

Chapter IX

Naval Targeting: Lawful Objects of Attack

by
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I. Naval Operations and Law

International law comprises both customary and treaty components.¹ Customary law is based upon the incident-by-incident and case-by-case development through practical experience and an implicit acceptance by a preponderance of governments. Treaty law is the express agreement of states on particular subjects. International law is made and developed by governments in order to protect governmental interests, and among these interests is the efficient and lawful use of armed forces. Since the time of *The Prize Cases*,² decided by the U.S. Supreme Court during the Civil War, the law of armed conflict has applied to any situation where international armed conflict exists factually. Consequently, it is not necessary that there be a declaration of war or a so-called technical “state of war” to make the law applicable. This is codified in a common provision which appears in each of the four Geneva Conventions for the Protection of War Victims (1949) which states that the Conventions shall apply “to all cases of declared war or of any other armed conflict” between the state parties “even if the state of war is not recognized by one of them.”³

The binding force of international law is stated directly in Navy Regulations:

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.⁴

The Chief of Naval Operations has the responsibility to ensure that the obligations of the Navy under the law of armed conflict are observed and enforced. Alleged violations of the law of armed conflict are to be promptly reported and thoroughly investigated. Corrective action is to be taken whenever required.⁵ At the present time officers of the Judge Advocate General’s Corps provide legal advice concerning Navy responsibilities under international law including the law of armed conflict. In the early history of the Navy, when

such legal advice was not provided, naval officers were held to a high standard of compliance with law, both international and domestic. An example is provided by *Little v. Barreme*,⁶ a unanimous decision of the U.S. Supreme Court written by Chief Justice John Marshall. In the limited naval war with France, the Congress provided by statute for the capture of vessels meeting certain criteria engaged in commerce with France. The President issued instructions to the Navy to capture particular vessels including, as found by the Supreme Court, vessels not covered by the statute. Captain Little, USN, captured *The Flying Fish* in compliance with the instructions of the President and sent it in for adjudication in the prize court which determined that the capture was not authorized by the statute. The owners of the vessel incurred damages of \$8,504.00 as a result of the unlawful capture and detention and they sued Captain Little personally for this amount. The Supreme Court, while expressing sympathy for Captain Little, who had acted in good faith, held that he was personally liable for the damages caused by the unlawful act. The breadth of the holding in this case is accurately summarized in the headnote which appears in the official U.S. Supreme Court *Reports*:

The commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril: if those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution.

At the time that judgment was entered against Captain Little, he was required by statute to obey the orders of his superiors without any qualification concerning the lawful or unlawful character of the order.⁷ At the present time officers of the armed services are only required to obey “lawful” orders as prescribed by article 92 of the Uniform Code of Military Justice, entitled “Failure to obey order or regulation.” This article provides:

Any person subject to this chapter who—

- (1) violates or fails to obey any lawful general order or regulation;
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
- (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.⁸

The law of naval targeting is based upon three fundamental principles which are stated in the U.S. Navy’s *Commander’s Handbook on the Law of Naval Operations*:

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 non-combatants, to the effect that non-combatants be spared as much as possible.⁹

Because the law of armed conflict (LOAC) is an eminently practical law which takes into account military efficiency, these basic legal principles are consistent with the military principles of objective, mass, and economy of force. The law requires that only militarily significant objectives be attacked,

but it permits the use of sufficient mass to destroy those objectives. Economy of force requires that no more effort should be directed against a military objective than is necessary to accomplish it. In addition, the law of naval targeting provides that all reasonable precautions must be taken to ensure that only military objectives are targeted and that non-combatants and civilian objects are spared as much as possible from the effects of armed conflict.

The most important treaties which are applicable to naval targeting and lawful objects of attack or capture are the following:

Declaration of Paris Concerning Maritime Law (1856)¹⁰

Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907)¹¹

Hague Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (1907)¹²

Hague Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships (1907)¹³

Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines (1907)¹⁴

Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War (1907)¹⁵

Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (1907)¹⁶

Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (1907)¹⁷

Process-Verbal Relating to the Rules of Submarine Warfare (London, 1936)¹⁸

Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)¹⁹

The listed treaties to which the United States is a state party remain in effect and are a part of the supreme law of the land under Article VI of the Constitution. The others, Hague Conventions VI and VII and the Declaration of Paris, are important also because they contain some binding principles of the customary law of naval warfare. In spite of the title of Hague Convention IV, concerning land warfare, it states basic principles equally applicable to naval targeting. For example, it prohibits the employment of “arms, projectiles, or material calculated to cause unnecessary suffering.”²⁰ Because of changes in the technology of naval warfare, some of the treaties are less applicable to contemporary naval targeting than when they were written.

II. The Law Prior to the World Wars

In the historic era when privateering and piracy were widespread, merchant ships were armed for defensive purposes. After the substantial

abandonment of privateering and the near elimination of piracy, it became unusual for a merchant ship to be armed. Following the development of armored warships in the U.S. Civil War, such ships became further specialized in offensive and defensive capabilities and were consequently very different from merchant ships. The military weakness of the merchant ship entitled it to special protection and the customary principle that it could not be lawfully attacked without warning was adopted.²¹ The procedures of visit and search by warships were used in naval warfare to enable boarding officers to determine the existence of probable grounds for capture and adjudication in prize. The intrinsic value of merchant ships made their capture rather than their destruction advantageous to the capturing state. The determination of whether or not a capture was lawful under the then criteria of international law was made by prize courts. These courts were domestic courts which applied the widely agreed upon international law criteria.²² The effective enforcement method which ensured a high degree of uniformity in the decisions of diverse national courts was mutuality and reciprocity. The judges of each national prize court recognized that the standards it applied to enemy merchant ships and neutral ships charged with violating the law would be the same standards which foreign prize courts would apply to its merchant ships.²³ Elaborate rules concerning enemy and neutral ships and the cargoes they carried were developed in the customary law. The Declaration of Paris (1856),²⁴ the first multilateral treaty on the law of naval warfare covered privateering and blockades as well as the basic rules of naval economic warfare. It provided:

1. Privateering is, and remains, abolished;
2. The neutral flag covers enemy's goods, with the exception of contraband of war;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;
4. Blockades, in order to be binding, must be effective: that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The original state parties to the Declaration of Paris were the major European naval powers of the time and Turkey.²⁵ The United States was not a party and regarded the prohibition of privateering as opposed to the interest of the minor naval powers including itself.²⁶ At the beginning of the Civil War the United States attempted to become an adherent to the Declaration because of the threat presented by the Confederate privateers, but the Declaration was closed and it was too late for further accessions. Article 1 of the Declaration of Paris has long been technologically obsolete, whereas article 4 has been universally accepted as customary law. Articles 2 and 3 no longer address contemporary realities and they have been swept away by the comprehensive economic warfare practices of each of the major belligerents in the two World Wars.

III. The Development of the Law of Naval Targeting During the World Wars

A. Beginning of Submarine Warfare: World War I. In 1914 the potential of the submarine warship as an efficient combatant unit, and in particular its ability to conduct economic warfare against enemy merchant ships, was not understood. It was assumed that submarines, like surface warships, would follow the time-honored procedures of visit and search.²⁷ Great Britain, as the predominant surface naval power, instituted the long-distance blockade and the use of the navicert system with the objective that merchant ships including neutral ones would not be able to assist the enemy war effort. During the First World War the traditional doctrine that enemy merchant ships may not be the object of direct attack was eroded because of the integration of such merchant ships into the naval forces of the enemy. In addition, the integration of some neutral ships into the war effort of the enemy required that a distinction be made between them and neutral ships participating in genuine inter-neutral trade. Those neutral ships which were participating in the Allied naval war effort were functionally no different from participating belligerent merchant ships and, therefore, contrary to the traditional doctrine, would appear logically to be lawful objects of attack.

The arming of British merchant ships, even though it was stated to be for "defensive purposes" only, made it impractical for submarines to use the traditional visit and search techniques. In the nineteenth century merchant ships were privately owned and their voyages and cargoes were privately controlled. During the World Wars private ownership existed nominally, but the effective control was in the governments and it was exercised with the single objective of advancing the war effort.²⁸ A further consideration which made visit and search impossible was the employment of the British Q-ships, which appeared to be innocent merchantmen but were actually heavily armed warships employed to lure submarines to the surface and destroy them.²⁹ In addition, the adoption of the convoy system by Great Britain and the United States in 1917 integrated merchant ships into belligerent naval operations with the result that they became functional warships.³⁰

Enemy warships remained lawful objects of attack without warning in the World Wars as they have always been historically. Because of the functional equivalency of participating merchant ships with warships, 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. In the German view 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 area.³¹ In a functional sense, Germany was conducting the same comprehensive methods of economic warfare which

were utilized by the Allied naval powers except that the German technique was enforced by submarines rather than by surface warships. 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.³² The only possible exception, in the view of the Allied naval powers, would be armed enemy merchant ships sailing in convoys escorted by warships. International conferences between the World Wars provided the opportunity for them to advance their claims in international law.

B. 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 clear at the outset that in doing so "the British Empire had no unworthy or selfish motives."³³ He continued in reference to the submarine:

It was a weapon of murder and piracy, involving the drowning of noncombatants. It had been used to sink passenger ships, cargo ships, and even hospital ships. Technically the submarine was so constructed that it could not be utilized to rescue even women and children from sinking ships and that was why he hoped that the conference would not give it a new lease of life.³⁴

The French, Italian, Japanese, and United States delegations joined with the British in deploring the claimed inhumane and illegal use of submarines by Germany in the World War but favored their retention.³⁵ 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.³⁶

Senator Elihu Root, a former secretary of state, 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 required 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.³⁷

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 government 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. . . .³⁸

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.

Article 22 of the London Naval Treaty of 1930³⁹ contained rules applicable to both surface and submarine warships. This 1930 treaty was terminated in 1936 except for article 22 which was continued in effect as the *Proces-Verbal Relating to the Rules of Submarine Warfare* (1936) “without limitation of time.” 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.⁴⁰

The interpretation and application of these binding rules of law were left to the Second World War and its aftermath. The principal ambiguities concerning naval targeting which appear in the text are the meanings of the terms “merchant ships,” and “a merchant vessel.”

C. Continuation of Submarine Warfare: World War II. Writing at the beginning of the Second World War, Professor H. A. Smith pointed out the dramatic difference between trading practices at the time of the Declaration of Paris 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 mobilized in the vast military organization of the totalitarian State.⁴¹

At the beginning 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 shipping 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.⁴²

During the Second World War the United States, first as a neutral and then as a belligerent, cooperated fully with the British methods.⁴³ 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.⁴⁴ 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 ships in 1938. On the subject of “conditions under which fire may be opened” the *Handbook* stated that if the enemy adopts a policy of sinking merchant ships without warning

it will then be permissible to open fire on an enemy surface vessel, submarine or aircraft, even before she has attacked or demanded surrender, if to do so will tend to prevent her gaining a favourable position for attacking.⁴⁵

Subsequent instructions stated that the enemy had adopted such a 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.⁴⁶ By October 17, 1939 Germany issued the order to attack all enemy merchant ships without warning.⁴⁷ Thus, early in the conflict, merchant ships and submarines of the opposing belligerents were attacking one another without warning. Germany followed its operational area declarations of the First World War by providing 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.⁴⁸

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.⁴⁹

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 shipping which Japan 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, the merchant ships of both the United States and Japan were fully integrated into the naval war effort. As a practical matter, such ships were indistinguishable from formally commissioned naval auxiliary warships,⁵⁰ and such merchant ships, like warships, were lawfully subject to attack without warning. The United States reversed its prior position and, along with Japan, and the other naval belligerents in the Pacific War, it recognized that such merchant ships were functional warships and were subject to the same rules of international law.

There are inconsistent analyses concerning the interpretation of the Protocol of 1936 as applied 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. . . .⁵¹

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.⁵²

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 major naval belligerents to observe the obligations laid down by the 1936 London Protocol. Immediately upon the outbreak of war the United States initiated a policy of unrestricted aerial and submarine warfare against Japanese merchant vessels, and consistently pursued this policy throughout the course of hostilities. Japan, in turn, furnished no evidence of a willingness to abide by the provisions of the Protocol. . . .⁵³

Another "Blue Book" contains a different analysis of this subject:

Professor Tucker has apparently assumed that the Protocol is designed to protect merchant vessels which are participating in the naval war effort. This does not take adequate account of the close relationship between the performance of combatant functions and the ensuing liability to attack without warning. In addition, it is inconsistent with the legislative history concerning the interpretation of "merchant vessel" as used in the Protocol.⁵⁴

The ambiguity concerning the terms "merchant ships" and "a merchant vessel" used in article 22 of the London Naval Treaty of 1930 and in the

identically worded Protocol of 1936 is considerably clarified by 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.⁵⁵

This stated criterion is more realistic than a test which attempts to distinguish between armed and unarmed merchant vessels. It is probably more important for the efficient conduct of anti-submarine warfare in particular contexts to have merchant ships make radio reports of submarine contacts than to have such ships armed. In addition, the great unarmed British passenger liners *Queen Mary* and *Queen Elizabeth* each had the capability of transporting an entire infantry division and its equipment at a high sustained speed without naval escort and consequently provided a significant contribution to the Allied naval war effort. Because of their effective participation, it cannot be doubted that they were lawful objects of attack.

Although the 1936 Protocol is sometimes referred to as the "Submarine Protocol," its second paragraph refers to "a warship, whether surface vessel or submarine." Consequently, the identical legal regime concerning attacks on merchant ships applies to both surface and submarine warships. Gunfire from surface warships is the ultimate sanction of the long-distance blockade employed by the Allied naval powers in both world wars. A surface warship may lawfully attack a belligerent or neutral vessel which is attempting to breach the blockade or resist visit and search.

One of the factors considered in treaty interpretation is the working interpretation given to the treaty by the state-parties.⁵⁶ The original state-parties to the 1936 Protocol included the great naval powers of the time: Great Britain, United States, Japan, France, and Italy.⁵⁷ Germany became a state-party shortly thereafter.⁵⁸ The working interpretation given to the Protocol by all six of these state-parties which were naval belligerents in the Second World War was that belligerent and neutral merchant ships participating in the naval war effort were not entitled "to the immunities of a merchant vessel" to use the wording employed by the Committee of Jurists who drafted the text. Therefore, the Protocol of 1936 is accurately interpreted as applying only to merchant ships which were not part of the war effort of the naval belligerents. In the Second World War there were but few merchant ships entitled to this protection. This legal situation is not a drastic departure from the traditional law which was applied prior to the World Wars. In that pre-existing law the immunity of a merchant ship was also conditioned upon its not participating in any way in the naval hostilities. The long-established principle of customary law that a unit or ship may not exercise belligerent functions without simultaneously becoming a lawful object of attack remains

valid. There is no evidence to show that the Protocol of 1936 was designed to change this.

A conclusion written several years ago appears to be 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.⁵⁹

The most important category of ships immune from attack is hospital ships. Customary law was first codified in the 1899 Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864,⁶⁰ which adapted the principles of the law of land warfare for the protection of wounded in armies in the field, to the maritime environment. Hague Convention (X) (1907)⁶¹ revised and enlarged the 1899 Hague Convention. It was applicable in both world wars. The first Geneva Convention (1864)⁶² for the protection of war victims comprised only ten articles and was limited to the protection of wounded personnel of armies in the field and to attending hospital and ambulance personnel.⁶³ The 1907 Hague Convention prescribed the legal regime for hospital ships in more detail than did the Hague Convention of 1899, specifying the external distinctive markings of hospital ships and requiring such ships to provide medical assistance to the wounded, sick, and shipwrecked personnel of the belligerents without distinction of nationality. Military interests were protected by the requirement that hospital ships must not be used for any military purpose. As a general rule, the immunity of hospital ships was respected in both World Wars with the exception of an incident in the First World War in which a German submarine sank a British hospital ship.⁶⁴

Cartel ships are also immunized from attack. The term "cartel" traditionally referred to an agreement between enemy belligerents concerning the exchange of prisoners of war. It is now used to refer to any non-hostile interaction of the belligerents governed by special agreement. In 1945 the Japanese merchant ship *Awa Maru* undertook a voyage for a prescribed purpose and upon a specified route agreed to by the United States and Japan.⁶⁵ The principal purpose was to carry relief supplies furnished by the United States to United States and Allied nationals held in Japanese custody upon the Asian mainland. On the return voyage to Japan, the ship was sunk without warning by a U.S. submarine. The commanding officer of the submarine, who had not seen the message immunizing the vessel, was subsequently relieved of his command and convicted by court martial of negligence in carrying out orders.⁶⁶ In the ensuing diplomatic interchange, the United States apologized and offered to provide Japan with a vessel of similar size and characteristics to replace the *Awa Maru*.⁶⁷

The U.S. Supreme Court held in *The Paquete Habana*,⁶⁸ a decision arising from the Spanish-American War, that coastal fishing boats were not liable to capture and condemnation in prize. The ruling in this case is codified in Hague Convention No. XI (1907),⁶⁹ which provides that vessels “used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture.” The Convention further provides that they cease to be exempt whenever they take part in hostilities.

IV. The Application of the Law of Naval Targeting to War Crimes; and Post Second World War Humanitarian Law Treaties

A. *War Crimes Trials*

1. 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 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 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.”⁷⁰ 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.⁷¹

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.⁷²

The unreasonable and unworkable result of the holding here 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 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 vessels in the Atlantic Ocean proscribed areas. The Tribunal's invocation of the normatively ambiguous 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 Admiral 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 claimed not to be based upon count three because the United States also conducted "unrestricted submarine warfare" in the Pacific.⁷³ 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.⁷⁴ 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 this count.

2. 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. Captain Roskill, the official British historian of the naval war 1939-1945, has written:

It is fair to mention there 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.⁷⁵

The exception referred to by Captain Roskill was the commander of a surface raider charged in the *Trial of Von Ruchteschell*⁷⁶ 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.

In addition to the trial of Admiral Doenitz before the International Military Tribunal at Nuremberg, there were two other cases involving the "Laconia order" which was issued by Admiral Doenitz on September 17, 1942 while he was serving as commander of the German submarine force. This order provided:

- (1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in life boats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
- (2) Orders for bringing in captains and chief engineers still apply.
- (3) Rescue the shipwrecked only if their statements would be of importance for your boat.
- (4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities.⁷⁷

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.⁷⁸

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.⁷⁹

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 U.S. 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.⁸⁰

The person who issued the order to attack and the aircraft commander who carried it out are both *prima facie* guilty of a war crime. The conduct of the aircraft commander appears to be entirely inexcusable since he must have observed the rescue operation. During the time that they are engaged in such an operation, enemy submarines 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 if it had not been for the bombing. As it was, many of the personnel of the *Laconia*, including Italian prisoners of war and British civilian passengers, 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. 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 the indispensable context in which the *Laconia* order was issued. The Tribunal did not find him guilty on this charge but it stated that the ambiguous terms of the order deserved the "strongest censure."⁸¹

The second case, the *Trial of Moehle*⁸² 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")⁸³ is widely regarded as an implementation of the *Laconia* order, it is significant that the defense in it did not invoke the order 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.⁸⁴

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 accused 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.⁸⁵

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.⁸⁶

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.⁸⁷

Several examples of the carrying out of this flagrantly unlawful order are referred to in the judgment of the Tribunal.⁸⁸ 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.⁸⁹ 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 were 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.

Although aircraft attacked merchant vessels engaged in a belligerent's war effort during the Second World War, no trials took place involving such 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.

B. Events Following the Battle of the Bismarck Sea

Unfortunately, it was not only Germans and Japanese who murdered survivors of ships they had attacked and sunk. In March 1943 the Japanese attempted to move about 7,000 soldiers by ship from Rabaul, New Britain where their military situation was increasingly precarious, to reinforce the Japanese Army in Lae, New Guinea.⁹⁰ This involved the transit of the Bismarck 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 Bismarck Sea where the B-25 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 Morrison, 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. 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 U-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.⁹¹

It is difficult to accept Professor Morrison's facile statement that Japanese soldiers do not surrender and his conclusion that a legitimate military necessity was involved. Some members of the Japanese Armed Forces, including the highly motivated Kamikaze pilots who participated in the Philippine and Okinawa operations, did surrender. It is not credible that Japanese soldiers without weapons 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.⁹² Another historian, Professor Ronald H. Spector, has provided a substantially similar factual account of the events following the Battle of the Bismarck Sea but has indicated some skepticism concerning the claim of military necessity.⁹³

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 Bismarck Sea, there is no way they can be described as other than flagrant violations 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. Justice Robert H. Jackson, the chief United States prosecutor before the International Military Tribunal at Nuremberg, stated 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.⁹⁴

Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (1907), a treaty of the United States, 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.⁹⁵

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

C. Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea (1949)

The four 1949 Geneva Conventions for the protection of war victims⁹⁶ were written in the shadow of the Second World War and were designed to prevent repetition of some practices associated with that conflict. Geneva Convention II sets forth more detail than Hague Convention X (1907) and in 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, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

The significance of this provision is that in addition to making “the shipwrecked, wounded and sick” unlawful objects of attack, it imposes

affirmative duties in terms of their protection and care on a non-discriminatory basis. Articles 22-35 provide more effective immunization from attack for hospital ships while prohibiting their use "for any military purpose" or for any acts "harmful to the enemy." Such ships may not possess or use secret communication codes and must be appropriately marked and notified to the enemy belligerent so as to facilitate their identification as hospital ships. Articles 36-40 provide enhanced protection for medical personnel and for medical transports including aircraft.

D. Geneva Protocol I Concerning International Armed Conflicts (1977)

The Geneva Diplomatic Conference on Humanitarian Law, which met for a period of several weeks in each of the four years from 1974 to 1977, produced Protocol I concerning international armed conflicts and Protocol II concerning internal armed conflicts. These Protocols deal with both the methods of armed conflict (known traditionally as "the Hague Law") and the protection of war victims (known traditionally as "the Geneva Law"). The Protocols are designed to supplement the Geneva Conventions of 1949 by adding provisions which have become necessary as a result of more recent developments in the methods of armed conflict.

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts⁹⁷ deals with both the methods of armed conflict and the protection of war victims in land combat situations, including those involving aircraft, as well as lawful objects of attack. Protocol I is a treaty in force with 86 state-parties currently, including several middle level military powers and allies of the United States.⁹⁸ This constitutes more than half of the states in the world community and accords the Protocol a significant status as law through the agreement of states. In addition, many of the provisions of the Protocol are codifications of customary law.⁹⁹ The two major military powers which are state parties are the Peoples Republic of China and the Soviet Union. The position of the Reagan Administration was that Protocol I, which the United States has signed, will not be submitted to the ratification process.¹⁰⁰

Articles 48-67 of the Protocol comprise a section which provides certain protections for the civilian population from the effects of hostilities including attack by aerial bombardment. Article 49(3) refers specifically to "sea warfare" and provides:

The provisions of this Section 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 or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

Other provisions specify methods and objects of attack which are unlawful. Article 51(4) prohibits indiscriminate attacks and describes them as attacks

“of a nature to strike military objectives and civilians or civilian objects without distinction.” Article 51(5) provides in full:

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.¹⁰¹

Sub-section (b) above is a codification of long-standing customary law. Article 51(6) provides in comprehensive terms that attacks “against the civilian population or civilians by way of reprisals are prohibited,” supplementing the prohibition on reprisals against protected civilian persons in Geneva Convention IV for the Protection of Civilian Persons in Time of War.¹⁰² Article 54(1) of the Protocol states: “Starvation of civilians as a method of warfare is prohibited.” This appears to prohibit the comprehensive economic blockades imposed by the major Allied naval powers in both World Wars because one of the principal effects of such blockades was the starvation of civilians. A question of fact arises as to what extent particular segments of the civilian population are incorporated into the war effort.

Articles 21-31 concern medical transportation. Article 22 provides a more comprehensive protection for hospital ships and coastal rescue craft than that provided in Geneva Convention II. For example, this article extends the protections of Convention II beyond hospital ships provided by a party to the conflict to also include hospital ships provided by a neutral or other state which is not a party to the conflict or by an impartial international humanitarian organization. The most obvious example of the latter category is the International Committee of the Red Cross. Article 23 provides protection to medical ships and craft whether they are located “at sea or in other waters,” thereby covering territorial waters and internal waters such as ports, lakes and rivers.

V. The Application of the Law of Targeting to Selected Situations Since 1945

A. *The Korean Armed Conflict*

The naval aspects of the Korean conflict were characterized by the overwhelming superiority of the United Nations naval forces.¹⁰³ The operational command at sea was exercised by the Commander of the U.S. Seventh Fleet and comprised ships and aircraft of the United States Navy, British Commonwealth navies, and several allied navies. The exercise of

complete control of the seas made it possible to conduct a close-in naval blockade of the Korean coasts which was similar to the blockades in use in the nineteenth century. The North Korean government had no significant naval forces and there was no evidence of successful attempts to breach the blockade. Operational plans provided for the use of visit and search of any enemy or neutral vessels which were encountered. The intercepted vessels consisted largely of North Korea deep-sea fishing vessels equipped with radio transmitters and receivers. There was evidence that a number of these vessels were employed to obtain intelligence concerning the location and disposition of warships under the United Nations Command. These vessels were captured and where appropriate, their crews were made prisoners of war. None of them was entitled to status as immunized objects under the holding in *The Paquete Habana*¹⁰⁴ concerning the immunity of small coastal fishing boats which were not involved in the enemy armed conflict effort.

Fish was a main staple of the Korean diet, particularly for coastal villages, in both the north and the south. It was decided, nevertheless, that fish would be declared contraband and that the elimination of even coastal fishing would add to the enemy logistic problems and provide an inducement to turn civilians against the North Korean regime. Leaflets in the Korean language with the following text were made available to as many North Korean fishermen as could be reached in September 1950:

The Communists brought this terrible war down upon you. You cannot fish from your boats until the Communists are killed or thrown out. The United Nations Forces are human and do not desire to harm innocent victims of the war, but if you try to fish again before the Communists are completely defeated, you must suffer the consequences. A legal blockade has been declared and is enforced by United Nations Forces.¹⁰⁵

When fishing was attempted thereafter, coastal boats were confiscated, and in some instances destroyed, and the fishermen were returned to the beach. No evidence was produced which indicated that North Korean military forces suffered significant logistical harm as the result of the ban on fishing. In contrast, there is evidence that North Korean fishing villages were reduced to starvation. Apparently, some of the fishermen were so desperate that they were reduced to attempting to spear fish in shallow water.¹⁰⁶ There is no doubt that this ban constituted a violation of the customary law immunizing coastal fishing boats enunciated in *The Paquete Habana* and codified in Hague Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (1907).¹⁰⁷

Shore bombardment and aerial bombing in support of United States and allied land forces were conducted in the same way that the U.S. Pacific Fleet operated during the Second World War.¹⁰⁸ In any area where civilian persons and objects were present, every effort was made to confine the bombardment to military targets. An example concerning the bombardment at Inchon prior to and during the famous amphibious landing behind enemy lines which

changed the course of the conflict was provided by the orders of Commander, Seventh Fleet:

Vice Admiral Struble's orders to the bombardment forces clearly specified that there should be no promiscuous firing at the city itself or at civilian installations. To achieve this, the entire objective area had been divided [in target area maps] into 60 sub-areas. Known military targets had been previously assigned, and those which offered the greatest potential hazard to our landing forces were circled in red. It had been agreed that any ship could fire into a red circle area with or without a "spot" [by observer aircraft]. In the uncircled areas, however, firing was permitted only if definite targets were found and an air spot was available. This differentiation between types of areas was adopted to reduce destruction of non-military targets to a minimum, to save the city of Inchon for occupation forces, and to avoid injury to civilian personnel.¹⁰⁹

There is substantial evidence that this same systematic distinction between civilians and civilian objects and military personnel and objects was made when the bombardment objectives were located in North Korea in proximity to civilians there. The result was that shore bombardment was conducted in substantial compliance with Hague Convention IX Concerning Bombardment by Naval Forces (1907).¹¹⁰

B. The Cuban Missile Crisis: Self-Defense and Targeting

The issue of the lawfulness of naval targeting is usually considered apart from the issue of self-defense or aggression in situations of ongoing armed conflict. Where there is no ongoing armed conflict, it is necessary to comply with the international law of self-defense in order to provide authority for the use of naval targeting. There are three indispensable requirements to justify in law military measures involving naval targeting which are based upon a claim of self-defense.¹¹¹ They are: (1) A good faith attempt to use peaceful procedures; (2) actual necessity (as opposed to a sham or pretense) in the context of either an existing armed aggression or a threat of armed aggression against the defending state which is both credible and imminent; and (3) proportionality in responding defensive measures. The elements of these requirements, which were developed over a long period of time in customary international law, are now codified in the United Nations Charter, a treaty of the United States.

Article 2(3) of the Charter provides:

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

Article 2(4) provides:

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

The complementary article 51 provides in relevant part:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs. . . .

The “inherent right,” which is the customary law, requires both actual necessity for and proportionality in responding defensive measures. The English language text of article 51 is neither well-drafted nor consistent with the negotiating history at the San Francisco Conference which reveals that reasonable and necessary anticipatory self-defense was retained and that self-defense is not limited only to the situation of an “armed attack.” The wording cannot be read as if it stated: “if, and only if, an armed attack occurs.” The more carefully drafted and equally authentic French text of article 51 uses the term “aggression armee” which includes, but is not limited to, armed attack, and this is consistent with the negotiating history. The view of Committee I at San Francisco that article 2(4) does not impair the customary law of self-defense is set forth in the words of its rapporteur, “The use of arms in legitimate self-defense remains admitted and unimpaired.”¹¹² The words “inherent right” in the English text refer to the preexisting customary law and, therefore, include anticipatory self-defense. Because the doctrines concerning anticipatory self-defense may be even more subject to abuse than the doctrines concerning an existing armed aggression, the three criteria are applied with greater stringency where anticipatory self-defense is claimed.¹¹³

A preeminent example of the application of these principles is the famous *Caroline* incident of 1837 which involved a river steamer of that name employed by U.S. nationals to aid the rebels in the then civil war in Canada.¹¹⁴ The British Government (then the sovereign in Canada) had attempted unsuccessfully to have the U.S. Government prevent assistance to the rebels. Thereafter, Canadian troops came into United States territory and destroyed the *Caroline* to prevent its imminent further use. The British Government claimed reasonable and necessary anticipatory self-defense. The diplomatic exchange is best known for Secretary of State Webster’s formulation of the requirements of self-defense as involving a “necessity of that self-defense [which] is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”¹¹⁵ This statement is too restrictive since a credible threat may be imminent without being “instant” and more than a “moment for deliberation” is required to make a lawful choice of means. The most important of Mr. Webster’s words carefully specified the requirements of proportionality as follows:

[N]othing unreasonable or excessive [is permitted], since the act justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it.¹¹⁶

The legal significance of the *Caroline* incident is that it illustrates compliance with the three requirements of international law. The British attempted to use peaceful procedures, were confronted with an imminent danger of attack,

and employed coercion in response which was strictly proportional, and the incident was resolved on this basis.

On October 16, 1962 President Kennedy received the "first preliminary hard information" showing the establishment of missile bases with an offensive targeting capability in Cuba.¹¹⁷ Aerial surveillance of Cuba was increased and conclusive photographic evidence of the inter-continental capability of the emplacements was obtained in the next few days. On October 18, 1962, Soviet Foreign Minister Gromyko visited the President and assured him that Soviet assistance to Cuba "pursued solely the purpose of contributing to the defense capabilities of Cuba."

President Kennedy and his advisers met in a group that subsequently became known as the "Executive Committee." A wide range of responses, from so-called "pin-point bombing" and invasion to doing nothing, was considered. Because there was no Soviet armed attack, lesser military responses were considered with full realization that if they were ineffective, more coercive uses of military power including naval targeting would be employed.

In the decade of the 1950s, much emphasis was placed upon plans involving "massive retaliation" with nuclear weapons or, as it was put informally, "a bigger bang for a buck." In contrast, some naval officers and civilians at the Naval War College in Newport and in the Navy Department in Washington continued to manifest an interest in limited uses of naval power. Among them was Rear Admiral Robert D. Powers, USN, who in 1958 wrote an influential article in the Naval Institute *Proceedings* entitled "Blockade: For Winning Without Killing."¹¹⁸ The article emphasized the potential uses in the nuclear age of a limited naval blockade with characteristics quite different from the comprehensive economic blockades conducted successfully by the Allied powers in two World Wars. In October 1962, when Admiral Powers was serving as the Deputy Judge Advocate General of the Navy, he wrote the initial draft of a proposal for a limited naval blockade of Cuba to interdict further missiles and components and to remove the existing ones. Following consultations with Rear Admiral Mott, the Navy JAG, Admiral Anderson, the Chief of Naval Operations, and General Maxwell Taylor, the Chairman of the Joint Chiefs of Staff, some changes were made in the draft and General Taylor took it to the "Executive Committee" where it was considered along with other recommendations in formulating the President's proclamation of October 23 entitled "Interdiction of the Delivery of Offensive Weapons to Cuba."¹¹⁹ In the text, as in the title, the term "blockade" was avoided so that there could be no confusion between the limited measures taken and the comprehensive economic blockades of the World Wars. The effectuation of the quarantine-interdiction, nevertheless, involved a limited naval blockade with offensive missiles having nuclear capability and inter-continental range classified as "prohibited material" which was functionally equivalent to contraband.

The President announced the measures to be taken in a radio and television address on October 22 which, in substance, made a claim of necessary and reasonable anticipatory national self-defense. On October 23 the prevailing opinion in the United Nations Security Council, which was initially skeptical about the factual claims made by the United States, changed drastically with the circulation by Ambassador Stevenson of copies of the aerial photographs showing the clandestinely established missile launching sites in Cuba. Also on October 23 the Organ of Consultation of the Organization of American States made the claim of anticipatory collective self-defense. Beginning on October 24, the ships carrying further offensive weapons to Cuba turned back rather than encounter the blockading naval forces. What had appeared at times to be a potential nuclear confrontation between the United States and the Soviet Union was resolved by the Kennedy-Kruschev Agreement which resulted in the removal of the existing missile emplacements.¹²⁰

The United States' responding measures in the Cuban Missile Crisis met each of the legal requirements for anticipatory self-defense. In view of the misleading statements made to the President by Soviet Foreign Minister Gromyko, it was deemed that the requirement of attempted peaceful procedures had been met and that it was futile to attempt further communications on the subject at that time. The drastic change in the nuclear balance of forces which would have resulted from the emplacement of Soviet missiles with nuclear capability in Cuba constituted the most serious kind of imminent danger to the United States and the Western Hemisphere. The character of the danger required that action be taken before the missiles were armed and operational. If delay had taken place until the missiles could be fired or used as the basis for "nuclear blackmail," it would have been too late. For these reasons, the requirement of an actual and imminent danger was met. The limited naval blockade amounted to the least possible use of military force in response and easily met the requirement of proportionality.

The operational planning for the limited naval blockade of Cuba included consideration of the lawful objects of naval targeting and the methods which should be employed against them. If the ships carrying further offensive weapons had not turned back on October 24, the contingency plans would have been acted on and the traditional procedures applicable to ships attempting to breach a blockade would have been used. The penultimate paragraph of the Presidential Proclamation provided:

Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores, and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond to or comply with directions shall be subject to being taken into custody.¹²¹

The ultimate sanction was reserved for ships which refused to submit to visit and search or attempted to run the blockade. Such ships would have

become lawful objects of attack and after failure to respond to warning could be sunk by naval gunfire. The final paragraph of the Presidential Proclamation stated:

In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.¹²²

The Cuban Missile Crisis, in addition to providing a modern model of the criteria for lawful anticipatory national and collective self-defense, illustrates the flexibility of naval force in achieving national objectives without the destruction of human or material values through its presence at the blockade line and without employing the full range of coercive measures which it possesses. The compliance with the international law criteria of self-defense provided legal authority for the use of the blockade and the necessary measures of naval coercion to enforce it.

C. *The Attack on the U.S.S. Liberty*

The 1967 attack on the *Liberty* has been summarized as follows:

At 1403 on Thursday, 8 June 1967 the U.S. electronics intelligence ship *Liberty* (AGTR 5) was steaming at a leisurely five knots, 14 miles offshore from the Egyptian town of El Arish on the Mediterranean coast of Sinai, when she was attacked by Israeli fighter-bombers. The attack continued for seven minutes, leaving eight of the ship's crew dead or dying, more than 100 wounded, and the ship riddled and burning.

Fourteen minutes later, the *Liberty* was attacked by three Israeli torpedo boats which raked the ship with gunfire—killing another four men—and then launched torpedoes. One torpedo hit a communications compartment, multiplying the *Liberty's* dead to a total of 34. Within 30 minutes of the torpedo attack, two helicopters carrying armed troops appeared alongside, and two jet fighters loitered in the sky astern as if poised for strikes. As suddenly as it had started, everything stopped. Israel said it was a "mistake."¹²³

It should be added that the attacks took place on a sunny day in international waters following a long period of Israeli aerial surveillance of the vessel.¹²⁴ The *Liberty's* flag at the mainmast was clearly visible and its white hull identification markings as well as its physical appearance made it very different from any Egyptian warship or Egyptian flag merchant ship. Following the torpedo attack, life rafts were dropped over the side of the ship, secured by a heavy line so that they would be available readily in case the order to abandon ship had to be given. The torpedo boats attacked the life rafts with gunfire, sinking two and cutting the line on the third. The Israeli torpedo boats then sped away taking the third life raft with them.

There are two inescapable conclusions which follow from the facts involved in the attack. First, the facts show that the attack was deliberate. The Government of Israel offered a number of unpersuasive excuses for the attack including that the ship was mistaken for the Egyptian naval coastal transport

El Quseir which was a ship half the size of the *Liberty* and of distinctly different appearance. The six hours of close-in aerial surveillance of the ship prior to the initial aerial attack combined with the ideal visual conditions rule out the possibility of a mistake.¹²⁵

The second necessary conclusion is that the law applicable to objects of attack was violated. The *Liberty* was a neutral ship sailing in international waters and it was apparent that it was not participating directly or indirectly in any belligerent state's naval war effort. As such, it was a ship lawfully immune from attack. In addition, the life rafts would have been illegal objects of attack in any circumstances. The attack on the life rafts, which was the last attack when the *Liberty* was afire and listing heavily, was a violation of the Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of 1949.¹²⁶ Whatever the Israeli motivation for the attack may have been, the conclusion of its illegality remains.¹²⁷

D. The Vietnam Armed Conflict

One of the problems confronted by the government of the Republic of Vietnam (South Vietnam) in the course of the ongoing hostilities in 1965 was the infiltration by small craft of enemy weapons and supplies through its territorial and contiguous waters. Operation Market Time, a cooperative endeavor of the U.S. Navy and the South Vietnam Navy, was designed to provide surveillance and inspection to prevent such infiltration in the three-mile territorial sea and in a nine-mile contiguous zone.¹²⁸ The time-honored procedures of visit and search were employed. Gunfire from naval vessels was the ultimate sanction, but it was not employed unless visit and search was resisted.¹²⁹ Because the operation was conducted within territorial waters where sovereign authority existed and within a reasonable contiguous zone, there was no conflict with international law. The measures employed were an aspect of the overall South Vietnamese claim to self-defense and the only objects of attack were lawful since they were limited to craft participating in the enemy war effort and resisting visit and search.

By 1972 most of the United States Army and Marine Corps forces had been withdrawn from Vietnam. In late March and early April of that year, the Democratic Republic of Vietnam (North Vietnam) launched a major attack across the "Demilitarized Zone" into South Vietnam. The U.S. Government responded with air attacks and a mining campaign directed against the port of Haiphong and other North Vietnamese ports.¹³⁰ The great majority of weapons and other military supplies imported by North Vietnam arrived by sea, and about 40 cargo ships called at these ports each month. President Nixon announced the mining May 8, 1972. Thereafter, it was announced that the ports, including internal and territorial waters, would be mined commencing at 0900 Saigon time on May 9 and that the mines were set to activate

automatically at 1800 hours Saigon time on May 11. This was done to permit vessels then in North Vietnamese ports ample time to depart before the mines were activated. The mines were laid by aircraft from U.S. Navy carriers and the interdiction resulted in no foreign merchant ships being sunk. Even though the United States did not use the blockade terminology, the mining campaign complied with the historic criteria for a close-in blockade. The announcement of the mining was widely publicized so that neutrals were informed in advance. It was limited to North Vietnam and did not block access to neutral ports. The blockade appears to have been effective and easily met the criteria of the Declaration of Paris that a blockade "must be effective, that is to say maintained by a force sufficient really to prevent access to the coast of the enemy."¹³¹ In addition, the mines were passive weapons and no ship was made an object of attack unless it activated the mines by entering or leaving one of the North Vietnamese ports. In comparison with the aerial bombing campaign where military objects were attacked with the possibility of ancillary civilian destruction,¹³² the mining was a very restrained response to the North Vietnamese attack.¹³³ For all of these reasons, the mining complied with both the historic and contemporary criteria of international law concerning objects of attack.

The available evidence indicates that the U.S. Navy conducted shore bombardment of military objectives under the same limitations which were observed during the Korean conflict.¹³⁴ The bombardment was sometimes conducted in support of United States and South Vietnamese ground force operations. The objects of attack were lawful for the same reasons that the objects of attack were lawful in the shore bombardments during the Korean conflict.¹³⁵

E. The Falklands/Malvinas Armed Conflict

Following the Argentinian invasion and conquest of the Falklands/Malvinas Islands in early April 1982 (which was accomplished without bloodshed due to the Argentine avoidance of civilian casualties), Great Britain sent a naval task force to regain the islands.¹³⁶ The task force was comprised of two small aircraft carriers with V/STOL (vertical short take off and landing) aircraft, five nuclear-powered attack submarines, eight guided missile destroyers, fifteen general purpose frigates, and a number of smaller combatant vessels including minesweepers and landing craft. The task force also contained several Royal Fleet Auxiliaries and a number of requisitioned commercial vessels including the liners *Canberra* and *Queen Elizabeth II*, used as troop transports, and the liner *Uganda*, used as a hospital ship. The entire task force, except for the *Uganda* which was not made an object of attack by Argentina,¹³⁷ consisted of vessels which were lawful objects of attack. Argentine Air Force and Navy aircraft inflicted substantial damage on ships of the task force and sank the destroyers *Sheffield* and *Coventry*, the frigates *Antelope* and *Ardent*, and

the landing craft *Sir Galahad*.¹³⁸ An aircraft-launched missile, apparently intended for one of the British aircraft carriers, sank the merchant ship *Atlantic Conveyor* which had participated in the naval war effort by carrying a cargo of helicopters and other military equipment.

On May 1 the nuclear submarine HMS *Conqueror* shadowed an Argentine Navy task force consisting of the large light cruiser *General Belgrano*¹³⁹ and two destroyers equipped with Exocet anti-ship missiles. The task force was operating south of a British exclusion zone of April 12 which covered a circle from the center of the islands with a 200 mile radius. On May 2 the *Conqueror* received permission from the British Cabinet to attack and it sank the *Belgrano* with two torpedoes, causing the death of more than 300 members of the crew.¹⁴⁰ There can be no doubt but that this was the sinking of a lawful object of attack. The British maritime exclusion zone was, however, interpreted by some as not extending to objects of attack outside of the zone.¹⁴¹ The apparent outcome was a British naval victory followed by a substantial political defeat in world public opinion. After the sinking of the *Belgrano*, Argentine surface combatants remained within the Argentine territorial and internal waters.

On June 6 the U.S. Maritime Administration informed both Great Britain and Argentina of a list of United States flag vessels and United States interest vessels (owned by U.S. nationals but flying a foreign flag of convenience) traversing the South Atlantic to ensure that these neutral vessels would not be attacked. The U.S. interest Liberian flag tanker *Hercules* was sailing from the East Coast of the United States to Alaska via Cape Horn.¹⁴² On June 8, when it was approximately 600 nautical miles off the Argentine coast and 500 miles from the Falkland Islands, it was attacked by Argentine aircraft in three different strikes using bombs and air-to-surface rockets. It proceeded to Rio de Janeiro harbor and, following a survey by Brazilian Navy authorities who determined that the damage was extensive and that unexploded bombs could not be removed safely, it was taken out to deep water and sunk. As a neutral vessel not participating in the British naval effort, the *Hercules* was clearly not a lawful object of attack. Following the refusal of the Government of Argentina to pay compensation, the owner brought an unsuccessful suit against that country under the Federal Alien Tort Act in the United States.¹⁴³

F. The Iran-Iraq Armed Conflict

The Iranian war effort was supported financially almost entirely by the export of its oil.¹⁴⁴ The "Tanker War" of 1980-1988 was carried on by Iraq exclusively through air attacks, and the targets of the substantial majority of Iraqi attacks were tankers transporting Iranian oil. Both Iran and Iraq proclaimed exclusion zones in which shipping was subject to attack. Approximately one half of the Iraqi attacks were within the Iraqi prescribed exclusion zones, and the other half were within the Iranian exclusion zone.¹⁴⁵

The available information indicates that most of the Iraqi attacks were not preceded by visual identification of the target. Apparently Iraqi Air Force planes targeted radar location of ships on the assumption that such identification of targets within one of the exclusion zones must be a tanker carrying Iranian oil or a tanker in ballast which was scheduled to take on Iranian oil. Because of the location of the targets in the exclusion zones and the usual absence of immune vessels from such zones, the Iraqi attacks cannot be appraised as indiscriminate even though carried out without visual identification.

The lack of visual identification was a cause of the Iraqi accidental attack on the guided-missile frigate *U.S.S. Stark* (FFG-31) on May 17, 1987, in international waters outside of any of the exclusion zones.¹⁴⁶ The air-to-surface missiles struck the ship, killing 37 crew members and wounding a substantial number of others. Published reports indicate that the *Stark* personnel and equipment were not ready to defend the ship even though the attacking aircraft was identified before the missiles were fired. Efficient damage control procedures prevented the *Stark* from sinking. It is apparent that the *Stark*, as a neutral warship in international waters, was not a lawful object of attack and the Iraqi Government apologized, assumed full responsibility, and agreed to pay damages.

The analysis of the lawfulness of the Iraqi air attacks is clearly applicable to the targeting of Iranian flag tankers. In addition, a general rule is that neutral ships acquire the character of an enemy merchant vessel when they are participating directly or indirectly in the enemy war effort.¹⁴⁷ Consequently, neutral flag tankers involved in the export of Iranian oil were equally lawful objects of attack by the Iraqi Air Force. Iran could not lawfully immunize its export of oil from attack by simply placing it on neutral ships.

Early in the war, Iranian air attacks knocked out Iraqi oil terminals in the Gulf and effectively prevented access to Iraqi ports. Thereafter, Iraq exported its oil overland by pipeline and received some of its war sustaining material through Kuwaiti and Saudi ports.¹⁴⁸ The six neutral states which comprised the Gulf Cooperation Council were increasingly concerned about the Iranian attacks on neutral shipping. In partial response to this concern, the United Nations Security Council adopted Resolution 552 on June 1, 1984. It reaffirmed "the right of free passage in international waters and sea lanes for shipping en route to and from all ports and installations of the littoral States that are not parties to the hostilities," condemned the Iranian attacks on "commercial ships en route to and from the ports of Kuwait and Saudi Arabia," demanded that such attacks "cease forthwith," and that there "be no interference with ships en route to and from States that are not parties to the hostilities." This amounts to a clear statement of the right of neutral shipping to be free from attack in international waters. The Security Council took this position even though the facts showed that both Kuwait and Saudi Arabia were providing

significant assistance to the Iraqi war effort by the overland transport of supplies and in other ways. The Council apparently was convinced that, on balance, the Gulf Cooperation Council states and their shipping retained neutral status. This decision seems to have been influenced by the fact that the neutral ships of the Gulf Cooperation Council states, including the Kuwaiti reflagged tankers, were not engaged in assisting the Iraqi war effort by carrying Iraqi oil. It should be added that Resolution 552 does not condemn the Iraqi attacks.

Iran's air and surface attacks on shipping typically followed visual identification. The selected targets were indiscriminate in that they included unlawful attacks on ships engaged in genuine inter-neutral trade. Some of the targets selected were ships carrying Iraqi war-sustaining material to Kuwaiti or Saudi ports for overland transport to Iraq. While the attacks caused damage to ships and personnel, they did not usually bring about sinkings because of the lack of efficient anti-ship missiles.¹⁴⁹ Although Iran had sufficient surface combatant ships to conduct visit and search, there is no evidence that it did so on a regular basis. Consequently, the contraband or immune character of particular cargoes was usually unknown to Iranian attackers. Iran claimed that its actions were in reprisal to the Iraqi attacks, but since these Iraqi attacks were lawful, there is no basis for the claim. The indiscriminate Iranian attacks must be appraised as unlawful.

Iran also laid moored mines, many of which broke their cables, in the international waters of the Gulf. Unlike the mining of North Vietnamese ports, where the location of the mines in territorial and internal waters and the notice to neutral shipping resulted in no damage to neutral ships, the Iranian mining was not announced and was apparently directed at neutral shipping.¹⁵⁰ This unlawful activity was substantially curtailed following the United States helicopter attack and capture of the Iranian minelayer *Iran Ajr* on September 21, 1987.¹⁵¹ The minelaying was taking place about 50 miles northeast of Bahrain in an area used by ships before moving to oil-loading terminals.

The U.S. Middle East Force which had previously consisted of only three to five ships was substantially augmented during 1987.¹⁵² In early 1987 the Government of Kuwait was increasingly concerned about Iranian attacks on tankers transporting Kuwaiti oil and it approached both the Soviet Union and the United States for assistance. Kuwait chartered three Soviet-flag long-hull tankers.¹⁵³ In May of the same year the Kuwaiti and United States Governments agreed that the United States would reflag eleven Kuwaiti tankers consistent with recognized international legal procedures.¹⁵⁴ The plans and procedures for U.S. Navy escort of these neutral tankers were agreed upon by the Middle East Force and the Kuwaiti Oil Tanker Company. In the initial convoy of reflagged tankers in July 1987, the lead tanker, the 401,382 ton *Bridgeton* struck a mine.¹⁵⁵ It successfully completed the voyage at reduced

speed, although it was subsequently out of use for several months while the damage was repaired. Since the hull of the *Bridgeton* was substantially thicker than the hulls of the escorting warships, its master recommended that the escorts fall in astern of his ship, which they did.¹⁵⁶ The *Bridgeton* as a neutral tanker not participating in the war effort of either belligerent, was an unlawful object of attack.

A number of small Iranian combatant vessels became lawful objects of attack by approaching the neutral vessels convoyed by the U.S. Navy in a hostile manner and were driven off or sunk by U.S. Navy vessels or helicopters. Meanwhile, because of the danger to other neutral shipping, including attacks by small Iranian combatant vessels using machine guns and rocket-propelled grenades, the British, French, Italian, Dutch and Belgian navies sent a number of small combatant vessels, including minesweepers, to the Gulf and escorted neutral vessels under their flags.¹⁵⁷

On October 16, 1987, the U.S.-reflagged former Kuwaiti tanker *Sea Isle City* located about ten miles off Mina al-Ahmadi was hit and damaged by a Silkworm missile fired by Iran from Fao Peninsula with the result of damage to the ship and injuries to personnel.¹⁵⁸ Three days later the U.S. Navy shelled and blew up an Iranian oil platform east of Bahrain and destroyed the electronic equipment on a nearby platform. Prior to the shelling, the United States gave notice of the impending action so that personnel would have the opportunity to evacuate the platforms, and it was believed that they did so. This attack on what was considered a lawful target was a limited and proportionate response to the attack on the *Sea Island City*. It should be added that there were no further attacks using Silkworm missiles on U.S. flagged vessels.

G. The April 1986 Attack on Libya: Self-Defense and Targeting

Authors' note:

This section was written based on the best information the authors were able to obtain from the available unclassified sources. They have been reliably informed that there is also classified material which contributed to the decisions made and actions taken in the planning and carrying out of this attack. Neither of the authors has access to such information and such access would not be consistent with their independent professional work. The present analysis emphasizes the law applicable to targeting.

The Reagan Administration claimed that the attacks on Benghazi and Tripoli on April 15, 1986 (April 14, Washington, D.C. time), were justified on the basis of self-defense. It is therefore necessary to apply the international law of self-defense (as in the analysis of the Cuban Missile Crisis) and other possible legal grounds for the attack to the events. The law of targeting will then be applied to determine the compliance with its requirements by the U.S. Navy and Air Force in the attack. The factual background which will be examined initially is essential to an understanding of the law.

1. The Factual Background

Attacks took place at the El Al Israel airline counters in the Rome and Vienna airports on December 27, 1985, resulting in 19 civilian casualties including five United States nationals, and among them, Natasha Simpson, an 11 year old girl.¹⁵⁹ President Reagan commented on those grim events in the opening statement at his press conference on January 7, 1986:

It's clear that the responsibility for these latest attacks lies squarely with the terrorist known as Abu Nidal and his organization. . . . But these murderers could not carry out their crimes without the sanctuary and support provided by regimes such as Col. Qadhafi's in Libya. Qadhafi's longstanding involvement in terrorism is well-documented, and there's irrefutable evidence of his role in these attacks. . . . By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if he [*sic*] had used its own armed forces.¹⁶⁰

In response to a question at the press conference, the President stated, *inter alia*, "I can assure you that we have the evidence. . . . Abu Nidal has more or less moved his headquarters there into Libya."¹⁶¹ The President issued an Executive Order on the same day, which stated:

I, RONALD REAGAN, President of the United States of America, find that the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat. . . .¹⁶²

Secretary of State Schultz' address to the National Defense University on January 15, 1986, considered recent episodes of terrorism under the title, "Low-Intensity Warfare: The Challenge of Ambiguity."¹⁶³ He recommended military responses to such "warfare" conducted against the United States while pointing out, "The law requires that such actions be necessary and proportionate."¹⁶⁴ Apparently the Libyan connection with the airport murders was that some of the perpetrators carried passports which had belonged to Tunisians who had worked in Libya.¹⁶⁵ This information is equivocal and consequently may or may not indicate Libyan support for these terrorist actions. Professor Richard E. Rubenstein, in his study of contemporary terrorism, states:

In fact, no evidence demonstrating Libyan complicity in these attacks was ever produced. Calling this episode of terrorism "war" was primarily a frustrated response, signifying acceptance of the principle of collective responsibility: if we cannot find and punish the perpetrators, we will punish their suppliers and sympathizers. . . . Militarily, it reflects the questionable premise that drying up the terrorists' external sources of supply will terminate their activities. Morally, it is intended to justify retaliation in which innocent civilians get hurt. And politically, it ends the search for indigenous social causes of terrorism, preferring to view local violence as a product of policies formulated in some foreign capital.¹⁶⁶

While it is very important to search for, identify and attempt to ameliorate or correct the "indigenous social causes of terrorism," the role of the suppliers of terrorism should not be overlooked. On February 8, 1988, *The Washington*

Post reported an interview with Qaddafi by Katherine Graham, chairman of The Washington Post Company, and correspondents of the *Post* and *Newsweek* under the headline, "Gadhafi: Terrorism is Response to U.S. Policies."¹⁶⁷ The article stated, *inter alia*:

Asked about Libyan involvement in supplying weapons to groups that carry out terrorist actions, Gadhafi did not directly deny such involvement but appeared to defend it on the grounds that it balanced U.S. intervention elsewhere:

"Why is Reagan involved with the contras in Nicaragua, with UNITA in Angola, with Afghanistan? This is the same question. Let's all agree that everyone concern himself only with things in his own borders."¹⁶⁸

It is also significant that the political causes of terrorism in the Middle East include the United States Government's comprehensive military and economic support for the State of Israel.¹⁶⁹

The Gulf of Sidra is bounded by Libyan territory except for an opening to the Mediterranean on the north which is approximately ten times the width of the opening permitted for a "juridical bay" (24 nautical miles or less) under the jurisdiction of the adjoining state.¹⁷⁰ The Government of Libya has, nevertheless, claimed that the Gulf of Sidra is a part of its internal waters, and its principal domestic airline traverses the northern part of the Gulf between the two largest Libyan cities, Benghazi and Tripoli. Freedom of the seas in the Gulf of Sidra outside of the 12 mile limit has been successfully maintained for many years by diplomatic protest¹⁷¹ and by task forces of small combatant vessels of the British, French and U.S. Navies. In contrast, from late January until late March 1986, a 30 ship task force of the U.S. Sixth Fleet conducted surface and aerial operations in and adjacent to the Gulf of Sidra. From March 23 until March 26 three carrier battle groups, the *Coral Sea*, the *Saratoga*, and the *America*, operated in the same area, sinking Libyan missile boats and downing Libyan fighter aircraft which were claimed to approach with "hostile intent."¹⁷² The Reagan Administration claimed publicly that this was a routine maintenance of the right of freedom of navigation, but accounts in the media stated that it was privately conceded to include a possible provocation. For example, Messrs. Hoffman and Cannon, writing in *The Washington Post* on March 25, 1986 stated:

Although the White House claimed yesterday that the purpose of the naval exercise was solely to demonstrate freedom of navigation in an international waterway, officials said privately that the exercise was planned with a realization that it might provoke a military confrontation with Qaddafi and a chance to underscore Reagan's determination to deal firmly with international terrorism.¹⁷³

Previously the exercise of freedom of navigation in this area had not been provocative because it was maintained by small naval task forces. Such an exercise can become provocative, however, by using a larger force than that which is routine and necessary.

The bombing of the La Belle discotheque in West Berlin which followed on April 5, 1986, caused the immediate deaths of a U.S. Army enlisted man and a young Turkish woman and injury to many others including U.S. military personnel. On the evening of April 14, the White House issued a statement that "In light of this reprehensible act of violence and clear evidence that Libya is planning future attacks, the United States has chosen to exercise its right of self-defense."¹⁷⁴ In an address to the nation on the same evening, President Reagan stated:

This monstrous brutality is but the latest act in Colonel Qadhafi's reign of terror. The evidence is now conclusive that the terrorist bombing of La Belle discotheque was planned and executed under the direct orders of the Libyan regime. . . . Our evidence is direct; it is precise; it is irrefutable. We have solid evidence about other attacks Qadhafi has planned against the U.S. installations and diplomats and even American tourists. . . . Self-defense is not only our right, it is our duty. . . . We Americans are slow to anger. We always seek peaceful avenues before resorting to the use of force—and we did.¹⁷⁵

Seymour M. Hersh, an investigative reporter for the *New York Times*, wrote in February 1987:

There was widespread concern and anger inside the National Security Agency over the Administration's handling of the Libyan messages intercepted immediately after the April 5 terrorist bombing of a West Berlin discotheque. The White House's reliance on these messages as "irrefutable" evidence that Libya was behind that bombing was immediately challenged by some allies, most notably West Germany. Some NSA experts now express similar doubts because the normal intelligence channels for translating and interpreting such messages were purposely bypassed. As of this month, the NSA's North African specialists had still not been shown these intercepts.¹⁷⁶

As an example of doubts expressed in Western Europe, the German source, *Der Spiegel*, published an article in April 1986 entitled "A Complexity of Findings—Secret Service Dispute Over Libyan Radio Messages." The article stated that the "U.S. National Security Agency" and its German equivalent had reached opposite conclusions as to the meaning of the radio intercepts. One of its conclusions stated:

Radio messages of such clarity which document a direct responsibility of the Libyan revolutionary leader Col. Muammar el Ghaddafi for the Berlin bombing were never recorded.¹⁷⁷

Mr. Hersh, in the article quoted above, also stated:

William J. Casey, then Director of Central Intelligence, personally served as the intelligence officer for a secret task force on Libya set up in mid-1981, and he provided intelligence that could not be confirmed by his subordinates. Some task force members suspected that much of Casey's information, linking Qaddafi to alleged "hit teams" that were said to be targeting President Reagan and other senior White House aides, was fabricated by him.¹⁷⁸

In early 1986 a report, entitled *Libya Under Qadhafi: A Pattern of Aggression* and covering alleged Libyan terrorism through the December 1985 attacks

at the Rome and Vienna airports, set forth the State Department's understanding of the facts:

The main targets of direct Libyan terrorist activities have been expatriate Libyan dissidents and leading officials of moderate Arab and African governments.¹⁷⁹

The report also states that these attacks have taken place in many countries and that Libya has planned anti-exile attacks in the United States, but only one example is provided.¹⁸⁰ There is a "Chronology of Libyan Support for Terrorism 1980-85"¹⁸¹ in the report which lists a total of 58 incidents, but only eight were alleged to involve direct action by Libya and of these none were stated to be directed against United States nationals. Two of the others referred to Libyan armed forces actions against Chad and one referred to the August 1981 incident in which two Libyan SU-22s were shot down by U.S. Navy aircraft. Some of the incidents appear to be based upon hearsay evidence which would not be admissible in a law court, although some are consistent with possible Libyan support for terrorism. A more recent State Department report issued in 1989¹⁸² accuses Libya of "Reaching for Respectability"¹⁸³ and of conducting a "Drive for Influence,"¹⁸⁴ but neither is in violation of international law and both are activities of most national states. The report contains a "Chronology of Libyan Support for Terrorism, 1986-1988"¹⁸⁵ with many of the incidents reported stated to be "believed" or "suspected." Like the earlier report, this one contains some statements which are consistent with possible Libyan support for terrorism.

In summary, the State Department reports fail to produce factual evidence of direct Libyan terrorism against United States nationals, and the information provided concerning Libyan support for terrorism is equivocal. Consequently, the Reagan Administration's claims against the Libyan Government are not substantiated by the State Department's reports.

The Vice President's Report on combating terrorism issued in early 1986 refers to "the uncovering of a pro-Qaddafi conspiracy to carry out three assassinations and to bomb strategic locations in the United States"¹⁸⁶ by the Federal Bureau of Investigation in 1985. The Report contains no details on this subject and the only other reference to Libya reports that Qaddafi stated that Libyans will attack "American citizens in their own streets."¹⁸⁷ If this were to happen, it would be within domestic jurisdiction and police power. Concerning international responses to terrorism, the Report states, *inter alia*:

Political or economic sanctions directed against sponsoring states offer the least direct danger to lives and property and are more likely than military force to gain international support.¹⁸⁸

The United States has used such economic sanctions against Libya and has applied the International Emergency Economic Powers Act.¹⁸⁹

On April 14, 1986 the twelve ministers of foreign affairs of the European community issued an announcement at The Hague which stated, *inter alia*:

The Twelve have decided to act according to the following lines regarding Libya and, where necessary, regarding other states clearly implicated in supporting terrorism:

- restrictions on the freedom of movement of diplomatic and consular personnel;
- reduction of the staff of diplomatic and consular missions;
- stricter visa requirements and procedures.¹⁹⁰

The announcement added that no arms or other military equipment will be exported to Libya and that further measures will be considered as necessary.

The Western Economic Summit meeting in Tokyo, May 4-6, 1986 issued "Declarations and statements by the seven Heads of State of Government and the representatives of the European Communities."¹⁹¹ Concerning international terrorism, it was stated, *inter alia*:

We specify the following as measures open to any government concerned to deny to international terrorists the opportunity and the means to carry out their aims, and to identify and deter those who perpetrate such terrorism. We have decided to apply these measures within the framework of international law and in our own jurisdictions in respect of any state which is clearly involved in sponsoring or supporting international terrorism, and in particular of Libya, until such time as the state concerned abandons its complicity in, or support for, such terrorism.¹⁹²

The "measures" included refusal to export arms, strict limits on the size of diplomatic missions, denial of entry to suspected persons including diplomatic personnel, improved extradition procedures, stricter immigration and visa requirements, and close bilateral and multilateral cooperation.

A negotiating history of the Tokyo Summit which appeared in the *New York Times*¹⁹³ stated that the specific mention of Libya was a last minute change inserted by the Summit leaders after the final draft declaration was presented to them. The European position was reported to be that terrorism could only be combatted effectively by understanding that it arose from legitimate political grievances but, nevertheless, the final text included the declaration that "terrorism has no justification."¹⁹⁴ An informal working paper stated to have been prepared by staff members of the United-States delegation conceded that one thing which might well motivate other countries to fight terrorism "is the need to do something so that the crazy Americans won't take matters into their own hands again."¹⁹⁵

Whatever the motivations, it is clear that the European community's official position is that state supported terrorism exists and that Libya is one offender. Nothing in the community's position, however, provides support for military as opposed to economic and diplomatic sanctions. The *New York Times* reported that President Reagan stated on April 21, 1986, that President Mitterrand of France privately suggested that the United States make an all-out military attack against Libya.¹⁹⁶ This is not consistent with the French President's public position denying overflight rights for the aircraft flying from the United Kingdom to Libya. Apparently the Reagan Administration

did plan a comprehensive military attack upon Libya to be effectuated in cooperation with Egypt. An article in *The Washington Post* of April 2, 1986, by Bob Woodward stated, under the headline "U.S. Unable to Persuade Egypt to Back Plan for Joint Anti-Qaddafi Move":

Eight months of secret U.S. efforts to win Egyptian approval for a U.S.-Egyptian military operation designed to overthrow Libyan leader Muammar Qaddafi appear to have foundered following public disclosure and rejection of the plan by Cairo, informed sources said yesterday.¹⁹⁷

2. Application of the International Law Requirements for Self-Defense

The same three basic requirements considered in the analysis of the Cuban Missile Crisis are applicable.¹⁹⁸ They are: the use of peaceful procedures if possible; actual necessity for defense of the national state against an existing armed aggression or an imminent one; and proportionality in responding defensive measures.

The media reported on the Libyan attempts to use peaceful procedures and the United States reaction. For example, two weeks before the U.S. bombing attacks, David H. Ottaway reported on the Libyan attempts to open diplomatic discussions with the U.S. Government:

In advance of Vice President Bush's trip to Saudi Arabia, Libyan leader Muammar Qaddafi sent two emissaries to Riyadh in an apparent attempt once again to open a dialogue with Washington in the wake of the U.S.-Libyan confrontation last week in the Gulf of Sidra.

Administration officials said they had no intention of responding to Qaddafi's latest overture through the Saudis. They added that they have also rebuffed half a dozen other attempts by Libya to make contact with the United States through various European and Arab channels following the December 27 terrorist attacks on the Rome and Vienna airports. . . .

The would-be European and Arab mediators, including King Fahd himself, were firmly told in January that the administration was not interested either in "a direct or indirect dialogue" with Qaddafi, according to the sources.¹⁹⁹

The Ottaway article also reports:

The administration has also told various would-be mediators that it is not interested in striking any "deal" with Qaddafi whereby the Libyan leader would promise to end terrorist attacks against U.S. interests in return for improved relations with the United States, the official said. . . .

In addition to King Fahd, Qaddafi also tried in January to enlist the support of the leaders of Greece, Austria, Malta, Italy and Morocco to open a dialogue with Washington.²⁰⁰

Unfortunately, it is necessary to conclude from the events summarized that the Reagan Administration failed to take advantage of the several opportunities presented to it for peaceful resolution of the controversy in spite of President Reagan's statement to the contrary.²⁰¹ Consequently, the United

States Government failed to comply with the first requirement to justify a claim of self-defense.

The second requirement of the law of self-defense is that there be an existing armed aggression against the United States or an imminent one which is reasonably anticipated in the near future.²⁰² The entire law of national self-defense has been developed to protect a national state from armed aggression or an imminent threat of such aggression to its most basic values including its continued national existence and independence. Other legal doctrines, including the recognized right of a state to take limited measures to protect its nationals abroad, have been developed to deal with lesser injuries.²⁰³ The Japanese attack on Pearl Harbor provides an example of a then-existing armed aggression against the United States. An example of a reasonably anticipated imminent armed aggression is the threat to the United States from the clandestine attempted emplacement of Soviet inter-continental missiles with nuclear capability in Cuba.

Both of these examples involved action by major military powers which was directed at the United States as a national entity. In contrast, the claims of President Reagan set forth above²⁰⁴ refer to injury or threatened injury from a state which has a trivial military capacity in comparison with that of the United States and only concern alleged past and future attacks on individual U.S. citizens rather than the United States as a whole. If a basis for the claim of self-defense can be the probability of future Libyan terrorism, then one is forced to consider possible future acts which are much harder to ascertain than the alleged unclear past events. In evaluating past events, even if it were assumed that Libya was responsible for the bombing at the La Belle discotheque, the attack on Benghazi and Tripoli several days later could not be self-defense to that bombing as an imminent threat.²⁰⁵

The determination of whether or not Libyan actions constituted a meaningful threat to the United States should also consider the role of other states in activities termed "terrorism." George C. Wilson and Fred Hiatt, writing on March 26, 1986, stated that:

U.S. intelligence showed that Iran and Syria probably were more involved in the recent acts of terrorism, but those countries were not the visible symbols of evil that Qaddafi presented. A demonstration of U.S. resolve was necessary and Libya was singled out.²⁰⁶

The persistence of such reports was reflected in an interview with Secretary of State Shultz. Lesley Stahl interviewed the Secretary on CBS-TV's "Face the Nation" on January 12, 1986:

Q. There are reports now that investigators in Europe believe that the terrorists who perpetrated the bombing in Rome and Vienna did not come from training camps in Libya, but came from camps in the Syrian-controlled Bekaa Valley, and then came through Syria into Europe. Are there second thoughts within our government about just exactly how much Libya is to blame for this latest terrorist act?²⁰⁷

Secretary Shultz replied, in part, "No. Libya is clearly supporting terrorism in general." In the balance of a long answer he did not mention Syria. The questioner persisted:

Q. Now, what about Syrian involvement? Just how much is that government responsible?

A. Syria's picture is a rather different one. I would remind you that Syria has long been on our terrorist list, but Syria's behavior toward all of these things is rather different from Libya's.

Q. In what sense? How is it different?

A. In their public attitudes, and because we are working with Syria on a number of fronts in a constructive way.²⁰⁸

In Secretary Shultz's news conference on January 9, 1986, he was asked a question about the Iranian role:

Q. Why the narrow focus on Libya when our own intelligence community has singled out Iran, for example, as a country that trains terrorists, a country that has taken American lives over the past several years in places like Lebanon? Why the lashing out on this one subject and not tackling the others?

A. Libya is a country that has been, is, and no doubt will continue to be involved in terrorist activities. . . . Insofar as Iran is concerned, we are as concerned anywhere about terrorist activities. We are talking about Libya in this instance. We have very little trade with Iran. . . .²⁰⁹

Secretary Shultz did not state that the "little trade" he referred to was principally the Reagan Administration's then secret weapons shipments to Iran.²¹⁰ The supply of weapons to Iran, of course, made it unrealistic to treat that country as Libya was being treated. There were also compelling reasons to treat Syria differently. During the Israeli armed attack on the Palestine Liberation Organization and Lebanon in 1982, Israel attacked and destroyed a large part of the Syrian Air Force and the Syrian air defense system. Thereafter, the Soviet Union reinforced its ties with Syria and rebuilt the air defense system.²¹¹ The result was that in 1986 Syria possessed a much more significant defense system than it did in 1982 and an attack on Syria would be much more costly to the attacker than would an attack on Libya. In addition to other reasons, Libya was apparently selected for its military weakness which made it a less credible threat to the United States than either Iran or Syria.

While it is not unlawful to select a weak target in order to minimize casualties to one's own forces, the matter must also be evaluated in terms of the proportionality of probable ancillary civilian casualties. It is impossible to support the finding of President Reagan in his Executive Order of January 7, 1986, that the Government of Libya constitutes "an unusual and extraordinary threat to the national security and foreign policy of the United States."²¹² There was simply no threat to the national security, and if there were a threat to foreign policy, it would not justify responding military measures. Because of these considerations, it is impossible to conclude that

the United States complied with the legal requirement of an existing or imminently anticipated armed aggression against it.

The third essential element of a valid claim of national self-defense is proportionality in responding measures. Because of the failure to use available peaceful procedures and the absence of actual necessity, it would be unnecessary to consider the issue of proportionality. Even if the first two requirements for self-defense had been met, there is considerable doubt that the intense use of military coercion in a responding bombing attack could be appraised as proportional. One reason for this doubt is that following the bombing attacks it became clear that the United States had killed and injured many more Libyans (both civilian and military personnel with no indication that any of the victims were involved in any acts of terrorism) than the number of Americans that Libya was accused of either killing or providing support for their killing.

U.S. Navy Regulations, which are routinely treated as law in many contexts including court martial proceedings, are issued by the Secretary of the Navy following the approval of the President.²¹³ Article 0915 entitled "Use of Force Against Another State" provides in relevant part:

The right of self-defense must be exercised only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required.

Force must never be used with a view to inflicting punishment for acts already committed.²¹⁴

In summary, it is very difficult to find legal support for the Reagan Administration's claim that the bombing attack is justified as self-defense.

3. Application of the International Law of Reprisal

It is sometimes suggested that the law of self-defense is inadequate to provide protection against contemporary acts and threats of terrorism and that the law concerning reprisals is more relevant.²¹⁵ The traditional law on the subject has three requirements for an act of reprisal to be justified: (1) a response to a violation of international law; (2) an unsatisfied demand for termination of the violation; and (3) a proportion between the original violation and the act of the reprisal.²¹⁶ There is some evidence that there may have been a violation of international law by Libyan support for terrorism, and apparently the Reagan Administration carried out the bombing on the basis that the original violation had not been terminated, although they did not at any time claim that the raids were reprisals. The most serious difficulty with application of the law of reprisal is the third requirement of proportionality.

The Geneva Convention for the Protection of Civilian Persons (1949)²¹⁷ prohibits reprisals against protected civilian persons. In addition, the well-established customary law prohibits attacks upon civilians. It is clear that the United States bombing attacks were not directed at civilians as such.

Nevertheless, it must have been apparent that the selection of claimed military targets in such close proximity to civilian residences and the French Embassy presented the gravest danger to civilians. The results of the bombing in civilian casualties raise substantial doubt as to whether the requirement of proportionality for reprisals was met.

4. Application of the Law of Targeting

The failure of the claim of self-defense and the serious doubts concerning justification as reprisal mean that there is no clear legal authority for attacking Libyan objectives. It is essential, nevertheless, to examine the bombing attacks under the criteria of the law of targeting.

The operational plan for the bombing of Libya was termed El Dorado Canyon. Because of the denial of over-flight rights by European countries, except Great Britain, the Air Force F-111 aircraft from Lakenheath Air Base in England flew around the west coast of the Iberian Peninsula, entering the Mediterranean at the Strait of Gibraltar, and after repeated refuelings, attacked targets in Tripoli. The Navy aircraft from the carriers attacked targets in Benghazi.

There were five targets specified for the bombing attack: (1) Benina air field at Benghazi where some Libyan military aircraft were on the ground; (2) Benghazi Barracks—the site of Qaddafi's alternate headquarters and command post; (3) Tripoli International Airport where some Libyan military transport aircraft were on the ground; (4) Sidi Bilal military facility in Tripoli—claimed to be a terrorist training school (Libya claimed that it is a school for naval cadets); and (5) Azziziyah compound in Tripoli—Qaddafi's main headquarters and his family's home.²¹⁸ Following interviews over a period of three months with more than 70 of the officials planning the attack, Seymour Hersh concludes that Col. Qaddafi was the primary target.²¹⁹ Qaddafi was not hit, but Hersh reports concerning his family:

All eight of Qaddafi's children, as well as his wife, Safiya, were hospitalized, suffering from shock and various injuries. His 15-month-old adopted daughter, Hanna, died several hours after the raid.²²⁰

President Reagan's executive order number 12,333, section 2.11, entitled "Prohibition on Assassination" states that "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."²²¹ Referring to this order in the context of the Libyan attacks, and particularly the bombing of the Qaddafi family living quarters, one commentator stated:

If the raid was in fact a veiled execution attempt, it would pit the Reagan Administration against a specific presidential order and substantial legal precedent. In 1976, after public discontent over the revelations of CIA assassination attempts in Chile, Guatemala and Iran, President Ford issued an Executive Order forbidding the Government from authorizing the assassination of world leaders. Both Presidents Carter and Reagan have reaffirmed that ban.²²²

Aviation Week & Space Technology reported under the headline, "U.S. Demonstrates Advanced Weapons Technology in Libya," that a senior military official stated shortly after the attack:

"Understandably, after the all-Navy action in Libya last month, the Air Force wanted a piece of the action." The official added, "The fact that the Defense Dept. budget is under consideration—and here was an opportunity to show how well the money is being spent on aircraft and weapons—was not overlooked by both services as a side benefit to the mission. Another reason to include the F-111s in the operation was that it showed the support of Great Britain for our antiterrorist activities."²²³

At his joint press conference with Secretary Shultz the evening of April 14, 1986, Secretary of Defense Weinberger said in his introductory comment:

We used a combination of 500-pound and 2,000-pound laser-guided weapons and precision-guided delayed gravity bombs. All of the Navy planes have returned without casualty. All of the F-111s with one exception, have been accounted for and are returning. . . . The attack was carried out precisely as planned, and it was, as the President said, evidence of very great skill, both navigational as well as the organization of the attack which was a difficult one from the professional point of view and done with great effectiveness. . . .²²⁴

During the ensuing question period, the following took place:

Q. There was also a report that you hit part of the French Embassy in Libya. Do you know anything about that report?

A. Secretary Weinberger. That would be, I think, virtually impossible.²²⁵

David Blundy and Andrew Lycett, have reported on both the rules of engagement and the civilian casualties.²²⁶

The rules of engagement for Operation Eldorado Canyon had been strictly formulated, or so it was claimed in the official U.S. explanation to the British Cabinet: the planes should strike only targets that could be precisely defined and shown to be related to terrorist and military activity. The weapons officer in each plane had to have a 'double lock-on' before he could release his bombs, which meant that he had to fix the target, not only with his forward looking infra-red night sight, but also with his Pave Track radar. Any plane which failed to achieve this was under orders to leave the target area and jettison its bombs over the sea. . . .

At least a dozen bombs and missiles fell in the area of Bin Ashur a [suburb of Tripoli], making craters ten feet deep, knocking out the front of an apartment building and scoring direct hits on private villas. The house next to the French embassy was destroyed and the embassy itself severely damaged. One bomb or missile landed in the center of a park and children's playground. A child's foot was sticking out of the rubble of one building. The body of an old man was fixed in a crouch as if he had been getting out of bed when the bombs hit. Another old man lay on a stretcher outside his villa, killed by falling rubble. It was a gruesome sight.²²⁷

In another account, David C. Martin and John Walcott report similar civilian damage and conclude that: "Measured by the bomb-damage assessment, the raid was less than impressive."²²⁸ The newspapers reported various inaccuracies in the bombing. For example, Edward Schumacher, reported in the *New York Times*:

More than a dozen bombs and missiles from the American air raids early Tuesday appear to have missed an air base and hit two farms about two miles away according to evidence seen by reporters on visits to the farms today.²²⁹

Unfortunately, aerial bombardment even with the most advanced technology remains a very blunt instrument. Operational planners of “surgical strikes,” employing “pin-point accuracy,” and “precision delivered munitions,” should recognize that results consistent with such plans are seldom manifested in an actual bombardment.

Even though there was no prior armed conflict between the United States and Libya, the armed attack brought into effect the law of armed conflict. Ever since the *Prize Cases*,²³⁰ decided by the U.S. Supreme Court during the Civil War, the law of armed conflict has been applicable to the fact of an international armed conflict including episodes of hostilities without requiring a so-called technical state of war. Therefore, Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War (1907),²³¹ is applicable to the bombing of Tripoli and Benghazi. It prohibits bombing of undefended locations, and military targets in Tripoli and Benghazi were defended even though the Libyan defenses were weak in comparison with the military technology and the weight of the ordnance employed against them. Article 6 of the Convention provides:

If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

In the bombardment of the Iranian oil platforms in the Persian Gulf, considered previously,²³² prior notice was given so that the personnel would evacuate the platform. In the attacks on Tripoli and Benghazi a probable objective was to kill Libyan personnel alleged to be involved in terrorist training activities and so no warning was given. In view of the ambiguous language concerning “[i]f the military situation permits,” it is not clear that Hague Convention IX required a warning. The unfortunate result, however, in addition to the killing of Libyan military personnel who possibly had no connection with terrorism, was the killing of a substantial number of civilians.²³³

The Navy *Commander's Handbook on the Law of Naval Operations* (“NWP 9”) under the heading “Incidental Injury and Collateral Damage” provides the legal criteria of the well-established customary international law:

It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage should not, however, be excessive in light of the military advantage anticipated by the attack. Naval commanders must take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the absolute minimum consistent with mission accomplishment and the security of the force.²³⁴

This legal standard is easier to apply in an on-going international conflict than it is to the attacks on Tripoli and Benghazi. The first difficulty here is to determine whether the military objectives which were targeted constituted “a legitimate military objective.” It is also difficult to identify the lawful “military advantage” which was anticipated by this attack. Consequently, it is impossible to relate incidental “injury or collateral damage” to civilian persons or objects to such a “military advantage.” Rather than seeking military advantage in the attack, the stated objective of the Reagan Administration was to deter claimed Libyan terrorism against U.S. citizens and the hard fact remained that no such direct terrorism was credibly proven to exist either before or after the bombing attack.²³⁵

A State Department “Fact Sheet” entitled *Libya’s Qaddafi Continues Support for Terrorism* contains charges against Libya for the years 1986-1988.²³⁶ It states Qaddafi conducts terrorism against Libyan dissidents²³⁷ and that Libya’s foreign policy and diplomatic objectives are inconsistent with those of the United States.²³⁸ It includes a “Chronology of Libyan Support for Terrorism 1986-1988,” which details thirty incidents in which “Libyan involvement” was often stated to be “suspected” but without a single incident involving a direct Libyan attack on U.S. citizens, although several attacks conducted by others against U.S. citizens or interests are stated to be supported by Libya but without any evidence.²³⁹ Of the thirty incidents, four are listed as involving “Americans.” Concerning the bombing at the La Belle discotheque, the “Fact Sheet” states: “The U.S. Government announced it had direct evidence of Libyan complicity in the attack.”²⁴⁰ There can be no question but that this was “announced,” but the evidence of complicity is, on the most favorable view, equivocal. Of course, it is possible that there was secret evidence which cannot be considered in this analysis.²⁴¹

In summary, even if there had been clear legal authority to bomb Benghazi and Tripoli, and full acknowledgment is accorded to the tactical effort to engage only in “precision bombing,” the results achieved in the killing of civilians probably violate the law. The existence of ancillary civilian casualties which occur as a result of the lawful targeting of military objectives is not unlawful. The key issue concerns proportionality. On the basis of the information about the attacks on Benghazi and Tripoli, it is not possible to conclude with assurance that the customary law standard of avoiding excessive, that is, disproportionate, injury or death to civilians was met by the targeting.²⁴²

Authors’ Postscript Concerning Subsequent Possible Evidence of Libyan Involvement in the Bombing of LaBelle Discotheque

Since the completion of the text on this subject there have been some references in the media to possible Libyan involvement in the bombing. Most

of the reports indicate that some agents of the former East German secret police, "Stasi", state the existence of a Libyan connection. Among the examples are accounts in *Time* magazine of July 23, 1990 ("World Notes" at p. 54, cols. 1-2), the *Washington Post* of June 21, 1990 (p. A27, cols. 4-5 cont. at p. A30, col. 1) and the *New York Times* of July 15, 1990 (p. 6, cols. 1-6) and July 28, 1990 (p. A4, cols. 4-5).

Two facts must be established to provide legal justification for the military response by the Reagan Administration. The first is unequivocal evidence of significant Libyan involvement. The second is equally unequivocal evidence of knowledge of this before the decision to respond militarily was made. Since most of the reports emanate from the former Stasi, this would require that the Reagan Administration was privy to Stasi sources.

In the event that both were to be established, significant major issues concerning the law of self-defense and of targeting would remain.

VI. The Basic Principles of the Law of Naval Targeting

It is now practicable to set forth the contemporary rules of law concerning naval targeting based upon the development of the customary law in the World Wars and subsequently and upon the treaty law including the London Protocol (1936) and Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949). Because the law applies equally to surface and submarine warships and military aircraft, a single set of basic rules may be formulated. *The Commander's Handbook on the Law of Naval Operations* (NWP 9) adopts a different approach by setting forth separate targeting rules for "Surface Warfare,"²⁴³ "Submarine Warfare"²⁴⁴ and "Air Warfare at Sea."²⁴⁵ Although the rules are substantially similar, the separate treatment is apparently designed to indicate that different weapons platforms operate in distinct tactical environments.

The general principles of the law of armed conflict are, of course, applicable to naval targeting. In addition to the basic principles of military necessity and humanity conceived as a single principle of avoiding unnecessary destruction of human and material values,²⁴⁶ and the Martens Clause²⁴⁷ which specifies that when the situation is not covered by an existing rule the parties to the conflict remain bound by the customary international law and the usages established by the community of states, the following are applicable:

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.
2. It is prohibited to direct attacks against the civilian population as such.
3. The basic distinction between combatants and non-combatants must be made.²⁴⁸

A. Enemy Warships and Military Aircraft

Enemy warships and military aircraft (including naval and military auxiliaries) may lawfully be the objects of attack, destruction, or capture anywhere outside of neutral territory. Since such warships and aircraft are valuable military assets, their capture is always desirable if tactically possible. It is unlawful to refuse quarter to an enemy attempting to surrender in good faith.²⁴⁹ When an enemy warship has clearly indicated the intention to surrender by hauling down its flag or hoisting a white flag, or by stopping engines, or by responding to the attacker's directions, or by taking to lifeboats, or in any other manner, the attack must be stopped. In many tactical situations a submarine indicates surrender by coming to the surface. Manifestation of surrender by an aircraft is especially difficult. However, if a good faith offer to surrender is made, it must be accepted. One such manifestation would be a willingness to land the aircraft in the territory of the attacker. It is not necessary to formally adjudicate the transfer of title of a captured enemy warship or military aircraft since such ownership vests immediately in the captor's government by the act of capture.²⁵⁰

B. Enemy Merchant Vessels and Civilian Aircraft and Neutral Merchant Vessels and Civilian Aircraft which are Participating in the Enemy Armed Conflict Effort

Such merchant vessels and civilian aircraft are valuable assets and should be captured if possible whenever they are located outside of neutral territory. The use of visit and search is not required if identification of status can be made by electronic or other means. If the military situation following a capture prevents the sending or taking in of such a vessel or aircraft for adjudication, it may be destroyed after adequate measures are taken for the safety of crew and passengers.²⁵¹ All documents and papers relating to the captured vessels or aircraft should be safeguarded and each case of destruction should be reported promptly to higher command.²⁵² If capture is militarily impracticable, the vessel or aircraft may be attacked and destroyed if it falls under one of the following categories:²⁵³

1. Refusing to stop or follow directions upon being ordered to do so;
2. Actively resisting visit and search or capture;
3. Sailing under convoy of enemy warships or enemy military aircraft;
4. If incorporated into or assisting the intelligence system of the enemy armed forces;
5. If acting as a naval or military auxiliary to the enemy armed forces;
6. If participating in the enemy war effort.²⁵⁴

C. Certain Enemy and Neutral Merchant Vessels and Civil Aircraft Which are Immune from Attack

The characterization of particular merchant vessels and civil aircraft as

“enemy” does not, without more, make them lawful objects of attack. Neutral merchant vessels and civil aircraft comprise two distinct categories: those participating in and those not participating in the enemy war effort.²⁵⁵ The following categories of vessels and aircraft are immune from attack:

1. Enemy merchant vessels and civil aircraft which are not participating directly in the enemy armed conflict effort;

Example: Such a vessel or aircraft which is away from the main area of combat operations in a location where visit and search, electronic or other identification, or orders to land may be employed.

2. Neutral merchant vessels and civil aircraft which are not participating in the enemy armed conflict effort;

Example: A neutral merchant ship or civil aircraft engaged in genuine inter-neutral trade or the transportation of civilian passengers.

3. Vessels and aircraft designated for and engaged in the exchange of prisoners (cartel vessels);

4. Vessels and aircraft guaranteed safe conduct by agreement of the parties to the conflict;

5. Properly designated and marked hospital ships, medical transports, and medical aircraft;

6. Vessels and civil aircraft engaged in philanthropic or non-military scientific missions;

7. Small coastal fishing boats and small boats engaged in local coastal trade. Such boats are subject to reasonable order of the naval commander in control of the area as, for example, an order to depart from the immediate area of combat operations.²⁵⁶

D. Naval Bombardment

“Bombardment” is used here to refer to naval bombardment by surface or submarine warships or by naval or military aircraft of enemy targets on land. All contemporary methods of bombardment including gunfire, rockets, missiles, and bombs are included. Prior to the World Wars, bombardment of shore objects by naval gunfire was an incident of many armed conflicts. It was employed again in both World Wars, and from 1939 to 1945 naval gunfire was used as the spearhead of Allied amphibious operations. The basic rules of naval targeting considered above are also applicable here.²⁵⁷

The United States is a party to Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War (1907).²⁵⁸ Its article 1(1) provides: “The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.” Article 2 states that military objectives, even in undefended locations, are not immunized from naval bombardment. Although aviation was in a primitive stage of development

in 1907, this Hague Convention applies comprehensively to bombardment and therefore includes aerial bombardment. Of course, the customary law rule of proportionality, that incidental civilian casualties and damage must be limited to that which is proportional to the military advantage to be expected from the attack, is applicable to naval bombardment as it is to all armed conflict. Consequently, the deliberate or wanton destruction of areas of concentrated civilian habitation is prohibited.

The parties to a conflict may immunize particular demilitarized zones by specific agreement. Medical personnel and facilities are always immunized unless they are used in violation of law for military purposes. It is also well established customary law that buildings devoted to religious, cultural and charitable purposes are not lawful objects of attack.²⁵⁹ The following rules are based upon customary law and the established practices of the community of states, portions of which have been codified in treaties:

1. Bombardment for the purpose of terrorizing the civilian population is prohibited.

2. The wanton or deliberate destruction of areas of civilian habitation including cities, towns, villages, dwellings or buildings is prohibited.

3. A demilitarized zone agreed to by the parties to the conflict is exempt from bombardment.

4. Medical facilities including medical establishments and units, medical vehicles, equipment and stores may not be made the objects of bombardment. The distinctive medical emblem, either a red cross, a red crescent or the red lion and sun, should be clearly displayed in order to facilitate immunity. Any object identified otherwise as a medical facility is also immune from bombardment even if it is not marked with the protective symbol.

5. Hospital zones established by agreement of the parties to the conflict are immune.

6. All religious, cultural or charitable facilities or buildings are not lawful objects of bombardment.²⁶⁰ The distinctive emblem to protect such facilities or buildings is a rectangle divided diagonally into two triangular halves with the upper portion black and the lower portion white.²⁶¹ Any object identified otherwise as such a facility is also immune from bombardment even if it is not marked with the protective symbol.

7. It is prohibited to bomb installations which if destroyed would release forces harmful to the civilian population if the probable harm to civilians would be excessive in relation to the military advantage to be achieved by bombardment. Such installations include nuclear and other power plants as well as dams, dikes, and similar objects.²⁶²

8. Whenever the military situation permits, commanders are obligated to make every effort to warn the civilian population located in proximity to a military objective which is the target of bombardment. Warnings should

be specific, if possible, but a general warning is permissible if a more specific one would jeopardize the mission of the bombarding force.²⁶³

E. Enforcement of the Law

The law of targeting illustrates the practicality of the law of armed conflict, promoting military efficiency by designating military personnel and objects as lawful targets while minimizing unnecessary destruction of human and material values through prohibiting attacks on civilian persons and objects. The basic principles of the law of naval targeting have remained constant while being applied to changing technology including the development of submarines, aircraft and nuclear weapons. These principles apply to contemporary over-the-horizon weapons systems which must be employed so as to protect civilian persons and objects from disproportionate ancillary casualties and damage. A thoughtful naval historian has recently concluded that future armed conflict at sea will be conducted almost exclusively under water by diverse types of submarine warships.²⁶⁴

It is sometimes suggested that a law of armed conflict of ideal doctrinal content would emphasize the principle of humanity over considerations of military necessity. Such a law would break down in actual practice and would be much less effective in protecting human and material values than the existing law which takes account of the full range of legitimate military interests. A basic sanction of the law of armed conflict is the common self-interest of the participants that more is to be gained by adhering to the law than by violating it. There is also an important element of reciprocity and mutuality in observance.²⁶⁵ The alternative to enforcement of the law is not only the unnecessary destruction of human and material values in armed conflict, but a chaotic international system which requires the entire world community to live under the threat of impending nuclear disaster.

The United States has, throughout its history with few exceptions, been a leader in the development and enforcement of international law including the law of armed conflict. Because military necessity has been taken into account in formulating the legal rules such claimed necessity cannot be invoked as a device to repeal or modify them. It is not possible to ascertain a military advantage, much less a military necessity, in four of the examples considered in this study: the bombing of a submarine engaged in rescue operations, the killings following the Battle of the Bismarck Sea, the prohibition of North Korean coastal fishing, and the April 1986 bombing of Libya.

In spite of these instances, the United States Government, and the Navy, as well as the other Armed Services, continue to emphasize the importance of the entire law of armed conflict and the key enforcement role of line officers. The mandatory instructions requiring observance of the law, the manuals explaining the law, including the legally accurate and militarily

practical *Commander's Handbook on the Law of Naval Operations*,²⁶⁶ and the reliance on officers of the Judge Advocate General's Corps who are specialists in international law all facilitate the line officer's role.

Notes

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1. The widely accepted sources of international law are set forth in art. 38 of the Statute of the International Court of Justice. They also include "general principles," "judicial decisions" and the writings of the "most highly qualified" scholars.

2. 67 U.S. 635 (1862). The Court held that President Lincoln's blockade of Confederate ports applied to the reality of existing naval conflict and was valid without a declaration of war.

3. Common art. 2 of each of the Conventions: Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362; Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, 12 August 1949, 6 U.S.T. 3217, T.I.A.S. 3363; Convention III Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365. These Conventions will hereinafter be referred to as the 1949 Geneva Conventions.

4. Art 0605, *U.S. Navy Regulations* (1973).

5. See U.S. Department of Defense, Department of Defense Law of War Program, DOD Directive 5100.77 (Washington: 10 July 1979); U.S. Department of the Navy, Law of Armed Conflict Program to Ensure Compliance by the Naval Establishment, SECNAVINST 3300.1A (Washington: 2 May 1980); U.S. Office of Naval Operations, Law of Armed Conflict Program to Ensure Compliance by U.S. Navy and Naval Reserve, OPNAVINST 3300.52 (Washington: 18 March 1983); Headquarters, U.S. Marine Corps, Marine Corps Law of War Program, MCO 3300.3 (Washington: 2 August 1984). The Army and Air Force have analogous instructions.

6. 6 U.S. (2 Cranch) 170 (1804). Justice Clark relied on this case in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 at 660 (1952).

7. Act for the Government of the Navy, ch. 24, 1 Stat. 709, 711 (1799).

8. 10 U.S.C. 892 (1983).

9. *The Commander's Handbook on the Law of Naval Operations* (NWP 9), para. 8.1 (hereinafter *Commander's Handbook* or NWP 9).

10. Schindler & Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), p. 787 (hereinafter Schindler & Toman).

11. 36 Stat. 2277 (1909); Schindler & Toman, *supra* note 10, p. 63.

12. Schindler & Toman, *supra* note 10, p. 791.

13. *Id.*, p. 797.

14. 36 Stat. 2332 (1909); Schindler & Toman, *supra* note 10, p. 803.

15. 36 Stat. 2351 (1909); Schindler & Toman, *supra* note 10, p. 811.

16. 36 Stat. 2371 (1909); Schindler & Toman, *supra* note 10, p. 313. Based on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1906), Schindler & Toman, *supra* note 10, p. 301.

17. 36 Stat. 2396 (1909); Schindler & Toman, *supra* note 10, p. 819.

18. The "Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930" (known informally as the "Protocol of 1936") contains the identical rules set forth in the London Naval Treaty Part IV (art. 22). Art. 23 of the London Naval Treaty provided, "Part IV shall remain in force without limit of time." The rest of the Treaty expired on Dec. 31, 1936. In the Proces-Verbal the parties to the London Naval Treaty invited other states to agree to Part IV (art. 22). There are 49 state-parties including France, Germany, Italy, Japan, Soviet Union, United Kingdom, and the United States. Schindler & Toman, *supra* note 10, p. 883.

The London Naval Treaty Part IV (art. 22) is in 46 Stat. 2858 at 2881-82 (1931).

19. *Supra* note 3.

20. Hague Convention IV, *supra* note 11, Annexed Regulations, art. 23(e).
21. The historic law of naval warfare is considered in C. John Colombos, *The International Law of the Sea, passim*, 66th rev. ed. (New York: David McKay Co., 1967).
22. L. Oppenheim, *International Law: Vol. II, Disputes, War and Neutrality* 7th ed., Lauterpacht ed., (New York: Longmans Green, 1952), pp. 869-79.
23. See generally C. John Colombos, *A Treatise on the Law of Prize* 3rd ed. (New York: David McKay Co., 1949).
24. Schindler & Toman, *supra* note 10.
25. Several minor naval powers acceded to the Declaration, *id.* at pp. 789-80.
26. W. Thomas Mallison, Jr., *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars, U.S. Naval War College: International Law Studies-1966* (Washington: U.S. Govt. Print. Off., 1968), p. 133.
27. The textual paragraph is based upon *id.* at pp. 106-13.
28. See the text accompanying *infra* note 41.
29. See Gordon Campbell, *My Mystery Ships* (Garden City, N.Y.: Doubleday, Doran & Co., 1929); R. W. Smith, "The Q-Ship—Cause and Effect," *U.S. Naval Institute Proceedings*, May 1953, v. 79, p. 533.
30. The role of Admiral W. S. Sims in obtaining adoption of the convoy system is described in Elting E. Morison, *Admiral Sims and the Modern American Navy* (Cambridge: The Riverside Press, 1942), pp. 337-63.
31. Germany based its claim on reprisals rather than on legal right. Mallison, *supra* note 26 at pp. 61-74.
32. *Id.* at pp. 109-11.
33. Naval War College *International Law Documents: Conference on the Limitation of Armament-1921* (Washington: U.S. Govt. Print. Off., 1923), p. 49.
34. *Id.* at p. 53.
35. *Id.*, *passim*.
36. *Id.* at pp. 58, 61.
37. *Id.* at pp. 115-16.
38. *Id.* at p. 116.
39. Treaty for the Reduction and Limitation of Naval Armaments, 46 Stat. 2858 at 2881-82 (1930); Schindler & Toman, *supra* note 10 at p. 881.
40. Schindler & Toman, *supra* note 10 at 883. An analysis of article 22 following its adoption appears in "London Naval Treaty, Article 22, and Submarines," *Naval War College, International Law Situation—1930* (Washington: U.S. Govt. Print. Off., 1931), pp. 1-65.
41. "The Declaration of Paris in Modern War," *Law Quarterly Review*, April 1959, v. 55, p. 237 at p. 249.
42. C. B. A. Behrens, *Merchant Shipping and the Demands of War* (London: H. M. Stationery Office and Longmans Green, 1955), p. 96.
43. See S. W. Roskill, "Capros not Convoy: Counter-Attack and Destroy!" *U.S. Naval Institute Proceedings*, October 1956, p. 1042. CAPROS= Counter Attack Protection and Routing of Shipping.
44. On the liability of armed merchant ships to attack, see Edwin Borchard, "Armed Merchantmen," *American Journal of International Law*, January 1940, v. 34, p. 110.
45. Portions of the *Handbook* are reprinted in *Proceedings of the International Military Tribunal at Nuremberg* v. 40, p. 88 at p. 89 (42 vols., 1947-1949) (cited hereinafter as IMT).
46. See the text accompanying note 40. Article 74 of the Prize Code, which reproduces the 1936 Protocol, appears in Green Hackworth, *Digest of International Law*, (Washington: U.S. Govt. Print. Off., 1944) v. 7, ch. 23, p. 248.
47. This was stated by Fleet Judge Advocate Kranzbuhler in his argument in behalf of Admiral Doenitz, IMT, *supra* note 45, v. 18, pp. 312, 323.
48. Mallison, *supra* note 26 at pp. 75-84.
49. The text of the message is taken from a photographic copy of the original which was declassified on December 2, 1960.
50. Mallison, *supra* note 26, at pp. 121-22.
51. Robert W. Tucker, *The Law of War and Neutrality at Sea, Naval War College, International Law Studies-1955* (Washington: U.S. Govt. Print. Off., 1957), p. 64.
52. *Id.* at p. 66.
53. *Id.*
54. Mallison, *supra* note 26 at p. 121.
55. Report of the Committee of Jurists, *Proceedings of the London Naval Conference of 1930 and Supplementary Documents, State Department Conference Series No. 6* (Washington: U.S. Govt. Print. Off., 1931), Appx. 2, p. 189.

56. See Harvard Research in International Law, "Draft Convention on the Law of Treaties," *American Journal of International Law (Supplement)*, October 1935, v. 29, p. 653, 937; McDougal, Lasswell & Miller, *The Interpretation of Agreements and World Public Order, passim* (New Haven: Yale Univ. Press, 1967).
57. Schindler & Toman, *supra* note 10, at p. 884.
58. *Id.* at p. 885.
59. Mallison, *supra* note 26, at p. 120.
60. Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, July 29, 1899, 32 Stat. 1827 (1903), Schindler & Toman, *supra* note 10, p. 289.
61. Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, October 18, 1907, 36 Stat. 2371 (1909), Schindler & Toman, *supra* note 10, p. 313.
62. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, August 22, 1864, 22 Stat. 940 (1888), Schindler & Toman, *supra* note 10, p. 279.
63. Henri Dunant, a Swiss business man, was the principal founder of the International Committee of the Red Cross and urged the adoption of the 1864 Convention as the result of his seeing the tragic condition of the wounded soldiers following the Battle of Solferino in Italy. He was the author of *A Memoir of Solferino* (original French text 1862; American Red Cross English transl. 1939) which, along with the code of the law of land warfare prepared by Professor Francis Lieber of Columbia College and entitled *Instructions for the Government of Armies of the United States in the Field*, promulgated as General Order No. 100 by President Lincoln on 24 April 1863 (Schindler & Toman, *supra* note 10 at p. 3), had a great influence in the development of the international humanitarian law of armed conflict.
64. "Judgment in Case of Lieutenants Dithmur and Boldt," reprinted in *American Journal of International Law*, October 1922, v. 16, pp. 708-724.
65. See R. G. Voge, "Too Much Accuracy," *U.S. Naval Institute Proceedings*, March 1950, v. 76, p. 257.
66. *Id.*
67. The diplomatic interchange and other documentation is in "Sinking of the 'Awa Maru,'" *Naval War College International Law Documents 1944-45*, (Washington: U.S. Govt. Print. Off., 1946), pp. 126-38.
68. 175 U.S. 677 (1900).
69. *Supra* note 17.
70. IMT, *supra* note 45, v. 1, p. 311. In the case of Admiral Raeder, who was also charged with war crimes in connection with Germany's submarine campaign, the Tribunal made "the same finding on Raeder on this charge [war crimes—count three] as it did as to Doenitz. . . ." *Id.*, v. 1, p. 315 at p. 317.
71. *Id.*, v. 19, p. 469.
72. *Id.*, v. 1, pp. 312-13.
73. The draft treaty on submarines produced by the Washington Naval Conference (1921-1922) contained a provision for criminal trials for its violation, but it was not ratified. See the text accompanying *supra* note 38.
74. Behrens, *supra* note 42 and accompanying text.
75. S. W. Roskill, *White Ensign: The British Navy at War 1939-1945* (Annapolis: U.S. Naval Institute, 1960), p. 97.
76. "Case No. 55: Trial of Helmuth Van Ruchteschell," *Reports of Trials of War Criminals* (London: H. M. Stationery Office, 1949), v. 9, p. 82 (hereinafter *Trials of War Criminals*).
77. Text of Order is in "Case No. 54: Trial of Mochle," *Trials of War Criminals, supra* note 76, v. 9, p. 75.
78. Roskill, *supra* note 75 at p. 224.
79. *Id.*, at pp. 224-25.
80. 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).
81. IMT, *supra* note 45, v. 1, p. 313.
82. *Trials of War Criminals, supra* note 76, v. 9, p. 75.
83. *Id.*, v. 1, p. 1; also reported in David Maxwell Fyfe, general ed., *War Crimes Trials*, v. 1, John Cameron, ed., *Trial of Heinz Eck et al. (The Peleus Trial)* (London/Edinburgh/Glasgow: William Hodge & Co., Ltd., 1948), which contains the entire record of proceedings in the trial.
84. *Trials of War Criminals, supra* note 76, v. 1, p. 2.
85. *Id.*, at p. 13.
86. 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 page 1,072.
87. FEIMT Judg., *supra* note 86 at p. 1073.

88. *Id.*, at pp. 1,073-74.

89. The textual account of the sinking is based upon FEIMT Proc., pp. 15,095-148 and FEIMT Judg., pp. 1,074-75.

90. The factual account in the text is based upon Samuel Eliot Morison, *History of the United States Naval Operations in World War II*, v. 6 (*Breaking the Bismarck Barrier*) (Boston: Little, Brown & Co., 1950), pp. 62 et seq., and Ronald H. Spector, *Eagle Against the Sun: The American War with Japan* (New York: Free Press, 1985), pp. 226-28. Professor Spector served as the Director of Naval History, Department of the Navy, 1986-1989.

91. Morison, *supra* note 90, p. 62.

92. 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 90, p. 228.

93. *Id.*

94. Report of Justice Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, Document XLIV, Minutes of Conference session of July 23, 1945 *International Conference on Military Trials, London* (Washington: U.S. Govt. Print. Off., 1949), p. 330.

95. *Supra* note 16, art. 16(1).

96. 1949 Geneva Conventions, *supra* note 3.

97. Schindler & Toman, *supra* note 10 at p. 621. Protocol II is in *id.* at p. 689.

98. Information provided by the International Committee of the Red Cross concerning ratifications and accessions to the Additional Protocols of 8 June 1977, as of 8 August 1989. The I.C.R.C. Press Release of 8 August 1989 stated that the Soviet Union ratified both Protocols without reservations or statements of interpretation on 4 August 1989.

99. The U.S. Joint Chiefs of Staff unclassified memorandum of 18 March 1986 contains a listing of many Protocol I articles which they consider are now, or are becoming, customary law.

100. One of the arguments supporting the position of the Reagan Administration is Douglas J. Feith, "Law in the Service of Terror—The Strange Case of Additional Protocol I," *The National Interest*, v. 1, p. 36 (1985). It is answered decisively by the late COL Waldemar A. Solf, JAGC, U.S. Army [a senior member of the U.S. Delegation to the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts] in "A Response to Douglas J. Feith's Law in the Service of Terror—The Strange Case of the Additional Protocol," *Akron Law Review*, Fall 1986, v. 20, p. 261.

101. Schindler & Toman, *supra* note 10, p. 651.

102. Schindler & Toman, *supra* note 10, p. 495. Art. 33(3) provides: "Reprisals against protected persons and their property are prohibited."

103. The textual account of the Korean conflict is based upon Cagle & Manson, *The Sea War in Korea* (Annapolis: U.S. Naval Institute, 1957), *passim*.

104. *Supra* note 68.

105. Cagle & Manson, *supra* note 103, pp. 296-97.

106. *Id.*, p. 357.

107. *Supra* note 17.

108. The old battleships were the spearhead of the amphibious assaults and they used target area mapping combined with careful aerial observation (typically in slow OS2U seaplanes which were sitting ducks for Japanese fighter aircraft) in order to distinguish military targets from civilian persons and objects. See the reference to the accurate character of their targeting in Spector, *supra* note 90, p. 303. The new high speed battleships which joined the fleets immediately prior to and during World War II typically provided anti-aircraft protection to the fast carrier task forces.

109. Cagle & Manson, *supra* note 103, p. 97.

110. *Supra* note 15.

111. A more comprehensive analysis of the international law of self-defense is in W. Thomas Mallison & Sally V. Mallison, *Armed Conflict in Lebanon, 1982: Humanitarian Law in a Real World Setting*, Chap. 2 entitled "Aggression and Self-Defense in the World Legal Order," 2nd rev. ed. (Washington: American Educational Trust, 1985).

112. Report of Rapporteur of Committee 1/1 to Commission I, *U.N. Conference on International Organization*, Dept. of State Conference Series No. 83 (Washington: U.S. Govt. Print. Off., 1946), p. 498.

113. *Supra* note 111 at p. 16. The doctrine of anticipatory self-defense is examined in the Judgment, 1 IMT 205-09, and in Marjorie Whiteman, *Digest of International Law* (Washington: U.S. Govt. Print. Off., 1971), v. 12, pp. 47-51.

114. John Bassett Moore, *Digest of International Law* (Washington: U.S. Govt. Print. Off., 1906), v. 2, pp. 409-14.

115. Mr. Webster to Mr. Fox, April 24, 1841, *British & Foreign State Papers (1840-1841)*, v. 29, p. 1129 at p. 1138.

116. *Id.*

117. The textual account of the facts, as well as the legal analysis, is based upon W. Thomas Mallison, "Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law," *George Washington L. Rev.*, December 1962, v. 31, pp. 335-98 (reprinted as a booklet).

See Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston: Little Brown Co., 1971).

118. Robert D. Powers, Jr., "Blockade: For Winning Without Killing," *U.S. Naval Institute Proceedings*, August 1958, p. 61.

119. Proclamation No. 3504, 3 C.F.R. 232 (1959-1963), reprinted in 50 U.S.C.A. Appendix 1 at 15. Theodore Sorensen (Special Counsel to the President) also wrote a blockade draft. Allison, *supra* note 117 at p. 208.

120. "United States and Soviet Union Agree on Formula for Ending Cuban Crisis: Exchange of Messages," *Dept. of State Bulletin*, Nov. 12, 1962, v. 47, pp. 741-46.

121. Proclamation No. 3504, *supra* note 119.

122. *Id.*

123. R. K. Smith, "The Violation of the 'Liberty,'" *U.S. Naval Institute Proceedings*, June 1978, p. 65.

124. The textual account is based upon: James M. Ennes, *Assault on the Liberty*, 5th ed., (New York: Random House 1979), *passim*, and especially chapters 6 and 7. [LCDR Ennes, USN (Ret.) served in the *Liberty* at the time of that attack]; Stephen Green, *Taking Sides: American's Secret Relations with a Militant Israel* (New York: Morrow & Co., 1984), ch. 9, "Remember the Liberty . . ." [This source points out at page 230 that Israeli forces almost succeeded in jamming all of the *Liberty's* radio circuits.]; and record of Proceedings [U.S. Navy] Court of Inquiry to inquire into the circumstances surrounding the armed attack on USS LIBERTY (AGTR-5) on 8 June 1967 [This source states some of the same facts, in less detail, as those set forth in LCDR Ennes' book].

125. The very limited response of the U.S. Government to the attack is set forth in Ennes, *supra* note 124, chap. 9 entitled "Cover-up." Chap. 10 concerns the Navy Court of Inquiry. Commander, U.S. Sixth Fleet launched aircraft to protect the *Liberty* but they were immediately recalled by order of Secretary of Defense McNamara. *Id.*, Appendix D at pp. 237-38.

The Israeli response may be contrasted with the unequivocal Japanese acceptance of responsibility in the sinking in the Yangtze River of the gunboat U.S.S. *Panay* by Japanese aircraft. See the diplomatic correspondence in "The Case of the U.S.S. 'Panay,' December 12, 1937," Naval War College, *International Law Situations-1938* (Washington: U.S. Govt. Print. Off., 1940) pp. 129-50.

126. *Supra* note 3. Jacobson, "A Juridical Examination of Israeli Attack of the U.S.S. *Liberty*," *Naval Law Review*, Winter 1986, v. 36, p. 1, is an authoritative and comprehensive legal analysis of the attack.

127. The probable motive is that the communications messages arising from Israel's armed attack on Syria, following the attacks on Egypt and Jordan, could have been monitored and recorded by *Liberty* if its electronic listening equipment had not been destroyed. See Jacobson, *id.*, at pp. 16-17.

128. "Vietnam Decree on Sea Surveillance, of 27 April 1965," *International Legal Materials*, May 1965, v. 4, no. 3, p. 461.

129. The textual account is based upon R. L. Schreadley, "The Naval War in Vietnam, 1950-1970," *U.S. Naval Institute Proceedings*, May 1971, p. 188.

130. See Ulrik Luckow, "Victory Over Ignorance and Fear: The U.S. Minelaying Attack on North Vietnam," *Naval War College Review*, Jan-Feb 1982, p. 17. See also W. Thomas Mallison and Sally V. Mallison, "A Survey of the International Law of Blockade," *U.S. Naval Institute Proceedings*, February 1976, p. 44, at pp. 50-51.

131. Declaration Respecting Maritime Law, Paris, April 16, 1856, Schindler & Toman, *supra* note 10, p. 787.

132. See Air War Study Group of Cornell University, *The Air War in Indochina*, rev. ed. (Boston: Beacon Press, 1971), *passim*.

133. It may be contrasted with the use of mines against Japan in the Second World War. See Johnson & Kratcher, *Mines Against Japan* (U.S. Naval Ordnance Laboratory, 1973), *passim*.

134. The U.S. Navy gunfire operation against North Vietnamese land targets and vessels was termed Operation Sea Dragon. See generally Schreadley, "The Naval War in Vietnam, 1950-1970," *U.S. Naval Institute Proceedings*, May 1971, p. 188.

135. See the text accompanying *supra* notes 108-110.

136. The textual account is based upon Robert L. Scheina, "The Malvinas Campaign," *U.S. Naval Institute Proceedings*, May 1983, p. 98, and John Nott [British Minister of Defense at the time of the conflict], "The Falklands Campaign," *id.* at p. 118.

Security Council resolution 502 (3 April 1982) called for a cessation of hostilities and Argentine withdrawal from the islands to reestablish the prior status quo.

137. The Argentine Antarctic supply ship *Bahia Paraiso* was converted into a hospital ship and was not made an object of attack. Scheina, *supra* note 136 at p. 98.

138. Nott, *supra* note 136 at p. 130.

139. Ex-U.S.S. *Phoenix* (CL-46).

140. Nott, *supra* note 136 at p. 121.

141. See Scheina, *supra* note 136 at p. 106; Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare," *Canadian Yearbook of International Law-1986*, v. 24, p. 91, contains a careful analysis of exclusion zones in the Falklands/Malvinas conflict at pp. 109-16.

142. The facts summarized in the text are based on the opinion of the U.S. Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989).

143. The decision of the U.S. Supreme Court, *id.*, employed a broad interpretation of the Foreign Sovereign Immunities Act, 28 U.S. Code 1330 *et seq.*, which resulted in the Argentine Republic having sovereign immunity from this suit and the holding that the Alien Tort Statute, 28 U.S. Code 1350 (a statute of the First Congress enacted in 1789), did not apply.

144. The facts set forth in the textual section are based on Ronald O'Rourke, "The Tanker War," *U.S. Naval Institute Proceedings*, May 1988, p. 30; and Raphael Danziger, "The Persian Gulf Tanker War," *id.*, May 1985, p. 160.

145. Address by CAPT J. A. Roach, JAGC, USN, "Missiles on Target: The Law of Targeting and the Tanker War" (20 April 1988), to be published in the 1988 *Proceedings of the American Society of International Law*. Fenrick, *supra* note 141 at pp. 116-22 analyzes the exclusion zones in this conflict.

146. The specific facts concerning this attack are based upon Michael Vlahos, "The Attack on the Stark," *U.S. Naval Institute Proceedings*, May 1988, p. 64.

147. Mallison, *supra* note 26 at pp. 129-32.

148. The facts in the textual paragraph are based on Danziger, *supra* note 144 at pp. 163-64.

149. *Id.* at p. 165.

150. See the text accompanying *supra* note 130.

151. O'Rourke, *supra* note 144 at pp. 32-33.

152. Wesley L. McDonald, "The Convoy Mission," *U.S. Naval Institute Proceedings*, May 1988, p. 36.

153. *Id.* at p. 37.

154. *Id.*

155. Interview with Captain Seitz, the Master of the *Bridgeton*, "SS Bridgeton: The First Convoy," *U.S. Naval Institute Proceedings*, May 1988, p. 52.

156. *Id.*

157. McDonald, *supra* note 152 at p. 43.

158. The facts in the textual paragraph are based on O'Rourke, *supra* note 144 at pp. 32-33.

159. "Libyan Sanctions," *Dept. of State Bulletin*, March 1986, v. 86, no. 2108, p. 36.

160. *Id.*

161. *Id.* at p. 12.

162. Executive Order No. 12543, 3 C.F.R. 181, reprinted in 50 U.S.C.A. 1701 and *Dept. of State Bulletin*, March 1986, p. 37.

163. *Dept. of State Bulletin*, March 1986, v. 86, no. 2108, p. 15.

164. *Id.* at p. 17.

165. "Libya Under Qadhafi: A Pattern of Aggression," *Dept. of State Special Report No. 138*, January 1986, p. 4.

166. Richard E. Rubenstein, *Alchemists of Revolution: Terrorism in the Modern World* 36 (New York: Basic Books, 1987). Contrast the political method in Benjamin Netanyahu, ed., *Terrorism: How the West Can Win* (New York: Farrar, Straus & Giroux, 1986).

167. *The Washington Post*, April 8, 1988 p. A1:3-6.

168. *Id.* *The New York Times*, Oct. 26, 1989, p. A8:1, reported that Qaddafi conceded past acts of terrorism.

169. Concerning the consistent violations by Israel of the Geneva Convention for the Protection of Civilian Persons (a treaty of both Israel and the United States) in its military occupations of Lebanese, Palestinian and Syrian territories, see *inter alia*, W. Thomas Mallison & Sally V. Mallison, *the Palestine Problem in International Law and World Order* (London: Longmans, 1986), chaps. 6 and 7.

170. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, art. 7(4)(5), 15 U.S.T. 1606, T.I.A.S. No. 5639.

171. See, e.g., [1974] *Digest of U.S. Practice in International Law*, p. 293 (1975).

172. See, *inter alia*, George C. Wilson, "U.S. Planes Retaliate for Libyan Attack: Missile Site, Two Patrol Boats Fired on in Gulf of Sidra Incident," *The Washington Post*, March 25, 1986, pp. 1A:1-5, 13A:1-3; Bernard

Weinraub, "2 More Libyan Vessels Sunk and Base Hit Again, U.S. Says, Vowing to Keep up Patrols," *New York Times*, March 26, 1986, pp. A1:4-6, A8:1-4.

173. David Hoffman and Lou Cannon, "Terrorism Provided Catalyst," *The Washington Post*, p. A12:1.

174. "U.S. Exercises Right of Self-Defense Against Libyan Terrorism," *Dept. of State Bulletin*, June 1986, v. 88, p. 1.

175. *Id.* at pp. 1-2. Ambassador Walters, the Permanent Representative of the United States, substantially repeated President Reagan's position in the U.N. Security Council on April 15, 1986, S/PV.2674, at pp. 13-19.

176. Seymour M. Hersh, "Target Qaddafi," *New York Times Magazine*, Feb. 22, 1987, p. 17 at p. 19.

177. Translation of *Der Spiegel*, April 21, 1986, p. 17.

178. Hersh, *supra* note 176. Following the April 1986 attack on Libya, subsequent reports in the media referred to the "disinformation" campaign. See, e.g., Bob Woodward, "Gadafi Target of Secret U.S. Deception Plan: Elaborate Campaign Included Disinformation That Appeared as Fact in American Media," *The Washington Post*, Oct. 2, 1986, pp. A1:1-5, A12:1-5, A13:1-2. Admiral William J. Crowe, Jr., Chairman of the Joint Chiefs of Staff, expressed concern about the disinformation. *Id.* See also Leslie Gelb, "Administration is Accused of Deceiving Press on Libya," *New York Times*, Oct. 3, 1986, pp. A1-1, A6:1.

179. *Supra* note 165 at p. 1.

180. *Id.*

181. *Id.* at pp. 5-8.

182. U.S. Department of State, *Fact Sheet: Libya's Qadhafi Continues Support for Terrorism*, January 1989.

183. *Id.* at p. 6.

184. *Id.* at p. 7.

185. *Id.* at pp. 12-19.

186. *Public Report of the Vice President's Task Force on Combatting Terrorism*, February 1986, p. 5.

187. *Id.* at p. 6.

188. *Id.* at p. 14.

189. 50 U.S. Code 1701-1706 (1981, with 1986 Supp.). The Libyan Sanctions Regulations are in 51 Fed. Reg. 1,354 (1986) as amended by 51 *id.* 22,802 (1986) codified in 31 C.F.R. 550.207.

190. European Community News, No. 14/1986, April 14, 1986, (distributed by European Community Information Service, Washington, D.C.).

191. *Bulletin of the European Communities Commission*, vol. 19, no. 5, pp. 106-110 (1986).

192. *Id.* at p. 109.

193. R. W. Apple, Jr., "Reagan Wins the Day as Libya is Denounced," *New York Times*, May 6, 1986, p. A12:1-4.

194. *Id.*

195. *Id.*

196. Bernard Weinraub, "U.S. Says Allies Asked for More in Libya Attack," *New York Times*, April 22, 1986, pp. A1:7, A8:1-3.

197. *The Washington Post*, April 2, 1986, pp. A1:6, A17:1-4.

198. See the text accompanying *supra* notes 111-113.

199. David H. Ottaway, "Qaddafi Overtures Rejected by U.S.," *The Washington Post*, April 2, 1986, pp. A1:5, A17:5-6.

200. *Id.*

201. See the President's statement in the text accompanying *supra* note 175.

202. See the text accompanying *supra* notes 114-116.

203. Marjorie Whiteman, *Digest of International Law* (Washington: U.S. Govt. Print. Off., 1971), v. 12, chap. 36, pp. 187-204; L. Oppenheim, *International Law, Vol. I, Peace*, 8th ed., H. Lauterpacht, ed. (New York: David McKay, 1955), pp. 687-90.

204. See the text accompanying *supra* note 175.

205. Contrast the imminence of attack in the *Caroline* incident in the text accompanying *supra* notes 114-116.

206. *The Washington Post*, March 26, 1986, pp. A1:5, A22:1.

207. Leslie Stahl, Interview of Secretary Shultz, *Dept. of State Bulletin*, March 1986, p. 20.

208. *Id.* at pp. 20-21.

209. *Id.* at p. 23.

210. "Part III: The Arms Sales to Iran," Report of the Congressional Committees Investigating the Iran-Contra Affair, H. R. Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess. (1987), pp. 157-234.

211. See Cordesman, "The Middle East and the Cost of the Politics of Force," *Middle East Journal*, Winter 1986, v. 40, pp. 13-15.

212. See the text accompanying *supra* note 162.

213. 10 U.S. Code 6011 (1989).

214. U.S. Navy Regulations, art. 0915 (2) and (3) (1973).
215. See, e.g., Guy B. Roberts, "Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals," *Case Western Reserve Journal of International Law*, Spring 1987, v. 19, p. 243; and Jeffrey A. McCredie, "The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?" *Id.*, p. 215. Both articles appear in a symposium concerning the April 1986 bombing of Libya, *id.*, pp. 121-293. The symposium also contains an incisive article by Professor Rex J. Zedalis concerning the basic values involved in the doctrines of anticipatory self-defense entitled, "Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense," *id.* at p. 129.
216. *Naulilaa Incident Arbitration*, Portuguese-German Arbitral Tribunal, 1928, Rec. des decis, des trib. arb. mixtes, v. 8, p. 409, reprinted in William W. Bishop, Jr., *International Law: Cases and Materials* (Boston: Little, Brown & Co., 1971), 3rd ed., p. 903.
217. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *supra* note 3, art. 33.
218. This factual account is derived from "U.S. Demonstrates Advanced Weapons Technology in Libya," *Aviation Week & Space Technology*, April 21, 1986, pp. 19-20; Russell Watson, "Reagan's Raiders," *Newsweek*, April 28, 1986, pp. 26-27; George L. Church, "Hitting the Source," *Time*, April 28, 1986, p. 17.
219. Hersh, *supra* note 176 at pp. 17-19.
220. *Id.* at p. 22.
221. 46 C.F.R. 59952 (Dec. 4, 1981).
222. *Time*, *supra* note 218 at p. 20.
223. *Aviation Week*, *supra* note 218 at p. 19.
224. "Joint Press Conference with Secretary Schultz and Secretary Weinberger," *Dept. of State Bulletin*, June 1986, pp. 3-4.
225. *Id.* at p. 4.
226. *Qaddafi and the Libyan Revolution* (Boston: Little, Brown & Co., 1986).
227. *Id.* at pp. 10-11.
228. *Best Laid Plans: The Inside Story of America's War Against Terrorism* (New York: Harper & Row, 1988), pp. 310-11.
229. "U.S. Bombs, Missing Target, Struck Farms Near Base," *New York Times*, April 20, 1986, p. A12:5.
6. See, e.g., "A Raid that Went Awry," *U.S. News and World Report*, June 20, 1988, p. 36.
230. 67 U.S. 635 (1862).
231. *Supra* note 15. The Convention will be considered in detail in Section VI D *infra*.
232. See the text accompanying *supra* note 158.
233. The Libyan Government stated that there were 37 deaths and 93 wounded in civilian neighborhoods. Martin & Walcott, *supra* note 228 at p. 310. Western newspaper and book sources which have been referred to above indicate a substantial number of civilian casualties. Because of the military character of the targets set forth in the text accompanying *supra* note 218, it is presumed that there were a substantial, but unknown, number of military casualties as well who may or may not have been involved in terrorist support.
234. NWP 9, para. 8.1.2.1. A similar formulation of the customary law is in Geneva Protocol I. art. 51(5)(b), in the text accompanying *supra* note 101.
235. Concerning the allegations of attacks against U.S. citizens prior to the U.S. attack, see the text accompanying notes 160-162 and 179-181, *supra*, which refers to direct attacks upon Libyan dissidents and alleged support for other terrorism.
- See Warriner, "The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986," *Naval Law Review*, v. 37, p. 49 (1988), which concludes that the attack was lawful. A defect in the analysis is the ready acceptance that "intelligence reports indicated that it [the attack on La Belle discotheque] was planned and executed on the direct orders of the Libyan regime." *Id.* at p. 82. The article deems it "doubtful" that Libya "posed a threat to the security or political independence of the United States." *Id.* at p. 92.
236. Office of the Secretary of State, Ambassador-at-Large for Counter-Terrorism (Jan. 1989).
237. *Id.* at p. 5.
238. *Id.* at pp. 6-9.
239. *Id.* at pp. 12-19.
240. *Id.* at p. 19.
241. Admiral Stansfield Turner, USN (Ret.), has provided examples of excessive secrecy resulting in over-classification in *Secrecy and Democracy: The CIA in Transition* (Boston: Houghton Mifflin, 1985), *passim*.
242. Concerning issues of constitutional and statutory law relating to the April, 1986 attack on Libya, see *War Powers, Libya, and State-Sponsored Terrorism*, Hearings before the Sub-Committee on Arms Control, International Security and Science of the House of Representatives Committee on Foreign Affairs, 99th Cong., 2nd Sess. (April 29, May 1 and 15, 1986).

243. Par. 8.2.

244. Par. 8.3.

245. Par. 8.4.

246. Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale Univ. Press, 1961), p. 530.

247. The Martens Clause is named after the chief Russian delegate at the 1899 and 1907 Hague Conferences who inserted the clause into the Preambles of Hague Convention (II) with Respect to the Laws and Customs of War on Land (1899) and Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907).

Geneva Convention (II) Concerning Armed Forces at Sea, *supra* note 3, incorporates the Martens Clause in art. 62(4). It states that even in the event that a state-party terminates its adherence to the Convention (this cannot be done in time of armed conflict or military occupation and until the release and repatriation of persons protected by the Convention has been accomplished), "It [the termination] shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

248. The basic principles considered in the present Section VI are well stated in NWP 9, chapter 8, entitled "The Law of Naval Targeting."

249. The rules concerning surrender in the text are based upon the customary law and its codification in various treaties including those concerning naval warfare.

250. Oppenheim, *supra* note 22, at p. 475.

251. *Id.*, at pp. 487-88. See NWP 9, *supra* note 9, par. 8.2.2.2.

252. Oppenheim, *supra* note 22, at p. 488.

253. The traditional law concerning visit, search and capture is described in *supra* note 26 at pp. 99-100.

254. The categories in the text are similar to those in the predecessor to NWP 9, *Law of Naval Warfare*, NWIP 10-2, sec. 503 (1955) and in *The Commander's Handbook on the Law of Naval Operations*, NWP 9, par. 8.2.2.2 (1987).

255. See the text accompanying *supra* notes 72-74.

256. Compare the consideration of immune vessels and aircraft in Oppenheim, *supra* note 22 at pp. 476-81.

257. See the text at *supra* note 246.

258. *Supra* note 15.

259. See Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, U.N. Treaty Series, v. 249, pp. 240, Schindler & Toman, *supra* note 10, p. 745, which codifies some of the customary law.

260. See *id.*, art. 5(1).

261. See NWP 9, par. 8.5.1.6.

262. See Geneva Protocol I, *supra* note 97, art. 56.

263. Hague IX, *supra* note 15, art. 6.

264. John Keegan, *The Price of Admiralty: The Evolution of Naval Warfare* (New York: Viking, 1988), pp. 266-75.

265. See Mallison, *supra* note 26, at pp. 19-22.

266. See also Air Force Pamphlet 110-31, *International Law—The Conduct of the Armed Conflict and Air Operations* (1976) and Department of the Army Field Manual 27-10, *The Law of Land Warfare* (1956) (This manual is being updated and revised).