHARACTERISTICS

The contemporary nuclear-powered and nuclear-armed submarines

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

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

²⁸ Kuenne 4, 5.

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

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

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

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

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

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

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

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

³² Kuenne 180.

³³ *Jane's Fighting Ships 1965-66* 372.

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

³⁵ Kuenne 181.

total of 140 submarines.³⁶ The respective figures for the Soviet Navy are thirty-five and 390³⁷ and for the British Navy, two and 42.³⁸

b. *COMBAT CAPABILITIES*

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

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

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

³⁶ *Jane's Fighting Ships 1965-66* 460.

³⁷ *Ibid.*

³⁸ *Ibid.* The respective figures for France are zero and nineteen. *Ibid.*

³⁹ Kuenne 178.

⁴⁰ *Ibid.*

⁴¹ Kuenne 188-91 and *passim*.

⁴² Martell, "Defending the Sea," *Industrial Research* 95, 98 (March 1966).

⁴³ *Ibid.*

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

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

3. Future Submarine Warfare

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

The same report continues:

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

⁴⁴ Kuenne 189.

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

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

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

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

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

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

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

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

B. PRINCIPAL CLAIMS CATEGORIES IN SUBMARINE WARFARE

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

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

I. Claims Concerning Combatants

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

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

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

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

2. Claims Concerning Areas of Belligerent Operation

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

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

3. Claims Concerning Objects and Methods of Belligerent Attack

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

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

4. Claims Concerning Weapons of Belligerent Attack

The crucial importance of claims and counterclaims concerning the

⁵¹ Claims concerning combatants are appraised in Chapter II.

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

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

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

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

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

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

1. Sources of Decision

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

⁵⁴ Claims concerning weapons are appraised in Chapter V.

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

⁵⁶ See McDougal & Feliciano 40.

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

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

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

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

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

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

a. CONVENTIONAL LAW

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

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

⁵⁹ 9 *Reps. U.N. Comm.* 1, 23 (1947).

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

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

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

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

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

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

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

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

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

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

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

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

⁶² 36 Stat. 2332 (1910), T.S. 541.

⁶³ 36 Stat. 2351 (1910), T.S. 542.

⁶⁴ 36 Stat. 2396 (1910), T.S. 544.

⁶⁵ 36 Stat. 2415 (1910), T.S. 545.

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

⁶⁷ 46 Stat. 2858 (1930), T.S. 830.

⁶⁸ 31 *A.J.I.L. Supp.* 137 (1937).

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

b. CUSTOMARY LAW

The pragmatic case-by-case development of the customary laws of war is, of course, a continuous process only in time of war or hostilities. This implicit agreement of states is, nevertheless, more comprehensive in doctrinal content and more effective than express conventional agreement in the development of the laws of war. In a fundamental sense it may be regarded as the accumulated juridical learning concerning the subject. Customary international law authorizes decision-makers to achieve contemporaneously effective and socially responsive decision by the rational evaluation of past authoritative experience. Thus, the inherited doctrines may be adapted to the needs of legal control in an era of rapidly changing technology or, in the alternative, be allowed to lapse and expire through disuse. In these respects the customary laws of war are similar to the Anglo-American customary common law. The laws of war tend to emphasize experience over logic⁷⁰ and, again like the common law, develop upon the basis of legislative or policy factors: "considerations of what is expedient for the community concerned."⁷¹ A view of the relevant sources of law and of change in the customary laws of war is reflected in the Judgment of the International Military Tribunal at Nuremberg:

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

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

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

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

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

⁷² 1 *I.M.T.* 221.

⁷³ 175 U.S. 677 (1900).

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

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

2. Basic Principles

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

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

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

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

⁷⁴ *Id.* at 686.

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

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

⁷⁶ Oppenheim-Lauterpacht 227.

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

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

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

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

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

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

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

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

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

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

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

⁸⁰ See McDougal & Feliciano 522-23.

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

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

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

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

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

⁸² 11 *Trials of War Crims.* 757 at 1253-54.

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

3. Sanctions

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

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

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

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

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

⁸⁶ See McDougal & Feliciano 53.

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

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

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

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

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

⁸⁷ See the text accompanying note 116 *infra*.

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

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

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

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

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

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

War crimes trials may be regarded as a deterrent sanction for the laws of war.⁹³ The conception is that the mere possibility of trials after the conclusion of the war may be an effective deterrent. It should not be assumed that only military personnel of the vanquished state will be subjected to trial. Although the personnel of victorious states are not usually subject to war crimes trials under international law, they may be subject to trial under municipal law including the military code governing the armed forces. The important point is that municipal military codes such as the United States Uniform Code of Military Justice⁹⁴ prohibit in substance the same type of conduct which is prohibited by the international laws of war.

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

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

⁹² See McDougal & Feliciano 675.

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

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

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

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

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

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

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

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

D. SITUATIONS WHERE THE LAWS OF WAR ARE APPLICABLE

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

There can be but little doubt that Germany’s role in the Second World War was that of a state illegally resorting to coercion by a war of conquest and aggression contrary to its obligations under the Pact of Paris of 1928⁹⁸ renouncing the use of war as an instrument of national policy. If it follows from this that every single military act of Germany, including its submarine war, is illegal, careful analysis concerning the legality of particular aspects of submarine warfare is unnecessary. It would simply be assumed that the officers and crew of each German submarine were war criminals without regard to whether they complied with the specific legal doctrines applicable to naval war or not. Employing the same reasoning, if the United States and the United Kingdom are regarded as states legally employing coercion, then it would follow that all of the particular features of their conduct of submarine warfare would be deemed lawful even

⁹⁷ Oppenheim-Lauterpacht, “Preface” v.

⁹⁸ “The Kellogg-Briand Pact,” 46 Stat. 2343 (1929), T.S. 796.

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

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

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

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

⁹⁹ 8 *Reps. U.N. Comm.* 34.

¹⁰⁰ *Id.* at 59.

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

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

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

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

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

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

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

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

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

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

¹⁰⁵ *Id.* at 218.

¹⁰⁶ *Id.* at 220.

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

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

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

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

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

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

E. LIMITED WAR AND THE EFFECTIVE CONTROL OF INTERNATIONAL COERCION

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

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

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

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

¹⁰⁹ Art. 3 of each Convention.

¹¹⁰ Art. 2, paragraph 1 of each Convention.

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

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

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

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

Limited war has been authoritatively described in these terms:

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

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

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

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

¹¹² *Ibid.*

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

¹¹⁴ Osgood 142.

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

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

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

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

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

¹¹⁶ Osgood 18.

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

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

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

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

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