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

CLAIMS CONCERNING LAWFUL OBJECTS AND METHODS OF BELLIGERENT ATTACK

The claims and counterclaims which are appraised in the present chapter include those concerning the highly coercive or violent combat interactions between belligerents. The most general claim is to attack certain objects through the employment of particular methods or techniques of attack. The countering claim is that particular objects are legally immune and that particular methods are unlawful.

The basic legal principles of military necessity and humanity provide broad guidance in distinguishing between lawful and unlawful objects of attack. In general, military necessity permits the selection as targets of those objects which constitute the bases of the enemy belligerent's military power. The humanity principle, in comparable generalization, prohibits the selection of objects which are not effective bases of enemy military power. Combatants who become disabled or helpless, for example, should no longer be made objects of attack. In the same way, these principles are used to determine the particular coercive methods which may be employed lawfully against the enemy. The entire population of the enemy belligerent state constitutes an indispensable base of its power. It is usual, however, to divide the population between combatant members of the armed forces and civilian noncombatants. It is obvious that each of these categories has a different relationship to the enemy military power. Combatants may be made direct objects of attack consistent with the law and highly destructive methods may be employed lawfully against them. Noncombatants may not be attacked directly and it is not lawful to employ highly destructive methods against them. Professor Lauterpacht has stated the central point:

It is clear that admission of a right to resort to the creation of terror among the civilian population as being a legitimate object *per se* would inevitably mean the actual and formal end of the law of warfare. For that reason, so long as the assumption is allowed to subsist that there is a law of war, the prohibition of the weapon of

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1 The basic principles are considered in the text of Ch. I accompanying notes 75–83.
terror not incidental to lawful operations must be regarded as an absolute rule of law.\(^2\)

The conceptual distinction between combatants and noncombatants is clear enough. A real difficulty, however, is caused by the blurring in fact of the line between combatant and noncombatant which has taken place in the present century.\(^3\) The result is that in some coercive situations combatants and noncombatants are not distinguishable.\(^4\)

In addition to protecting noncombatants, a major objective of this branch of international law is to regulate the processes of coercion and violence in such a way as to permit and assist the transition from coercive to peaceful procedures. The detailed rules prescribing the limits on violence involve two basic assumptions.\(^5\) One is that widespread, wanton, and unnecessary destruction of values tends permanently to embitter relations between enemies so that the return to a constructive peace is either very difficult or impossible. The other is that a peace of extermination, such as that imposed by Rome upon Carthage, is not a legally permissible objective. If it were lawful, all other limitations would become meaningless.

In both World Wars, difficult legal issues were presented by the combat interactions between merchant ships and submarines. The present chapter emphasizes such combat interactions involving claims concerning objects and methods of attack. Claims concerning bombardment as a method of warfare, including strategic nuclear bombardment, may be considered more conveniently in Chapter V.

A. THE TRADITIONAL LAW CONCERNING OBJECTS AND METHODS OF ATTACK IN NAVAL WARFARE

Chief Justice Marshall commented in 1815: “In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed. . . .”\(^6\) In the era when privateering and piracy were widespread, it was the general practice to arm nonbelligerent merchant ships as well.\(^7\) Although the merchant vessel’s armament was designed for self-defense, this armament enabled it to present a danger to any vessel whether privateer, pirate or warship. In this factual context, warships were not under obligation to give unusual

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\(^{3}\) See Oppenheim-Lauterpacht 207–08.


\(^{5}\) See the similar formulation of basic assumptions in McDougal and Feliciano 43.

\(^{6}\) The Nereide, 9 Cranch 388, 426 (U.S. 1815).

\(^{7}\) Hyde 1990.
consideration to merchant ships which were themselves capable of initiating attack.

After the abandonment of privateering and the suppression of piracy, it became exceptional for a merchant ship to be armed. During the second half of the nineteenth century warships were greatly improved in both offensive armament and in defensive armor plating. These and other technical advances made the surface warship highly specialized for military purposes and a very different ship from the merchantman. As a result, merchant ships, even if armed, posed only a minor danger to such warships. This military weakness of the merchant ship in relation to the overwhelming military power of the surface warship afforded ample reason to establish the principle that the merchantman and its personnel were entitled to special protection and, in particular, could not be lawfully attacked without warning.

The custom developed in time of war whereby a belligerent warship, rather than attacking a merchant ship without warning, called upon it to surrender or to submit to the procedure of visit and search. The warship was legally justified in attacking only if the merchantman failed to stop, attempted to escape, or otherwise resisted. In view of the military superiority of the warship it was probably not entitled to use more force to compel the submission of the merchant ship than was reasonably required in the circumstances.

1. Methods: Visit, Search, and Capture

In the context just described, the capture of merchant ships rather than their destruction became the regular method employed by warships. In the same way, the procedures of visit and search were employed regularly to enable boarding officers to determine the existence of probable grounds for capture.

The following description of the procedures of visit, search, and capture was prepared by the Harvard Research in International Law. Although published in 1939, it reflects more accurately the principal procedural steps as developed in earlier times:

(1) In order to exercise the right of visit and search, a warship signals the vessel as by radio or by firing a blank charge. If such notice does not suffice, the warship may fire a projectile across the bows of the vessel. Before this or simultaneously, the warship shall hoist its flag, above which at night a light shall be placed. The
vessel shall reply to the signal by hoisting its flag and by stopping at once. Thereupon the warship sends to the vessel a boat manned by an officer and by unarmed men of whom not more than two shall accompany the officer on board the vessel. The boarding party may examine the ship’s papers and may interrogate persons on board. It may inspect the cargo but the cargo may not be broken open or removed. Postal correspondence may not be opened or removed.

(2) If the vessel when summoned does not stop, attempts to escape, or resists visit and search, it may be compelled to stop by force and the belligerent shall not be responsible for resulting injury to life or property.

(3) If the visit and search gives rise to a reasonable suspicion that the vessel or its cargo is subject to condemnation or preemption, the vessel may be captured and brought or sent into port for prize proceedings.\(^\text{13}\)

Paragraph (1) indicates the somewhat ceremonial character of visit and search. The requirement that the men in the boat be unarmed reflects the historical situation in which the warship possessed great military superiority over the merchant ship being visited. The requirement that each vessel hoist "its" flag was designed to outlaw the use of false flags as a ruse. Although the Harvard Research refers to radio, this means of communication did not exist during most of the time that visit and search was a viable naval procedure. At that time information was obtained by visit and search which could not be obtained or communicated in other ways.

It should be noticed that even under the traditional law, as indicated by paragraph (2) above, the warship is entitled to use force where the merchant vessel offers resistance. In extreme cases, this included sinking the merchant vessel where the resistance could not be overcome otherwise.

The rights of visit, search, and capture belonged only to the duly commissioned warships of belligerent states.\(^\text{14}\) They were directed at merchant ships, whether belligerent or neutral, and could be exercised anywhere on the high seas or in belligerent territorial waters but not in neutral territorial waters.\(^\text{15}\) The central purpose was to ascertain the relevant facts concerning the merchant ship including its enemy or neutral status and the origin, destination, and character of the vessel and its cargo.\(^\text{16}\) It at least a prima facie case for capture was made out as a result of the visit and search, the warship then had legal authority to make the capture

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\(^{14}\) Stone 591; Oppenheim-Lauterpacht 848–49, 861–63.

\(^{15}\) Oppenheim-Lauterpacht 849.

\(^{16}\) Id. at 848; Tucker 332.
even though the prize court might later release the merchant ship in the light of further evidence subsequently developed in the case.\textsuperscript{17} The right of visit and search was ancillary to the right of capture rather than being independent.\textsuperscript{18} Thus, if there was reliable evidence, extrinsic to the merchant vessel itself, indicating its liability to capture, it could be lawfully captured without visit and search.\textsuperscript{19}

2. Objects: Enemy Ships and Goods

Under the traditional law as in the modern law, warships are subject to capture or destruction. It is, of course, lawful to attack warships without warning. Where an enemy public vessel is captured its title is immediately transferred to the captor state and prize proceedings are not necessary.\textsuperscript{20}

There is a basic distinction in international law between the treatment of enemy property on land and the treatment of enemy property at sea. The law of land warfare makes a fundamental distinction between public and private property. The general rule is that private property on land is immune from capture by the enemy, with some exceptions based upon urgent military necessity. The law of naval warfare does not provide immunity for enemy private property (ships and cargoes) at sea. The reason for this differential treatment is not difficult to ascertain. In land warfare, the military occupation of enemy territory prevents the enemy belligerent state from exercising control over the property and using it for war purposes.\textsuperscript{22} In these circumstances no substantial military interest is frustrated by leaving private property with its private owner. In naval warfare, however, it is necessary to obtain control of enemy private property through capture or destruction in order to prevent its possible use in behalf of the enemy’s war effort. Even where the enemy state does not control the transactions of its private traders, it is recognized that the net result of the transactions is to strengthen the enemy war effort. Enemy private property, consequently, has always been a lawful object of appropriation or destruction in naval warfare except for certain immunities.\textsuperscript{23}

The traditional law required that enemy private ships which were captured must be brought to port and subjected to prize proceedings to determine on the evidence before the Court whether they were actually enemy

\textsuperscript{17} Hyde 2024.
\textsuperscript{18} Id. at 1958.
\textsuperscript{19} Id. at 1958–59.
\textsuperscript{20} Oppenheim-Lauterpacht 475.
\textsuperscript{21} Art. 46 of the Regulations Annexed to Hague Convention IV Respecting the Laws and Customs of War on Land (1907) provides in relevant part: “Private property cannot be confiscated.”
\textsuperscript{22} See generally McDougal & Feliciano 809–24.
\textsuperscript{23} Tucker 74–75; Oppenheim-Lauterpacht 465.
ships and so subject to capture.\textsuperscript{24} In exceptional circumstances it was legally permissible to destroy an enemy merchant ship after capture if the personnel and ship's papers were removed to a place of safety.\textsuperscript{25} When this was done the Prize Court must be subsequently satisfied that both the capture and the destruction were legally justified.\textsuperscript{26} Otherwise, the capturing state was liable in damages to the enemy owner.

A belligerent was traditionally entitled to capture enemy private goods carried under a neutral flag.\textsuperscript{27} The British adhered to this view in the face of opposition from other states which argued for the principle of "free ships, free goods." \textsuperscript{28} France, in opposition to Great Britain and other states, claimed the right to capture neutral goods on enemy vessels.\textsuperscript{29}

The British and the French were allied against Russia during the Crimean War. As a wartime expedient they agreed that Great Britain would not seize enemy goods on neutral vessels and that France would not appropriate neutral goods on enemy vessels.\textsuperscript{30} Both agreed that they would not employ privateers.\textsuperscript{31} After the termination of the war the principal maritime powers agreed to the Declaration of Paris (1856) which provided:

1. Privateering is, and remains abolished;
2. The neutral flag covers enemy's goods, with the exception of contraband of war;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;
4. Blockades, in order to be binding, must be effective: that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.\textsuperscript{32}

The Declaration of Paris did not purport to change the old rule that private enemy ships and private enemy goods on them could be captured.\textsuperscript{33} The British had agreed to give up the right to seize enemy goods under the neutral flag in return for the French agreement to refrain from capture of neutral goods on enemy vessels. The agreement to abolish privateering was regarded as highly significant but in reality was less so since privateering was already technologically obsolescent in view of the

\textsuperscript{24} Oppenheim-Lauterpacht 482-86.
\textsuperscript{25} \textit{Id.} at 487-88.
\textsuperscript{26} \textit{Id.} at 488.
\textsuperscript{27} Smith 158; Oppenheim-Lauterpacht 459.
\textsuperscript{28} Smith 159.
\textsuperscript{29} \textit{Ibid.}
\textsuperscript{30} \textit{Id.} at 160; Oppenheim-Lauterpacht 460.
\textsuperscript{31} Smith 160.
\textsuperscript{32} The text of the Declaration appears in 1 Savage, \textit{Policy of the United States Toward Maritime Commerce in War} 381, n.2 (Dept. of State, 1934).
\textsuperscript{33} Oppenheim-Lauterpacht 462.
increasing specialization of warships. Since a principal purpose of the Declaration was to protect private property, it is probable that the enemy goods referred to in the second article did not include state-owned enemy goods. The rule embodied in this article was substantially frustrated a few years later in the American Civil War by the development of the doctrine of continuous voyage. This doctrine was used to look beyond the stated or nominal destination of goods to ascertain whether or not their ultimate destination was the enemy. The Declaration was abandoned by both sides in the early part of the First World War.

3. Objects: Neutral Ships and Goods

The traditional law subjected neutral ships and goods to capture only where specific rights of the capturing belligerent had been violated. The grounds for the capture of neutral ships included breach of blockade, resistance to visit and search, carriage of contraband, and some other types of assistance to the enemy belligerent which were characterized as "uneutral service." In order to justify capture of a neutral merchant ship for breach of the traditional close-in blockade it was necessary to meet certain requirements including proper notification of the blockade to neutrals. In order to impose liability to capture for carriage of contraband, notification to neutrals of the contraband list was required. The threefold classification of free goods, conditional contraband, and absolute contraband was employed to determine the military value of the goods to the enemy. "Unneutral service" included both the transportation of persons on behalf of the enemy and the transmission of intelligence to the enemy. These situations were regarded as roughly analogous to carrying contraband and resulted in subjecting the merchant vessel involved to treatment similar to that for carrying contraband. Another type of unneutral service arose when the neutral merchant vessel took a direct part in the hostilities or acted under the direct orders of an agent of the enemy government such as sailing in a convoy protected by enemy warships or transporting enemy troops. In such situations the status of the neutral merchant vessel was assimilated to that of an enemy one and it would thus be exposed to capture and condemnation in prize as if it were an enemy.

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34 See the commentary in Oppenheim-Lauterpacht 461, n. 1; Smith, "The Declaration of Paris in Modern War," 55 L.Q. Rev. 237, 238-42 (1939).
35 Oppenheim-Lauterpacht 461; Savage, op. cit. supra note 32 at 117-18.
36 Smith 163.
37 Oppenheim-Lauterpacht 861.
38 See generally Smith 127-28.
39 See generally O p p e n h e i m -L a u t e r p a c h t 799-808.
40 See Oppenheim-Lauterpacht 833-38.
41 Id. at 839-40.
There were significant legal differences between the capture of enemy and neutral merchant vessels.\(^42\) Enemy merchant vessels were subject to capture generally for the purpose of appropriating them and their cargo pursuant to the right of a belligerent to capture and appropriate enemy private property at sea. The capture itself was a provisional appropriation and it was subject to confirmation through the prize court proceedings. The neutral merchant vessel could be lawfully captured and condemned only where it had violated specific rights of the belligerent.

The unratified Declaration of London (1909)\(^43\) represented an attempt to provide an international codification of the traditional law. Among other detailed provisions, it contained a list of free goods\(^44\) which were "not susceptible of use in war" and which belligerents were prohibited from treating as either absolute or conditional contraband.\(^45\) Mr. Arnold-Foster has commented critically upon this aspect of the Declaration:

It put iron ore on the free list, so that all such ore would be free to pass straight through a British blockade to Krupps' munition works at Essen. Yet the foundation of modern war potential is steel: a nation's capacity to produce steel is one of the surest measures of its military strength.

Rubber for motor tyres was on the free list, although, as was soon found in the war of 1914, much of the mobility of modern armies depends on motor transport. The Declaration authorized seizure of guns and shells, but not the metals for making them: explosives might be seized but not cotton or nitrates.\(^46\)

At the beginning of the First World War the United States invited the belligerents to adhere to the Declaration.\(^47\) Germany and Austria-Hungary agreed to do so conditioned upon Allied agreement which was not forthcoming.\(^48\) Thereafter, the Declaration was swept away by the reprisal orders of the British and the actual economic warfare practices of the Germans.

In summary, the traditional law concerning objects and methods of attack was based upon certain factual conditions which actually existed

\(^{42}\) Id. at 862. See generally Colombos, A Treatise on the Law of Prize (3rd ed. 1949); Garner, Prize Law During the World War (1927).

\(^{43}\) The text of the Declaration appears in 2 Savage, Policy of the United States Toward Maritime Commerce in War 163 (Dept. of State, 1936).

The U.S. Naval War Code (1900) was an earlier codification which was withdrawn in 1904. It was prepared by Admiral Stockton (President of the U.S. Naval War College and later President of The George Washington University). See U.S. Naval War College, International Law Discussions 1903 101 (1904).

\(^{44}\) Art. 28.

\(^{45}\) Art. 27.


\(^{47}\) Savage, op. cit. supra note 43 at 1.

\(^{48}\) Ibid.
in the second half of the nineteenth century. The merchant vessel's immunity from attack without warning was based on its military impotence in relation to the warship. Merchant vessels were not only privately owned but were also privately controlled. Specifically, the private owner, whether in peacetime or in wartime, determined the voyage and the cargo. It is clear that these factual conditions only concerned surface vessels since submarines were not demonstrated to be effective naval units until 1914 and 1915. It is probable that the Declaration of London was obsolete in 1908 and 1909 when it was written. It was demonstrated to be obsolete beyond any reasonable doubt in the first half of the First World War.\textsuperscript{49} During the same time, the international law of prize became increasingly obsolescent.\textsuperscript{50}

**B. CLAIMS CONCERNING OBJECTS AND METHODS OF ATTACK IN GENERAL WAR**

In Chapter III some consideration was given to the objects and methods of belligerent attack which were closely related to submarine operational areas. It was there concluded that visit and search at sea was a hazardous undertaking for surface warships as well as for submarines in modern conditions of general war at sea.\textsuperscript{51} It was also concluded that the utilization of Q-ships as an antisubmarine measure made it even more hazardous for submarines to undertake the traditional procedure of visit and search.\textsuperscript{52} It will be recalled that Q-ships appeared to be innocent merchantmen but were in reality heavily armed warships.

**1. Capture or Destruction of Enemy Warships**

Only belligerent warships are legally empowered to make an attack upon warships of the enemy belligerent.\textsuperscript{53} Since submarine warships have the same status as lawful combatant units possessed by surface warships they are similarly empowered to attack the warships of the enemy belligerent. One of the tactical functions of attack submarines is to attack enemy submarines.\textsuperscript{54} The same basic legal doctrines apply to such naval engagements as to those between surface warships.

\textsuperscript{49} "From July 7, 1916, the Declaration was no longer applied, even in part." Oppenheim-Lauterpacht 634.

\textsuperscript{50} Oppenheim-Lauterpacht 877.

It would not therefore, it is believed, be consistent with the function of an impartial science of International Law to maintain that there exists at present a working body of generally agreed rules of prize law, in particular in its bearing upon the rights and duties of neutrals.

*Id.* at 877–78.

\textsuperscript{51} See the text of Ch. III accompanying note 21.

\textsuperscript{52} See the text of Ch. III accompanying notes 56, 57.

\textsuperscript{53} Oppenheim-Lauterpacht 467.

All enemy warships including naval auxiliaries, whether armed or un­armed, are lawful objects of attack without warning and without regard to whether the attack takes place in a submarine operational area or elsewhere. Attack upon enemy warships may be made anywhere on the high seas or in the territorial waters of any belligerent state but not in neutral territorial waters.

During both World Wars warships were expensive and valuable vessels and their capture by the opposing belligerent would be militarily desirable. As a practical matter, however, there were relatively few instances of capture of warships. Among these instances, a small number of submarines were captured. In spite of the desirability of capture, the naval technology during the World Wars and particularly the long-range effectiveness of both gunfire and torpedoes made the destruction of enemy warships the normal attack objective.

2. Capture or Destruction of Enemy Merchant Ships

An enemy merchant ship, as well as its cargo, represents considerable economic value. Consequently, the interests of a belligerent would be most obviously served by capturing such a ship and having it and its cargo condemned by the prize court. Although this is a lawful procedure and there may still be rare occasions where it can be employed, it is clear that capture was a highly unusual situation in both World Wars.

a. WORLD WAR I

In 1913 the British Admiralty announced the arming of a number of merchant vessels. The measure was stated to be a response to the danger presented by foreign powers which claimed the right to convert merchant ships into warships either in port or on the high seas. The announcement stressed that the British merchant vessels which were to be armed would retain their status as private merchantmen since they were armed for defensive purposes only. It was also emphasized that their status would be entirely different from that of the British armed merchant cruisers which would be commissioned as regular warships in the event of war. Thus, the United Kingdom at the beginning of the First World War had a number of merchant ships which were stated to be armed

56 Submarine captures are described in Potter & Nimitz 562; Roskill 58–59; Roskill, The Secret Capture (1959); United Kingdom Central Office of Information, The Battle of the Atlantic 33 (1946).
against other dangers but which, in the actual event, could use their arms against submarines.\textsuperscript{59}

It has been stated previously that the principal objects of attack of German submarines at the beginning of the war were enemy warships and that the submarines were later redirected against enemy merchant vessels. In the early part of the war German submarines made at least some attempt to comply with the traditional procedures of visit and search. The arming of British merchant ships and the use of the arms against German submarines, along with other antisubmarine activities, did not facilitate this attempt. It soon became apparent that even a British armed merchant ship sailing alone presented a very real military danger to German submarines which attempted to comply with the traditional law. The predictable result of the new situation was that considerations of military necessity, as well as simple self-preservation, led to the submarines remaining submerged and making torpedo attacks without warning. The best-known case involving sinking without warning was the \textit{Lusitania} which has been referred to earlier.\textsuperscript{60} The only realistic alternative to this submarine tactic was to abandon effective use of the submarine. In this situation the British argued the inhumanity, and consequent illegality, of submarine attacks without warning on merchant vessels. While this had considerable impact as propaganda, it did not have a corresponding influence upon the actual conduct of naval warfare. After the convoying of merchant ships was adopted by the Allies during the First World War\textsuperscript{61} it was difficult enough for a German submarine to avoid the naval escorts and make a successful attack without warning upon Allied merchant ships in a convoy. As a practical matter, it was impossible for submarines to capture convoyed ships. In both World Wars, Allied sea power drove German merchant ships from the high seas in a very short time.\textsuperscript{62} When the capture of a German merchant ship was attempted, the practice of attempting scuttling to avoid capture was usually employed.\textsuperscript{63}

\textsuperscript{59} McDougal & Feliciano 563 state that the “defensive” arming of merchant ships represents a revival of “an ancient usage that had disappeared with the abolition of privateering and the development of modern naval forces.” (footnote omitted)

\textsuperscript{60} See the text of Ch. III accompanying notes 39–42.

The sinking of the \textit{Sussex} on March 24, 1916 was also an important case. The principal United States note on this case is in [1916] \textit{Foreign Rel. U.S. Supp.} 232 (1929). See also Buehrig 48–55.

\textsuperscript{61} Convoy was not adopted until mid-1917. Potter & Nimitz 466–70; 3 Fayle, \textit{Seaborne Trade: The Period of Unrestricted Submarine Warfare} 128–47 (1924).

The role of Admiral Sims, the Commander of U.S. Naval Forces in European Waters, in obtaining adoption of the convoy is described in Morison, \textit{Admiral Sims and the Modern American Navy} 337–63 (1942).

\textsuperscript{62} Roskill 36.

\textsuperscript{63} See e.g. the attempted scuttling of the German blockade runner \textit{Odenwald} on Nov. 6, 1941 described in Karig, \textit{Battle Report: The Atlantic War} 148 (1946).
The result of this, as stated previously, was that the Declarations of Paris and London were no longer susceptible of application in the new factual context. Professor H. A. Smith has provided apt summary concerning the Declaration of Paris, after indicating that it must be interpreted "in the light of the political and economic structure of the mid-nineteenth century":

If we are again confronted with the facts for which the Declaration laid down the law, then that law must be applied to those facts. That is to say, if we can discover a genuine enemy private merchant carrying on his own trade in his own way for his own profit, then we must admit that his non-contraband goods carried in neutral ships are immune from capture at sea. Under the conditions of the modern socialistic world such a person is not easily to be found. In the books of the last generation he was commonly called the 'innocent merchant', and the disappearance of this phrase from the literature of our day has its own significance. To-day he has become a disciplined individual mobilised in the vast military organization of the totalitarian State. It would be a defiance both of the letter and the spirit of the Declaration of Paris to bring within its protection the mobilised forces of the enemy.64

In its role as the honest neutral broker between the naval belligerents the United States sought a modus vivendi which would be acceptable to both the United Kingdom and Germany.65 On January 18, 1916 Secretary of State Lansing made a proposal to the British Government which was designed to "bring submarine warfare within the general rules of international law and the principles of humanity without destroying its efficiency in the destruction of commerce . . . ." 66 If the British accepted he would then press it upon the Germans. Its central part stated:

[S]ubmarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and passengers to places of safety before sinking the vessels as prizes of war; and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever.67

Among the propositions upon which the note was stated to be based were these two:

A merchant vessel of enemy nationality should not be attacked without being ordered to stop.

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65 See Buehrig 40–44.
67 Id. at 147–48.
An enemy merchant vessel, when ordered to do so by a belligerent submarine, should immediately stop.\(^{68}\)

In concluding the note Secretary Lansing observed:

I should add that my Government is impressed with the reasonableness of the argument that a merchant vessel carrying an armament of any sort, in view of the character of submarine warfare and the defensive weakness of undersea craft, should be held to be an auxiliary cruiser and so treated by a neutral as well as by a belligerent government, and is seriously considering instructing its officials accordingly.\(^{69}\)

The proposal appeared to be a compromise which would exact concessions from each side while providing some recompense. The Allies were to be required to disarm their merchant ships and to cooperate with submarines attempting to exercise visit and search. Since the traditional law permitted capture, Germany would be legally entitled to capture Allied merchantmen. In return, the merchant ships of the Allies were not to be subjected to attack without warning. Further, it was possible that the United States would treat a merchant vessel with any kind of armament as "an auxiliary cruiser," that is, a warship.

Certain practical considerations, however, made the concessions to Germany more apparent than real. German submarines could not carry prize crews to place aboard captured merchantmen. In addition, with Allied supremacy on the surface of the seas, such a captured merchantman would shortly be recaptured or sunk by Allied naval forces. Germany could not sink the merchant vessels as prizes unless the ship's boats were to be considered a place of safety.\(^{70}\) It is difficult to envision any situation other than calm weather and close proximity to land where the lifeboats actually would be such a place of safety. In view of these factors, it is doubtful that Germany could have accepted the proposal even if the Allies had done so. There was, however, no disposition on the part of either the United Kingdom or France to agree to it. The United States Ambassador in London reported that the proposal was regarded there as wholly in favor of Germany\(^ {71}\) and that if the United States persisted in advancing it this action would be viewed as "unfriendly interference."\(^ {72}\) Secretary Lansing had invoked humanity in presenting the proposal, but it was not realistic to expect the belligerents to give humanity priority over considerations of military efficiency.

One result of the United States proposal was that it gave Germany an

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\(^{68}\) Id. at 147.

\(^{69}\) Id. at 148.

\(^{70}\) Prof. G. G. Wilson has emphasized that safety refers not to the same comforts enjoyed before destruction of the vessel but to "the same absence of risk to life." "The Submarine and Place of Safety," 35 A.J.I.L. 496, 497 (1941).


\(^{72}\) Id. at 152, 153.
opportunity to reevaluate its position on armed merchant vessels. Germany had captured a set of British Admiralty confidential instructions to armed merchant ships on the British steamer *Woodfield*. These instructions, in the German view, provided conclusive evidence of the illegal methods of warfare employed by British armed merchantmen. The *Woodfield* instructions provided in part:

If a submarine is obviously pursuing a ship by day, and it is evident to the master that she has hostile intentions, the ship pursued should open fire in self-defense, notwithstanding the submarine may not have committed a definite hostile act, such as firing a gun or torpedo.\(^{73}\)

It is interesting to apply this instruction to the situation where a submarine attempts to exercise the right of visit and search. The merchant ship master may reasonably believe that the submarine has "hostile intentions," so he may open fire first. In fact, almost any approach by a submarine could be regarded as pursuit of the merchant ship under the instructions.\(^{74}\)

On February 10, 1916 the United States Ambassador in Germany sent the Secretary of State a German Government memorandum on the treatment of armed merchantmen. It stated, *inter alia*:

The German Government has no doubt that a merchantman assumes a warlike character by armament with guns, regardless of whether the guns are intended to serve for defense or attack. It considers any warlike activity of an enemy merchantman contrary to international law, although it accords consideration to the opposite view by treating the crew of such a vessel not as pirates but as belligerents.\(^{75}\)

The conclusion was that:

In the circumstances set forth above, enemy merchantmen armed with guns no longer have any right to be considered as peaceable vessels of commerce. Therefore the German naval forces will receive orders, within a short period, paying consideration to the interests of the neutrals, to treat such vessels as belligerents.\(^{76}\)

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\(^{73}\) *Id.* at 191, 196.

\(^{74}\) Shortly after the start of the First World War the British had given the United States Government:

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

*Id.* at 188.


\(^{76}\) *Id.* at 165.

The German memorandum of February 10, 1916 was modified slightly in a further note of February 28, 1916 which stated in relevant part:

The orders issued to the German naval commanders are so formulated that
The German reevaluation concerning merchant ships as the objects of submarine attack set forth in this note was based principally upon the distinction between armed and unarmed merchant ships. This placed the burden upon the submarine commander to make sure that a particular merchantman was armed before the submarine could attack without warning. As a practical matter, this probably resulted in a number of Allied armed merchant ships not being subjected to attack without warning because of uncertainty concerning their armament. Consistent with this note, Germany could still apologize for sinking the unarmed belligerent merchant ship *Lusitania* and state that it was contrary to instructions for German submarines to sink unarmed merchantmen.\(^77\)

The United States Government issued a further statement on the status of armed merchant ships on March 25, 1916. This “memorandum,” which was not labeled a reply to the German memorandum, provided, *inter alia*:

A presumption based solely on the presence of an armament on a merchant vessel of an enemy is not a sufficient reason for a belligerent to declare it to be a warship and proceed to attack it without regard to the rights of the persons on board. Conclusive evidence of a purpose to use the armament for aggression is essential . . . . [A] belligerent warship can on the high seas test by actual experience the purpose of an armament on an enemy merchant vessel, and so determine by direct evidence the status of the vessel.\(^78\)

This United States memorandum represented a return to pro-Allied policy in the guise of a return to the traditional law.\(^79\) The German memorandum had accepted full responsibility for determining whether or not particular merchant ships were armed. The United States memorandum went further. Where the submarine was able to ascertain that the merchant ship was armed, this was only the beginning of the inquiry. It must then “test by actual experience the purpose of an armament on an enemy merchant vessel.” In other words, the submarine was to give the armed merchant ship the opportunity to attack first. If the merchant ship attacked and the submarine was not sunk, it would then be free to treat the merchant ship as a warship and counterattack. If the merchant ship did not use its armament to attack the submarine, the submarine could presumably proceed with visit and search to determine whether the merchant ship was subject to capture. It does not require extended analysis to conclude that the United States memorandum, if actually applied,

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\(^{77}\) The German note of May 4, 1916 concerning the *Lusitania* is quoted in part in the text of Ch. III accompanying notes 41, 42.


\(^{79}\) See generally Buehrig 42–43, 86–87 and *passim.*
would have imposed a wholly unreasonable burden upon Germany and its submarine warships. In many situations the result of a submarine attempting to obtain "direct evidence" would be the sinking of the submarine. In addition, the "direct evidence" was not necessary. The assumption, implicit in the memorandum, that each British merchant ship master decided ad hoc as to the employment of the armament was false. The purpose of the comprehensive instructions captured on the Woodfield was to substitute British Government control for the discretion of the individual master or ship owner.80

Thereafter, as is well known, the United States went to war against Germany. The ostensible reason was alleged German violations of the law of naval warfare. President Wilson in his address to the Congress on April 2, 1916 recommending a declaration of war stated, inter alia:

The new [German] policy has swept every restriction aside. Vessels of every kind, whatever their flag, their character, their cargo, their destination, their errand, have been ruthlessly sent to the bottom without warning and without thought of help or mercy for those on board, the vessels of friendly neutrals along with those of belligerents . . . .

. . . I am not now thinking of the loss of property involved, immense and serious as that is, but only of the wanton and wholesale destruction of the lives of non-combatants, men, women, and children, engaged in pursuits which have always, even in the darkest periods of modern history, been deemed innocent and legitimate. Property can be paid for; the lives of peaceful and innocent people can not be. The present German submarine warfare against commerce is a warfare against mankind.81

One cannot help but sympathize with the "noncombatants" who through acts of more or less volition went to sea and became the victims of the naval war. In the same way one must sympathize with German civilians who, without volition, became the victims of the long-distance blockade. In explaining the basis for treating foodstuffs to Germany as contraband, the British Foreign Secretary stated in early 1915:

The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears.82

80 In addition to the Woodfield instructions quoted in the text accompanying supra note 73, see Hurd, The Merchant Navy (3 vols. 1921, 1924, 1929); Salter, Allied Shipping Control (1921); J. R. Smith, Influence of the Great War Upon Shipping 153–84 (Carnegie Endowment for Int'l Peace, Preliminary Economic Studies of the War No. 9, 1919).


As a belligerent the United States helped the United Kingdom to perfect the merchant ship as an effective combatant unit. The United States, like the United Kingdom, armed its merchant ships and sailed them in convoys escorted by naval vessels. In addition, the United States exercised comprehensive government control over the voyages sailed and the cargoes carried by merchant shipping to insure that it was employed in the most efficient manner possible in behalf of the war effort.

The outcome of the combat interactions between merchant ships and submarines in the First World War was that each treated the other as a lawful object of attack which could be sunk without warning. This reciprocal situation was summarized in the report of the United States Advisory Committee at the Washington Conference on the Limitation of Armament which stated:

The merchant ship sank the submarine if it came near enough; the submarine sought and destroyed the merchant ship without even a knowledge of nationality or guilt. . . . Defensive [merchant ship] armament was almost sure to be used offensively in an attempt to strike a first blow.

b. WORLD WAR II

At the beginning of the Second World War the naval belligerents on both sides took up where matters had been left in 1918. For example, they acted without any regard to the Declaration of London. The contraband lists published by the principal belligerents in September 1939 were even more comprehensive in scope than those employed in the latter part of the First World War.

The British Government put into effect all of

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83 The "Regulations Governing the Conduct of American Merchant Vessels on Which Armed Guards Have Been Placed" are set forth in 2 Savage, Policy of the United States Toward Maritime Commerce in War 582 (1936).
84 J. R. Smith, op. cit. supra note 80 at 185-216; Salter, op. cit. supra note 80 passim. See Wilson, U.S. Naval War College, International Law Situations 1930 44-48 (1931).
85 Wash. Conf. 274. Prof. Higgins has written a very traditional defense of the legal rights and immunities of armed merchant ships which minimizes the facts quoted in the text: "Defensively Armed Merchant Ships" in Higgins, Studies in International Law and Relations Pt. I, 239; Pt. II, 265 (1928).
86 The British and German contraband lists of 1939 are set forth in 7 Hackworth 24-26. The result was to change the conception of contraband from a compromise between neutral and belligerent interests to a consideration of the latter only.
87 The Law of Naval Warfare art. 631(b) (footnote omitted) states:
The precise nature of a belligerent’s contraband list may vary according to the particular circumstances of the armed conflict.
the techniques of merchant ship warfare which it had learned so slowly and painfully during the First World War as well as some new ones.\textsuperscript{87} British merchant ships were armed\textsuperscript{88} and were sailed in that most effective of offensive and defensive antisubmarine warfare methods: the convoy escorted by antisubmarine warships and aircraft.\textsuperscript{89} All British merchant ships were subject to comprehensive direction and control by the British Government.\textsuperscript{90} Captain Roskill has summarized the pattern of government control over merchant shipping:

On 26th August 1939 there was issued in Whitehall an order which established the pattern under which the whole of the British Merchant Navy was to work for the next six years. It stated that the Cabinet Committee responsible for ‘Defence Preparedness’ had, in consultation with the Foreign Office and the Board of Trade, authorised the Admiralty ‘to adopt compulsory control of movements of merchant shipping . . . ’ Parallel with this assumption of operational control by the Admiralty, other government directives transferred the responsibility for the loading and unloading of all merchant ships from their owners to the Ministry of Shipping.\textsuperscript{91}

It is significant that the strategic control of British merchant ships, like that of warships, was vested directly in the Admiralty.\textsuperscript{92} British instructions concerning the tactical employment of armed merchant ships, which had been prepared before the war, were put into effect. One portion of the \textit{Defense of Merchant Shipping Handbook} (1938) concerned “reporting the enemy” and provided that it is the merchant ship master’s first and most important duty to report the nature and position of the enemy by wireless telegraphy. Such a report promptly made may be the means of saving not only the ship herself but many others; for it may give an opportunity for the destruction of her assailant by our warships or aircraft, an opportunity which might not recur.\textsuperscript{93}

\textsuperscript{87} See generally Roskill 35–36, 117–19. Merchant ships with a catapult-mounted aircraft are described in \textit{id.} at 118. Apparently this was a temporary measure until sufficient escort aircraft carriers were available.
\textsuperscript{88} The arming is described in \textit{id.} at 46–47.
\textsuperscript{89} Captain Roskill has described the offensive tactical characteristics of convoy as a method of antisubmarine warfare in “\textit{Capros not Convoy: Counter-Attack and Destroy!}” \textit{Nav. Inst. Proc.} 1047 (1956). \textit{CAPROS=Counter Attack Protection and Routing of Shipping}.
\textsuperscript{90} See generally United Kingdom Ministry of Information, \textit{Merchantmen at War: The Official Story of the Merchant Navy 1939–1944} (undated; circa 1945).
\textsuperscript{92} This control was under the direction of “the Trade Division” which was “one of the largest organisations within the Naval Staff under its own Assistant Chief of Naval Staff.” 1 Roskill, \textit{The War at Sea 1939–1945: The Defensive} 21 (1954).
\textsuperscript{93} 40 \textit{I.M.T.}, 88.
On the important subject, "conditions under which fire may be opened," the *Handbook* stated that if the enemy adopts a policy of sinking merchant ships without warning it will then be permissible to open fire on an enemy surface vessel, submarine or aircraft, even before she has attacked or demanded surrender, if to do so will tend to prevent her gaining a favourable position for attacking.94

Subsequent instructions stated that the enemy had adopted such a policy of sinking without warning.95

At the beginning of the war the German Navy used the Protocol of 1936 as the basis for the conduct of submarine warfare. The Protocol was incorporated almost verbatim into article 74 of the German Prize Code of 1939.96 Thereafter, changes were introduced by degrees until "an order was issued on 17 October 1939 to attack all enemy merchant ships without warning."97 Thus, quite early in the Second World War merchant ships and submarines of the opposing belligerents were attacking one another without warning. The judgment of the International Military Tribunal in the case of Admiral Donitz summarizes the steps involved in the progressive utilization of German submarines:

Donitz insists that at all times the Navy remained within the confines of international law and of the Protocol. He testified that when the war began, the guide to submarine warfare was the German Prize Ordinance taken almost literally from the Protocol, that pursuant to the German view, he ordered submarines to attack all merchant ships in convoy, and all that refused to stop or used their radio upon sighting a submarine. When his reports indicated that British merchant ships were being used to give information by wireless, were being armed, and were attacking submarines on sight, he ordered his submarines on 17 October 1939 to attack all enemy merchant ships without warning on the ground that resistance was to be expected. Orders already had been issued on 21 September 1939 to attack all ships,

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94 Id. at 89.
95 Id. at 90.
96 Art. 74 appears in 7 Hackworth 248.
97 The words are Kranzbuhler's in his final argument to the Tribunal in behalf of Admiral Donitz. 18 I.M.T. 312, 323. See Captain Roskill's statement of the events summarized in the text in Roskill, *op. cit. supra* note 92 at 103, 104. A German perspective appears in Ruge, *Der Seekrieg: The German Navy's Story 1939-1945* 63, 65 (1957).


including neutrals, sailing at night without lights in the English Channel. 98

Admiral Donitz was charged generally with “waging unrestricted submarine warfare contrary to the Naval Protocol of 1936.” 99 The aspects of the case concerning submarine operational areas have been appraised previously. 100 The charges concerning objects and methods of attack related to the sinking of merchant ships and the treatment of survivors of sunken ships.

In his argument on behalf of Admiral Donitz, Flottenrichter Kranzbuhler referred to the “great struggle which took place between the U-boats on the one hand, and the armed merchant vessels equipped with guns and depth charges on the other hand, as equal military opponents.” 101 He contended that:

According to German legal opinion a ship which is equipped and utilized for battle does not come under the provisions granting protection against sinking without warning as laid down by the London Protocol for merchant ships. I wish to stress the fact that the right of the merchant ship to carry weapons and to fight is not thereby contested. The conclusion drawn from this fact is reflected in the well-known formula: “He who resorts to weapons must expect to be answered by weapons.” 102

His argument, it should be mentioned, accurately reflects the close relationship between lawful combatants and lawful objects of attack. The prosecution merely responded that it was “untenable” to regard the sinking of Allied merchant ships without warning as legally justified by the Allied merchant ship tactics. 103 The Tribunal dealt with British armed merchant ships in the following passage:

Shortly after the outbreak of war the British Admiralty, in accordance with its Handbook of Instructions of 1938 to the Merchant Navy, armed its merchant vessels, in many cases convoyed them with armed escort, gave orders to send position reports upon sighting submarines, thus integrating merchant vessels into the warning network of naval intelligence. On 1 October 1939 the British Admiralty announced that British merchant ships had been ordered to ram U-boats if possible.

In the actual circumstances of this case, the Tribunal is not prepared

98 1 I.M.T. 311-12.
99 Id. at 311.
100 See the text of Ch. III accompanying notes 112-31.
101 18 I.M.T. 315.
102 Ibid.
103 19 I.M.T. 487.
to hold Donitz guilty for his conduct of submarine warfare against British armed merchant ships.¹⁰⁴

According to its terms this holding applied to "British armed merchant ships." It is a wise holding in the light of the full participation of these merchant ships in combat.¹⁰⁵ Writing in 1940 Professor Borchard recalled that the historic immunity of merchant ships had been based upon their military weakness in relation to warships and stated:

[When merchant ships became speedy, powerful and armed and the vulnerable submarine appeared on the scene, the reason for immunity from unwarned attack disappeared. It is elementary that an armed belligerent merchant ship, especially when under orders to attack submarines at sight, is a fighting ship, subject to all the dangers of the belligerent character. ...]¹⁰⁶

The Tribunal made no specific holding concerning British unarmed merchant ships. It is possible that the broad term "armed merchant ships" may have been used to apply to all British merchant ships actually participating in the British naval war effort, such as sailing in convoy or sending submarine position reports, without regard to whether a particular ship was armed. It is important for the purpose of accurate legal analysis to determine whether only armed merchant ships or any merchant ships participating in the naval war effort may be sunk without warning. An analysis of the Protocol is essential in this inquiry.

The Protocol has been set forth in Chapter III in connection with submarine operational areas.¹⁰⁷ Its first paragraph provides that in their action with regard to "merchant ships" submarines must obey the same international law rules which are applicable to surface vessels. Its second paragraph enunciates a general rule concerning methods of attack to be employed against "a merchant vessel" by both submarine and surface

¹⁰⁴ 1 I.M.T. 312.
¹⁰⁵ Prof. Lauterpacht has manifested some ambivalence concerning this subject:
In so far as the Tribunal attached decisive importance to the circumstance that merchant vessels were armed for defensive purposes or engaged in activities and received assistance of essentially defensive character, its judgment is not likely to command general assent. Oppenheim-Lauterpacht 492.

¹⁰⁶ Compare his views expressed in the text accompanying notes 228, 229 infra.
¹⁰⁷ See the text of Ch. III accompanying note 114. The Protocol is set forth there except for its "preamble which states: "The following are accepted as established rules of International Law." This appears to suggest that the parties merely declared in treaty form that which had been previously agreed to as customary law. The Root Resolutions embodied in the unratified Submarine Treaty (1922) stated that certain other rules were a "part of international law." See the text of Ch. II accompanying note 85. It is unlikely that these inconsistent rules could all be part of the pre-existing law.
This general rule is that the warship "may not sink or render incapable of navigation" a merchant ship without first placing "passengers, crew, and ship's papers in a place of safety." It is further specified that the ship's boats may not be regarded as a place of safety unless, taking account of weather conditions, the proximity of land or the presence of a potential rescue vessel makes them safe. The general rule enunciated is subjected to these two exceptions in which, it should be noticed, the adjectives "persistent" and "active" are used: 108 (1) "persistent refusal to stop on being duly summoned"; (2) "active resistance to visit and search."

The black letter statement in the Harvard Research, Draft Convention on the Law of Treaties enunciates well-established criteria to be used in treaty interpretation. It provides:

A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, travaux préparatoires, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.109

The multifactor approach set forth is designed, inter alia, to avoid the oversimplistic "plain meaning" approach to treaty interpretation. It should require no extended analysis here to indicate the intellectual inadequacy of the "plain meaning" device in dealing with a serious interpretative problem.110 In the words of the late Judge Anzilotti of the International Court:

But I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto.111

The most general purpose of article 22 of the London Naval Treaty of 1930 and of the Protocol of 1936, which embodies the same rules,112 was to provide some regulation of submarine warships in view of the non-ratification of Senator Root's resolutions which were set forth in the ill-

108 These adjectives did not usually appear in the similar formulations in the traditional law.
109 Harvard Research, Treaties 937.
112 The relation between Treaty and Protocol is described in Ch. III, note 114.
It may be suggested, in consequence, that the regulation of submarines contemplated was not to be so stringent as to preclude ratification. The United States, the United Kingdom, Japan, France, and Italy were the parties to the London Naval Treaty of 1930. Perhaps the clearest feature of their “subsequent conduct” in “applying the provisions of the treaty” in World War II is that they did not regard its protection as being extended to merchant ships, whether armed or not, which participated in the conduct of the naval war. It is reasonable to expect that this unanimous working interpretation of all five of the parties to the Treaty would have been entitled to the greatest deference by the International Military Tribunal if it had considered specifically the status of unarmed belligerent merchant ships participating in the naval war effort. In addition, Germany, which adhered to the Protocol, employed the same interpretation during the war.

As to “the conditions prevailing at the time interpretation is being made,” the Tribunal should have been aware that the Protocol had not actually precluded the effective use of the submarine against merchant ships participating in the war or hostilities either in the Atlantic or in the Pacific. There is no reason to believe that the prohibition of the effective use of submarines against such merchant ships was part of the general purpose of the Treaty and the Protocol. If it had been, it is most probable that France would not have adhered to the Treaty and that Germany would not have adhered to the same provisions subsequently embodied in the Protocol.

The first paragraph of the Treaty, by requiring submarines to comply with the rules applicable to surface warships, does compel the submarine to come to the surface and lose its capability of surprise attack. From a naval tactical viewpoint such a requirement is reasonable provided only that the “merchant ship” involved is not participating in the war or hostilities. It has been stated concerning the Treaty that “merchant ships” in the first paragraph and “a merchant vessel” in the second paragraph are highly ambiguous terms. Much of the ambiguity is resolved by the “Report of the Committee of Jurists” (April 3, 1930) concerning the wording of article 22 of the London Naval Treaty of 1930. This report, prepared by the lawyers who drafted the Treaty, states in relevant part:

The Committee wish to place it on record that the expression “mer-

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113 See the text of Ch. II accompanying notes 85–87.
114 The role of France as a supporter of efficient use of submarines has been described in Ch. II passim.
115 Admiral Rickover has criticized the unratified Washington Submarine Treaty and the London Naval Treaty for not considering the problem of the armed merchantman. Rickover, “International Law and the Submarine,” 61 Nav. Inst. Proc. 1213, 1221 (1935). It is probable that the armed merchantman as an effective combatant unit was considered and left outside the scope of the London Treaty.
chant vessel,” where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.116

The stated criteria is considerably more realistic than a test which attempts to distinguish only between armed and unarmed merchant vessels. The criteria should certainly include, *inter alia*, any armed merchant vessel and no consideration should be given to the purported distinction between “defensive” and “offensive” armament. It should not, however, be limited to armed vessels because there are many modes of unarmed participation in hostilities. For example, a fast unarmed passenger liner employed as a troop transport during war or hostilities should not be entitled to “the immunities of a merchant vessel.”117 During the Second World War the *Queen Mary* and *Queen Elizabeth* were so employed in behalf of the Allied war effort.118 It is clear that they represented a very substantial addition of military power to the Allied side. Such a vessel, though unarmed, is a far more effective participant in the hostilities than many slower and smaller armed vessels. In addition, if the fast liner engaged in carrying troops were to sail at a much slower speed and be escorted by a small warship, it would be subject to attack without warning.

Reference has been made to the military significance of an enemy merchant ship making radio reports of submarine sightings.119 In particular combat contexts it is probably far more important for the efficient conduct of antisubmarine warfare to have radio reports made by merchant ships than to have such ships armed.

In summary, the juridical criteria to determine whether or not a merchant vessel is participating in the war or hostilities in a way which results in losing “the immunities of a merchant vessel” should be determined by the fact of such participation and not by the particular method of participation. In a general war in which almost all belligerent merchant ships are so participating, it may, as a practical matter of tactics, be necessary for belligerent submarines to treat all enemy merchant ships as lawful objects of attack without warning. In unusual circumstances, perhaps involving a solitary merchantman far from the regular trade routes,120 where it is possible for submarines to determine the nonparticipant status of a particular ship, it is clear that they are legally obligated to do so.

The consequence of the foregoing appraisal, that the Protocol is designed to protect only those merchant ships which are not participating in the

116 London Conf. 189.
118 Roskill 43, 243, 357.
119 See the text accompanying supra note 93.
120 See McDougal & Feliciano 631. See also the text accompanying note 242 infra.
war or hostilities, is the conclusion that there was not consistent violation of the Protocol by any of the major naval belligerents during the Second World War.

Professor Tucker has reached different conclusions concerning this subject. He has written concerning the Protocol in the Atlantic war:

Despite this reaffirmation of the traditional law in the 1936 London Protocol, the record of belligerent measures with respect to enemy merchant vessels during World War II fell far below the standards set in the preceding conflict. In the Atlantic Germany resorted to unrestricted submarine and aerial warfare against British merchant vessels almost from the very start of hostilities. . . .

. . . In the final stages of the conflict the measures taken by Great Britain against enemy shipping wherever encountered were only barely distinguishable from a policy of unrestricted warfare. Concerning the role of the Protocol in the Pacific war, Professor Tucker has written:

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

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.

The comprehensive participation of Allied merchant ships in the Atlantic war has been described. There is no reason to believe that Allied merchant ships were employed differently in the Pacific war. As to

121 Tucker 64.
122 Id. at 66.
123 Id.
124 See the text accompanying supra note 116.
Japanese merchant ships in the Pacific war, a U.S. Navy press release in 1946 stated in part:

[T]he conditions under which Japan employed her so-called merchant shipping was [sic] such that it would be impossible to distinguish between "merchant ships" and Japanese Army and Navy auxiliaries. . . .

\[126\]

\(c.\) THE LAW OF NAVAL WARFARE

The U.S. Navy official instructions concerning objects of attack should be examined. Article 503(b) (3) of the Law of Naval Warfare\[127\] provides:

Enemy merchant vessels may be attacked and destroyed, either with or without prior warning, in any of the following circumstances:

1. Actively resisting visit and search or capture.
2. Refusing to stop upon being duly summoned.
3. Sailing under convoy of enemy warships or enemy military aircraft.
4. If armed, and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy.
5. If incorporated into, or assisting in any way, the intelligence system of an enemy's armed forces.
6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces.

The first paragraph is consistent with the second exception to the general rule set forth in the Protocol.\[128\] Paragraph (2) would be consistent with the first exception to the general rule in the Protocol if it stressed the persistent character of the refusal to stop.\[129\] As stated previously, the adjectives "persistent" and "active" in the second paragraph of the Protocol must be given full effect since they, or equivalent expressions, were not usually employed in the traditional law. Paragraph (3) accurately reflects the traditional law as well as the uniform practice of the two World Wars. Unfortunately, paragraph (4) appears to reflect the confused claims and counterclaims advanced during the First World War concerning the purported distinction between offensive and defensive armament. The attempt to employ this supposed criterion now, and in the foreseeable future, is even more futile than the attempt to use it between 1914 and 1918. The traditional law as it was developed during the two World Wars is adequately reflected in paragraph (5). Its comprehensive formulation


\[127\] The title of art. 503(b) (3) is "Destruction of Enemy Merchant Vessels Prior to Capture." Perhaps the phrase "without the necessity of capture" should have been substituted for the last three words.

\[128\] See the text accompanying note 108 supra.

\[129\] Ibid.
is particularly appropriate in view of the military importance in antisubmarine warfare of submarine position reports made by merchant ships.

Paragraphs (3) through (6) appear to refer to typical situations in which enemy merchant vessels have been employed in general war. For example, the fast troop transports come under paragraph (6).\textsuperscript{130} But this paragraph, in spite of its broad formulation, probably does not reflect fully the law developed during the World Wars. Unless the paragraph is construed more broadly than the term "naval or military auxiliary to an enemy's armed forces" has usually been construed, it might well be possible to have an enemy merchant ship designed for carrying cargo and actually engaged in carrying a cargo of substantial military importance to the enemy which does not come under paragraphs (1) through (5) and which would not be included under (6). The result of this type of ship not coming under any provision of article 503(b)(3) would be that it could not be attacked without warning and could only be captured. The ship and its cargo would then pass unharmed by United States submarines unless, in some highly unusual situation, a United States submarine should be carrying a prize crew and be able to comply with the traditional method of capture.\textsuperscript{131}

The provisions of this article are accurate as far as they go but are inadequate in covering this one particular situation. During the past general wars enemy cargo ships were attacked without warning even if they did not participate otherwise in the enemy war effort.\textsuperscript{132} They were attacked without warning because they were cargo vessels carrying cargoes of military importance. There is, unfortunately, no reason to believe that such cargo ships which comply rigorously with the requirements of article 503(b)(3) will be immune from attack without warning in future general wars. This article, however, could provide specific grounds for claims and counterclaims based upon charges of illegality. If this occurs, the next steps could involve the invocation of reprisals and counterreprisals so that a future general war could be conducted, thereafter, without regard to this article of the Law of Naval Warfare.

3. Immune Enemy Ships

It is clear that the military necessity principle is honored in the doctrines relating to enemy warships and enemy merchant ships as objects of attack. The doctrines concerning the immunity of certain enemy ships reflect the attempt to provide implementation of the humanity principle. Although these ships enjoy immunity from attack by all naval forces,

\textsuperscript{130} See the text accompanying note 118 supra.

\textsuperscript{131} It is more likely that a large surface warship would be able to effect capture.

\textsuperscript{132} See the German reference to "enemy freight ships" in the text of Ch. III accompanying note 42.
it is appropriate to consider this subject briefly in a study of the law applicable to submarine warships.

a. HOSPITAL SHIPS

Hospital ships comprise the most important category of immune ships. Under the Geneva Sea Convention of 1949 they must be painted white with dark red crosses as distinguishing marks which are designed to facilitate recognition by both surface vessels and aircraft.

Hague Convention X (1907) was based upon the assumption that hospital ships accompanied battle fleets and waited nearby during the battle. When the battle was over they speedily provided assistance to the wounded, shipwrecked, and drowning. In World War II hospital ships performed other functions and did not usually accompany the combatant naval forces. It is clear that the mere presence of a hospital ship in white paint in the daytime and additionally lighted at night might inform the enemy of important naval activities. Even a solitary hospital ship sailing into a militarily important harbor or base in or near the battle zone would serve to call the enemy’s attention to it. The usual practice in World War II, consequently, was to transport the wounded while in the battle zone on armed naval vessels, including transports which had discharged their troops. After arrival at rear areas the wounded were transferred to the hospital ships which were protected by Hague Convention X.

This change in the function of hospital ships is taken into account in the Geneva Sea Convention. The principal type of hospital ship recognized by it is the military hospital ship which is built or equipped “specially and wholly with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them.” The Convention provides that these ships “may in no circumstances be attacked or captured but shall at all times be respected and protected.” The same standards of protection are extended to private hospital ships such as those utilized

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133 Citation appears in Ch. I note 66.
134 Art. 43.
137 Pictet, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (International Committee of the Red Cross, 1960) provides useful analysis and legislative history.
138 Art. 22.
139 Ibid.
by National Red Cross Societies of states which are parties to the conflict or of neutral states.¹⁴⁰ Aid must be rendered without distinction as to the nationality of the wounded, sick, and shipwrecked.¹⁴¹

It is not surprising that the Geneva Sea Convention provides for the protection of the military interests of the belligerents. If it did not, it would probably be impossible to attain its central humanitarian objectives. All warships of a belligerent party to the Convention may demand the surrender and removal from hospital ships of the wounded, sick, and shipwrecked in order to make them prisoners of war and to prevent the enemy belligerents from employing them subsequently for military purposes.¹⁴² This authority is conditioned upon the wounded and sick being in a fit state to be moved and the warship having adequate medical facilities.¹⁴³ Because of their inadequate passenger carrying facilities, submarines could not provide the requisite adequate medical facilities except in unusual circumstances.

During 1944 and 1945 an example arose concerning capture of the wounded under Hague Convention X.¹⁴⁴ The Allies allowed Germany to send the hospital ships Tubingen and Gradisca through Allied-controlled waters to embark sick and wounded troops in Salonica. On the return voyage the ships were diverted to Allied ports and about 4,000 prisoners were taken. A large percentage of the prisoners thus captured were only slightly wounded. The action was specifically authorized by Hague Convention X¹⁴⁵ and no protest was made by Germany.

In summary, the Geneva Sea Convention gives belligerents a right to control and search hospital ships in order to insure their use for humanitarian purposes only. In broad language, it prohibits the use of hospital ships "for any military purpose"¹⁴⁶ or for any acts "harmful to the enemy."¹⁴⁷ They may not possess or use secret communications codes.¹⁴⁸ The Convention provides that:

They [the parties to the conflict] can refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires.¹⁴⁹
b. CARTEL AND SIMILAR SHIPS

Historically, the term cartel referred to an agreement between enemy belligerents to regulate the exchange of prisoners of war. In the same way, cartel ships referred to vessels which were designated for use in such an exchange. In a broader sense, the term cartel is now used to refer to other kinds of nonhostile relations regulated by special agreement between enemy belligerents.

An illustration of such an arrangement and the difficulties involved in carrying it out arose in the later part of the Second World War. In 1945 the Japanese merchant ship *Awa Maru* undertook a voyage agreed upon between the United States and Japanese Governments whereby it was to carry relief supplies furnished by the United States to United States and Allied nationals held in Japanese custody upon the Asian mainland. The vessel had been granted a safe conduct by the United States and the other Allied powers. It had completed its outward voyage from Japan to Hong Kong, Singapore and other ports carrying the relief supplies. On its homeward-bound voyage it was entitled, according to the agreement, to the full measure of immunity while following the prescribed route. On April 1, 1945 the *Awa Maru* was torpedoed without warning by the United States submarine *Queenfish*. At the time of the sinking the ship had deviated slightly from its prescribed route but, after an investigation, the United States assumed full responsibility for the sinking. The commanding officer of the *Queenfish* was apparently unaware that the ship attacked had been granted safe conduct by the Allies. He was relieved of his command and convicted by general court-martial for, inter alia, negligence in carrying out orders. During the course of the ensuing diplomatic interchange, the United States offered to provide Japan with a vessel of similar size and characteristics to replace the *Awa Maru*.

c. COASTAL FISHING BOATS

The case of *The Paquete Habana* has been referred to as an example of customary law which is applicable in naval warfare. In this case the United States Supreme Court held that small coastal fishing boats operating out of Havana during the Spanish-American War were not liable to capture and condemnation in prize. In justifying the decision, Mr. Justice Gray referred to the "considerations of humanity [due] to a

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150 Oppenheim-Lauterpacht 542.
151 Ibid.
152 Tucker 98.
154 See the text of Ch. I accompanying notes 73, 74.
poor and industrious order of men..." 155 He also explained:

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.156

A few years later the customary law reflected in *The Paquete Habana* decision was set forth in treaty form in Hague Convention XI (1907). The exemption was expanded beyond coastal fishing boats to include also "small boats in local trade." 157 These limitations were stated to apply to both exempt categories:

They cease to be exempt as soon as they take any part whatever in hostilities.

The contracting powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.158

It is difficult to avoid the conclusion that even coastal fishing and trade contribute to some extent to the enemy war effort. Apparently this was the situation during the Korean War even though it is regarded as a limited war. During that war a traditional close-in naval blockade was in effect 159 and the United Nations Command prohibited coastal as well as deep-sea fishing by the North Koreans.160 Among the reasons justifying the prohibition were the following:

Rear Admiral Smith took the attitude that this sea food was legitimate contraband and should be stringently denied [to] the Communists. The restriction of fishing by the UN blockading force would seriously add to the Communist's logistics problems ashore, and force them to import fish from Chinese and Russian sources.161

The result was that the great importance of fish in the North Korean diet made fishing a matter of military importance which outweighed the considerations of humanity referred to by Mr. Justice Gray. In addition, it was pointed out that a great many of the supposed North Korean fishing boats were actually engaged in laying mines.162 Such boats would not, of course, be exempt under the holding in *The Paquete Habana* or in the conventional formulation of fishing boat immunity in Hague Convention XI. There is no reason to believe that boats performing functions similar

155 175 U.S. 677, 708 (1900).
156 Ibid.
157 Art. 3.
158 Ibid. The text of the Convention appears in 2 Scott 463.
159 Cagle & Manson 281–84 and passim.
160 Id. at 297.
161 Id. at 296.
162 Ibid.
to those of the North Korean fishing and mining boats would be accorded immunity in a general war.

**d. OTHER IMMUNE VESSELS**

Hague Convention XI (1907) prescribes a general immunity from capture for "vessels charged with religious, scientific, or philanthropic missions."\(^{163}\) As a practical matter, this provision has not been often invoked in the World Wars and, when it has been invoked, narrow interpretations have been applied to it.\(^{164}\) Philanthropic missions have been carried out pursuant to special cartel arrangements entered into by the enemy belligerents rather than under the convention.

The assumption in Hague Convention XI that scientific missions are devoid of military significance is contrary to contemporary expectations concerning the use of scientific knowledge. The immunity granted to vessels on scientific missions was based upon the assumption that scientific inquiry has only a peaceful importance. In many fields scientific knowledge is as readily adaptable for military as for peaceful purposes.\(^{165}\) At the present time, for example, there is inadequate charting of ocean floor depths and contours. As nuclear submarines are enabled to submerge to greater depths this type of oceanographic information will be of military as well as of peaceful significance.

Further problems will arise in the near future when there will be research submarines and submersibles which are not warships operating in the oceans of the world.\(^{166}\) Many of these research vessels will be highly specialized and not suitable for use as warships, and cannot be treated as such. The Geneva Convention on the Territorial Sea and the Contiguous Zone (1958) provides that, while engaged in innocent passage through territorial waters, "submarines are required to navigate on the surface and to show their flag."\(^{167}\) It is possible that a submersible research ship, perhaps due to an error in navigation or because of the view that it is immune as a result of its scientific character, may fail to comply with this rule.\(^{168}\)

In order to ascertain the character of the submarine or submersible and

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163 Art. 4.

164 See the cases summarized in 6 Hackworth 544-46.


168 It is widely assumed that the four Geneva Conventions on the Law of the Sea (1958) deal only with the law of the sea in time of peace but this is not stated expressly in the Conventions.
the possible military aspects of its mission, it may be lawfully ordered to the surface.

An illustration of communications with submerged submarines was provided by Special Warning No. 32 issued by the U.S. Navy Oceanographic Office during the quarantine-interdiction of Soviet missiles to Cuba in 1962. It concerned submarine surfacing and identification procedures when in contact with "Quarantine Forces in the general vicinity of Cuba" and provided in part:

U.S. Forces coming in contact with unidentified submerged submarines will make the following signals to inform the sub that he may surface in order to identify himself: Signals follow—Quarantine forces will drop 4 to 5 harmless explosive sound signals which may be accompanied by the International Code signal "IDKCA" meaning "Rise to Surface." This sonar signal is normally made on underwater communications equipment in the 8 kc. frequency range. Procedure on receipt of signal: Submerged submarines, on hearing this signal, should surface on easterly course. Signals and procedures employed are harmless.\(^\text{169}\)

It must be recognized that research submarines and submersibles may not have communication facilities comparable to those of submarine warships.

4. Capture or Destruction of Neutral Merchant Ships

Historically, neutral merchant ships have not been claimed as objects of direct military attack to as great a degree as have enemy merchant vessels. It is clear that this situation was drastically changed during the World Wars. The use of mines against enemy merchant vessels, for example, amounted to a claim to attack neutral merchant vessels as well since mines do not discriminate between belligerents and neutrals.\(^\text{170}\)

a. NEUTRALS WHICH ARE INTEGRATED INTO THE ENEMY WAR EFFORT

It seems clear on the basis of moral and legal principles as well as upon the customary law developed in both World Wars, that neutral merchant vessels which are integrated into the enemy war effort may be lawfully accorded the same treatment as enemy merchant vessels which are so integrated. It has been demonstrated that the Protocol does not protect enemy merchant ships which are participating in the war or hostilities.


\(^{170}\) The effectiveness of modern types of sea mines is described in Roskill 47–48.
There is no reason in either experience or logic why the Protocol should be interpreted as protecting neutral merchant ships which are engaged in the same functional activities that result in lack of protection for an enemy merchant ship.171

It will be recalled that the International Military Tribunal held that Admiral Donitz violated the Protocol in ordering the sinking of neutral merchant ships in the submarine operational area. This aspect of the judgment has been criticized insofar as it extended to neutral merchant ships not engaged in genuine internaetal trade.172

The British use of ship warrants and the accompanying coercion imposed upon neutrals have been carefully described by Miss Behrens:

In the summer of 1940 the ship warrant scheme was launched, both to further the purposes of economic warfare and in order to force neutral ships into British service or into trades elsewhere that were held to be 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. For the ill-disposed there were to be no bunkers, or stores, or insurance, or water or credit, no access to dry-docks, no Admiralty charts, no help or guidance or supplies of any sort. Since the British Commonwealth covered a very large area, and since various neutral countries, and particularly the United States, soon began from goodwill or self-interest to co-operate in the arrangements, trade for the ill-disposed though sometimes possible became exceedingly difficult.173

Certainly in a general war similar to the World Wars neutrals are not in an enviable position. Compliance with the demands of one belligerent will lead the opposing belligerent to regard the neutral merchant vessel concerned as participating in the first belligerent's war effort and so subject to treatment as though it were an enemy.174 Whether particular neutral merchant ships obtained ship warrants because of coercion or because of a desire to cooperate, they were effectively integrated into the British and Allied war effort. It is difficult to find any sound reason why neutral merchant ships so integrated should not be subject to the same procedures of attack, including sinking without warning, to which enemy merchant ships may be subjected lawfully.

The ship warrant system and the effective sanctions to enforce it de-

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171 A conclusion contrary to that stated in the text would appear necessarily to place exaggerated emphasis upon the word symbol "neutral." Even under the traditional law neutrals were assimilated to enemies in some situations. See the text accompanying note 41 supra.

172 See the text of Ch. III accompanying notes 121-27.

173 Behrens, Merchant Shipping and The Demands of War 96 (History of the Second World War, United Kingdom Civil Series 1955).

scribed by Miss Behrens are a part of the comprehensive administrative methods of economic warfare practiced by the Allies during the Second World War. The British Ministry of Economic Warfare characterized this as a matter of changing the emphasis "from control on the seas to control on the quays." The fact was that, even assuming that visit and search was otherwise feasible, boarding officers could not obtain adequate information concerning the voyages, cargoes, and destinations of particular neutral ships and they were even less able to obtain an overall view of the attempted enemy commerce in particular contraband items. The obtaining of accurate commercial intelligence was transferred from boarding officers at sea to ministries or boards of economic warfare operating at home and in neutral countries. The comprehensive economic warfare techniques including ship warrants, ship navicerts, and navicerts were not primarily designed to intercept contraband goods en route to the enemy. They were designed, rather, to prevent contraband goods from even being loaded upon a ship in a neutral port. In the same way, the certificates of enemy origin and interest were designed to prevent any neutral shipper from giving serious consideration to carrying enemy exports. In order to implement these techniques, British or Allied officers examined the cargo which was loaded in neutral ports and issued certificates stating compliance with contraband control or with enemy export control.

It is clear, at least as a matter of theory, that neutrals need not cooperate with a belligerent which is enforcing a comprehensive economic warfare system. Noncooperation, however, would result in much more dangerous and destructive enforcement of economic warfare regulations. The traditional techniques of enforcement at sea would be much more onerous to the neutral ship owner. The possession of the necessary certificates under the comprehensive system prevented neutral vessels from being subjected to the time-consuming, costly, and dangerous procedure of diversion to port for examination of the cargo and possible condemnation of the vessel and cargo. In addition, the neutral merchant ship which cooperated with the required procedures received the benefits of all the British and Allied facilities which were essential to the operation of a merchant vessel. These were, of course, the same facilities which were withheld from noncooperating neutral merchant ships under the ship warrant system. In short, the comprehensive economic control system provides substantial benefits to cooperating neutrals.

From the standpoint of the belligerent, the modern comprehensive system offers many advantages. Among these are a more complete and effici-

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175 Medlicott 416.
176 The textual paragraph is based upon Medlicott 415–659; 2 Medlicott 1–25, 381–418 and passim; McDougal & Feliciano 509–19.
177 Ibid.
ent interdiction of commerce to and from the enemy. In addition, the system results in an economy in the use of naval vessels which would otherwise be required for implementing the traditional enforcement techniques at sea. Military efficiency is advanced by the high degree of effectiveness achieved by the comprehensive system. At the same time considerations of humanity are advanced by its substantially less destructive characteristics in comparison with the traditional methods. In summary, the system operates in an eminently reasonable manner and it is consequently as unrealistic to attempt to declare its illegality as between the enforcing belligerents and the neutrals as it would be to attempt to do so between the opposing belligerents.

b. NEUTRALS WHICH ARE NOT PARTICIPATING IN THE WAR OR HOSTILITIES

In appraising submarine operational areas in general war it was stated that belligerent states utilizing such areas had a legal obligation to provide safe lanes or routes for neutral merchant ships engaged in genuine interneutral trade. In considering neutral merchant ships as objects of attack, it is clear that everything possible should be done by the belligerents to protect such ships which are engaged in genuine interneutral trade. By definition, this trade does not enhance the economic war strength of one or the other belligerent. An attack upon a neutral merchant ship known to be engaged in interneutral trade is, therefore, a violation of law. It should be mentioned that even though this principle is clear there are substantial difficulties involved in actually protecting such ships in a general war where many merchant ships are integrated into the war effort of a belligerent. It is reasonable to expect that more effective protection for neutral ships which are not participating in the war or hostilities can be provided in limited war situations.

5. Enemy Personnel as Objects of Attack

It is lawful to kill or wound enemy combatants, that is, naval or merchant marine personnel, pursuant to a lawful attack upon an enemy

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178 Sea power was the ultimate sanction for the comprehensive system of economic warfare as it was the immediate sanction for the traditional system. 1 & 2 Medlicott passim. The British also considered sanctioning devices which they did not employ: The legal advisers to the Ministry [of Economic Warfare] and Foreign Office pointed out that if it were announced that ships without navicerts ‘would be liable after seizure to be sent in or sunk according to circumstances,’ this would not necessarily involve action outside international law, although a plain announcement that ships without navicerts would be liable to be sunk would not be justified under existing principles or any admissible extension of them.

1 Medlicott 434.

179 See the text of Ch. III accompanying note 98.
warship or merchant ship. During such an attack it is not only lawful to kill or wound the combatant personnel, but it is also lawful to kill or wound the otherwise especially protected medical and religious personnel incidental to the attack on the ship. 180 In general, the legal doctrines concerning personnel as objects of attack perform the relatively modest role of prohibiting violence which is already unnecessary to achieve the military objective of an attack. As a rule, enemy naval or merchant marine personnel who have become helpless or who have come under the power of a belligerent are no longer lawful objects of attack. The result is that subsequent or continuing violence which is directed against them is illegal.

a. THE DUTY TO GIVE QUARTER

The duty to grant quarter when an enemy surrenders is as applicable to sea warfare as it is to land warfare. 181 In sea warfare there are special problems including the mode of manifesting surrender. The Trial of Von Ruchteschell, 182 where the defendant was the commander of a German surface raider, illustrates some of the issues arising in connection with the duty to give quarter at sea. There were two charges that the defendant had continued the attack after the enemy merchant ship had indicated surrender. The first charge involved a daylight attack against the Davisian in which its wireless aerial was destroyed with the raider's first salvo. 183 The raider maintained heavy fire and signaled that the ship attacked was not to use its radio. The report states: "The captain of the Davisian stopped his engines, hoisted an answering pennant and acknowledged the signal." 184 The gunfire continued fifteen minutes longer, however, and wounded several members of the crew while they were trying to abandon ship. The basis of the conviction of the accused on this charge was apparently that the ship attacked had given an unequivocal indication of surrender.

The second charge involving refusal to give quarter involved a night attack upon the Empire Dawn in which the raider's first salvo set the

180 See Oppenheim-Lauterpacht 498–99, where "stokers" are classified with medical and religious personnel. Neither stokers nor nuclear propulsion specialists should be classified as noncombatants.


181 Oppenheim-Lauterpacht 474.


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

Roskill 97.

183 1 Reps. U.N. Comm. 82, 83.

184 Id. at 82.
bridge on fire and destroyed the wireless. Even though the ship under attack was rendered powerless by the first salvo, it continued to move through the water and was still moving when it began to sink. The *Empire Dawn* did not open fire and its captain signaled by torch that he was abandoning ship. During these events the raider’s fire continued while the lifeboats were being lowered and cut the lines of one of the lifeboats. It crashed into the sea and several members of the crew were killed. The accused was not convicted on this charge and the apparent distinction was that the *Empire Dawn* had not given an unequivocal manifestation of surrender. In addition, it seems probable that the torch signal from the burning ship could not have been seen on the raider. The fact that the ship was actually sinking while the raider’s fire continued appears to have been inadequate consideration.

In this case two naval officers, one British and one German, appeared as expert witnesses. Their common evidence concerning manifestation of surrender was summarized as follows:

1. the attacked ship must stop her engines;
2. if the attacker signals, the signal must be answered—if the wireless is out of action, it must be answered by a signalling pennant by day or by a torch or flashlight by night;
3. the guns must not be manned, the crew should be amidsthips and taking to the lifeboats;
4. the white flag may be hoisted by day and by night, all the ship’s lights should be put on.

The duty to give quarter is, of course, the same in submarine warfare as it is in other naval warfare. There are undoubtedly unusual problems which occur concerning manifestations of surrender in submarine warfare. A submarine even when fully surfaced lies low in the water. There may be, consequently, particular difficulties in observing a submarine’s manifestation of surrender. Where a submarine is forced to the surface following depth charging, it seems reasonable that the submarine’s commander should be given an opportunity to surrender unless an unequivocal intention of fighting it out on the surface is manifested. The attempt of a surface ship to indicate surrender to a submerged submarine also raises problems. For example, it is clear that the submerged submarine at periscope depth has only limited visibility.

**b. DUTIES TO SURVIVORS**

The rescue of survivors is particularly important in sea warfare. If the survivors are not rescued within a short period of time, their chance of survival is greatly reduced. The common interest of states in rescuing survivors is reflected in the Geneva Sea Convention:

> After each engagement, Parties to the conflict shall, without delay,

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185 *Id.* at 83.
186 *Id.* at 89.
take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.\textsuperscript{187}

The notes to the \textit{Trial of Von Ruchteschell} state the following propositions concerning duties to survivors:

\begin{enumerate}
\item If the raider is aware of survivors who have taken to their life-boats, he must make reasonable efforts to rescue them;
\item it is no defence that the survivors did not draw attention to their boats if they had reasonable grounds to believe that no quarter was being given.\textsuperscript{188}
\end{enumerate}

There can be no doubt concerning the urgency of rescue in submarine warfare. Rescue in such a context, unfortunately, appears to be particularly difficult. It is especially dangerous to attempt the rescue of submarine personnel if other submarines are in the vicinity. Where the rescue by submarines of surviving personnel is in issue, the grim facts are that submarines in both World Wars were small vessels without adequate passenger facilities.

Admiral Donitz was charged before the International Military Tribunal with ordering the killing of survivors and issuing orders prohibiting rescue.\textsuperscript{189} It will be recalled that the basic rule in the second paragraph of the Protocol prohibits a warship from sinking “a merchant vessel” unless the passengers and crew are first put in a place of safety. In its application of this provision of the Protocol in its judgment in the case of Admiral Donitz, the Tribunal stated:

\begin{quote}
The evidence further shows that the rescue provisions [of the Protocol] were not carried out and that the Defendant ordered that they should not be carried out. The argument of the Defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Donitz is guilty of a violation of the Protocol.\textsuperscript{190}
\end{quote}

Perhaps the most obvious inadequacy of the quoted portion of the judgment is that the Protocol, as demonstrated above, only applies to merchant vessels which are not participating in the war or hostilities. One may seriously question, consequently, whether or not among the merchant ships sunk by German submarines during the Second World War there were any significant number of cases where the Protocol, including its rescue

\textsuperscript{187} Art. 18, paragraph 1.
\textsuperscript{188} I \textit{Reps. U.N. Comm.} 88.
\textsuperscript{189} I \textit{I.M.T.} 313.
\textsuperscript{190} \textit{Ibid.}
provisions, was applicable. In addition, the opinion of the Tribunal ignores the facts of submarine warfare including the lack of space for passengers in submarines.

An adequate sense of reality on this subject may be achieved by consideration of Admiral Nimitz' answer to a question propounded on behalf of Admiral Donitz by the International Military Tribunal:

13. Q. Were, by order or on general principles, the U.S. submarines prohibited from carrying out rescue measures toward passengers and crews of ships sunk without warning in those cases where by doing so the safety of the own boat was endangered?

A. On general principles the U.S. submarines did not rescue enemy survivors if undue additional hazard to the submarine resulted or the submarine would thereby be prevented from accomplishing its further mission. U.S. submarines were limited in rescue measures by small passenger-carrying facilities combined with the known desperate and suicidal character of the enemy. Therefore it was unsafe to pick up many survivors. Frequently the survivors were given rubber boats and/or provisions. Almost invariably survivors did not come aboard the submarine voluntarily and it was necessary to take them prisoner by force. 

Thus, according to Admiral Nimitz, United States submarines did not attempt rescue if either additional danger existed or if the submarine's military mission would be frustrated. It seems neither reasonable nor just to require a different standard on the part of German submarines. Even if more were to be required as a matter of legal doctrine it is difficult to see how such a rule could be sanctioned unless submarines were provided with more adequate passenger-carrying facilities.

It should be mentioned also that there were apparently numerous instances when it was not feasible for surface warships to make rescue attempts even though they had adequate passenger facilities. The British heavy cruiser Devonshire, operating in the South Atlantic, sank the German raider Atlantis on November 22, 1941 and the German supply ship Python on November 30, 1941. In neither case was rescue attempted since it was thought that U-boats might be in the vicinity.

To say that rescue cannot be attempted by submarines in the two situations stated by Admiral Nimitz is not to say that submarines cannot render other assistance to survivors. Admiral Nimitz referred to giving "rubber boats and/or provisions" to the survivors. There is no reason why assistance of this kind should not be regarded as legally obligatory when rescue is not

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191 40 I.M.T. 108, 110.
192 Id. at 99; Ruge, Der Seekrieg: The German Navy's Story 1939-1945 175-76 (1957).
possible and when military necessity permits. In summary, there is an ob-
ligation to rescue survivors when there is neither undue hazard to the sub-
marine nor an interference with its military mission. When these conditions
exist there is a particular obligation to assist survivors short of rescue, as by
righting overturned lifeboats and providing rubber boats, food, and medical
supplies. Humanitarian considerations and acts must be encouraged in
every practical way even though they have had a secondary role to military
necessity in combat situations.

The German attempt to establish a rescue zone of immunity during the
period September 12-16, 1942 following the sinking of the British troopship
Laconia and its frustration by the United States aircraft bombing attack
has been described. On September 17, 1942 the German U-boat Com-
mand issued the “Laconia Order.” It was not given to U-boat captains
in writing but it was regularly read or stated to them as a part of the
briefing they received before leaving on war patrols. It provided:

(1) No attempt of any kind must be made at rescuing members
of ships sunk, and this includes picking up persons in the water and
putting them in lifeboats, righting capsized lifeboats and handing over
food and water. Rescue runs counter to the rudimentary demands of
warfare for the destruction of enemy ships and crews.

(2) Orders for bringing in captains and chief engineers still apply.

(3) Rescue the shipwrecked only if their statements would be of
importance for your boat.

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

It should be taken into consideration that at the time of the issuance of
the quoted order Admiral Donitz must have been under severe psychologi-
cal pressure in view of the attack made upon the German submarines
engaged in the Laconia rescue operations. It is apparent that the quoted
order is inconsistent internally. Paragraph (1) appears to prohibit rescue
while paragraphs (2) and (3) seem to justify, or even to order, rescue in
particular circumstances. The admonition of harshness contained in para-
graph (4) is subject to diverse interpretations.

In its judgment concerning Admiral Donitz the Tribunal stated:

It is also asserted that the German U-boat arm not only did not
carry out the warning and rescue provisions of the Protocol but that
Donitz deliberately ordered the killing of survivors of shipwrecked
vessels, whether enemy or neutral. . . . The Defense argues that these
orders [including the Laconia order] and the evidence supporting

193 See the text of Ch. III accompanying notes 132-39.
195 Ibid. The same formulation of the order appears in The Peleus Trial, 1 Reps.
them do not show such a policy and introduced much evidence to the contrary. The Tribunal is of the opinion that the evidence does not establish with the certainty required that Donitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.\textsuperscript{196}

There are some aspects of the quoted judgment which present difficulties. It is possible that the Tribunal regarded the ambiguity of the order as arising from doubt as to whether the purpose of the order was to forbid rescue or was to direct the killing of survivors. If it was the latter, it was unlawful but the Tribunal acted with restraint in resolving the ambiguity in favor of Admiral Donitz in the criminal proceedings. If the \textit{Laconia} order was an attempt to prohibit the rescue of survivors in the situations of operational necessity in which Admiral Nimitz indicated that survivors were not rescued by United States submarines in the Pacific, the order was lawful in this respect.\textsuperscript{197}

The real basis for criticism of the order is the reference in the first paragraph to not assisting survivors as by putting them in lifeboats and giving them provisions. These statements are contrary to the legal obligations of submarine personnel to assist survivors when military necessity prevents their conducting rescue operations. This illegal portion of the \textit{Laconia} order should not be justified as a reprisal measure to the aircraft attack upon the German submarines engaged in the rescue operations. During the Second World War Hague Convention X (1907) was in effect and it contained no specific prohibition concerning directing reprisals at survivors. Elementary considerations of humanity and morality would, nevertheless, indicate conclusively that reprisals should not be directed at helpless survivors of a sunken ship. Reprisals against survivors including the wounded, sick, and shipwrecked are expressly prohibited by the Geneva Sea Convention.\textsuperscript{198}

In the \textit{Trial of Moehle} \textsuperscript{199} the defendant was a German U-boat flotilla commander who was charged with a war crime in the contents of the instructions he gave to his commanding officers prior to their departure on war patrols. The briefing consisted primarily of technical matters but the defendant read the \textit{Laconia} order. If questions were asked, he provided two examples.\textsuperscript{200} The first concerned a U-boat commander who reported seeing a raft with five British airmen on it in the Bay of Biscay. It was stated that he was severely reprimanded by the U-boat Command and was told that the correct action would have been to destroy the raft since

\begin{footnotes}
\item[196] I.M.T. 313.
\item[197] The conclusion of the illegality of the order as a whole is stated in Tucker 73.
\item[198] Art. 47.
\item[199] Reps. U.N. Comm. 75 (1946).
\item[200] Id. at 75
\end{footnotes}
otherwise it was probable that the airmen would be rescued and go into action again. The second example involved the sinking of American ships near land. The official criticism directed against the submarine commanders was said to be that the crews had not been destroyed but probably reached the coast and manned new ships. After giving these examples, the defendant said that each commander must act according to the dictates of his conscience and that the safety of his boat should be his primary consideration.

The defense argued that the *Laconia* order was ambiguous but that its purpose was to impress upon submarine commanders that they should not rescue survivors since doing so endangered the submarines. It was thus regarded as a legal order based upon operational necessity. The prosecution contended that the purpose of the order was to direct the killing of survivors. The central legal issue, however, concerned Moehle's role in commenting upon the order. The court apparently regarded his stated examples as resolving its ambiguities and thereby changing it into an order to kill survivors and he was convicted.

Perhaps the most obvious duty to survivors is to refrain from killing them. Unfortunately this duty has been violated in some instances. The importance of the subject justifies separate consideration.

c. THE PROHIBITION OF KILLING SURVIVORS

Survivors struggling in the water or seeking safety on life rafts or in lifeboats are no longer effective instruments of enemy military power. It should be abundantly clear that they are not lawful objects of attack. In *The Peleus Trial* the commander of the German submarine *U-852* and three officers and a rating of the same submarine were charged with:

Committing a war crime in that you in the Atlantic Ocean on the night of 13/14th March, 1944, when Captain and members of the crew of Unterseeboot 852 which had sunk the steamship *Peleus* in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them.

The prosecution resolved the uncertainty in the charge by stating that the

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201 *Id*. at 77, 80.
202 *Id*. at 76.
203 *Id*. at 80. He was sentenced to imprisonment for five years. *Id*. at 78.
204 This case, also known as the "Trial of Eck," is reported in (1) the entire vol. 1 of *War Crimes Trials* (Maxwell Fyfe, gen. ed.; Cameron, ed. of vol. 1; decision 1945; pub. 1948); (2) 1 *Reps. U.N. Comm*. 1 (1945).
205 The present analysis of the case is based principally upon the report in 1 *War Crimes Trials* which apparently contains the complete or almost complete record of the proceedings.
defendants were not accused of sinking the merchant ship without warning but of killing its survivors.\textsuperscript{206}

The crew of the \textit{Peleus} consisted of thirty-five individuals comprising eight nationalities. The ship was of Greek registration and was under charter to the British Ministry of War Transport. Following the sinking of the ship many of the surviving crew members climbed aboard rafts or floating wreckage. The submarine cruised about the scene for approximately five hours after the sinking while the survivors and the wreckage were made the objects of machine gun and hand grenade attack. Practically all of the survivors were either killed or subsequently died of wounds except for three who managed to conceal themselves and stay alive. They were rescued about a month later and recounted these grim events.\textsuperscript{207}

The \textit{U-852} was, thereafter, beached under air attack on the east coast of Africa and its log revealed the sinking of a merchant ship at the location where the \textit{Peleus} was sunk. The prosecution relied upon affidavits prepared by the three survivors of the \textit{Peleus} as well as upon testimony of members of the crew of the U-boat who were not directly involved in the killing. The evidence indicated that the defendant, Eck, the captain of the U-boat, ordered the shooting and throwing of hand grenades at the rafts and the wreckage and that the other accused carried out his orders.

The defense of Eck was based principally upon the claim that it was operationally necessary for him to eliminate all traces of the sinking in order to save the U-boat from Allied antisubmarine warfare measures.\textsuperscript{208}

Eck was aware of the aircraft bombing attack on the submarines which were rescuing the survivors of the \textit{Laconia}. He testified on this subject:

This case showed me that on the enemy's side military reasons take precedence over human reasons before saving the lives of survivors.

For that reason I thought my measures justified.\textsuperscript{209}

Eck was also aware of the \textit{Laconia} order but he did not invoke it as a superior order which directed his actions.\textsuperscript{210} If he had done so it would have had very unfavorable consequences for Admiral Donitz in the later

\textsuperscript{206}Ibid. It is clear, by inference, that the sinking without warning was not regarded as illegal. In the same way, in the Trial of Von Ruchteschell (see the text accompanying note 181 \textit{supra}) there was no charge concerning sinking without warning although the defendant, as a raider commander, was responsible for the sinking of several ships without warning.

\textsuperscript{207}The facts stated in the textual paragraph were developed in the case of the prosecution and not controverted in any material respect by the defense: 1 War Crimes Trials 7-38; 1 Reps. U.N. Comm. 2-4.

\textsuperscript{208}1 War Crimes Trials 105-07; 1 Reps. U.N. Comm. 4.

\textsuperscript{209}1 War Crimes Trials 55.

\textsuperscript{210}1 War Crimes Trials 42-47 (opening argument for Eck), 47-64 (evidence for Eck), 103-07 (closing argument for Eck); 1 Reps. U.N. Comm. 4-5.

Shortly before his execution Eck gave a deposition to be used in behalf of Admiral Donitz before the I.M.T. in which Eck stated that he had received no orders to
trial before the International Military Tribunal.\textsuperscript{211} The other accused relied principally upon the plea of superior orders, specifically, Eck’s orders to them.\textsuperscript{212}

An experienced U-boat commander testified in behalf of the defense.\textsuperscript{213} He emphasized the efficiency and rapidity of Allied antisubmarine counter-attack measures at the time and in the area of the sinking of the \textit{Peleus}. Under questioning by the judge advocate this officer conceded that he would not have done the same thing that Eck did in the circumstances.\textsuperscript{214} Apparently he would have followed the usual U-boat procedure of leaving the scene of a sinking at high speed. Since the particular sinking took place at night it would have been relatively safe for the U-boat to use its high-surface speed during the hours of darkness. Whatever defensive action was taken by the U-boat following the sinking it is probable that even if all of the wreckage had been destroyed the place of the sinking would have been marked by an oil slick easily visible from the air.\textsuperscript{215}

Eck and two of the accused officers (one was the ship’s medical officer) were found guilty and condemned to death.\textsuperscript{216} The remaining two accused were also found guilty but received lesser sentences because of mitigating circumstances.\textsuperscript{217} Eck’s defense of operational necessity was not justified and this was conceded even by the veteran submarine commander called by the defense. The facts demonstrate that helpless survivors were murdered on the high seas.\textsuperscript{218} It is also clear that the plea of superior orders did

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\textsuperscript{211} The prosecution before the I.M.T. could then have claimed that the \textit{Peleus} case was an implementation of the \textit{Laconia} order.

\textsuperscript{212} Prof. Tucker states that "the illegality of the \textit{Laconia} order should be placed beyond question" because of its interpretation and application in the Moehle and \textit{Peleus} cases. Tucker 73. This conclusion does not take account of the fact summarized above and also the fact that Eck did not invoke superior orders as a defense in the \textit{Peleus} case. In addition, the Moehle case involved Moehle’s misapplication of the \textit{Laconia} order rather than the order itself. See the text accompanying notes 199–203 supra.


\textsuperscript{214} \textit{Id.} at 65–71; \textit{id.} at 6–7.

\textsuperscript{215} \textit{Id.} at 69–70; \textit{id.} at 6.

\textsuperscript{216} There would not have been a large oil slick if the \textit{Peleus} were a coal-burning ship. Eck referred to this in his testimony. 1 \textit{War Crimes Trials} 59.

\textsuperscript{217} 1 \textit{War Crimes Trials} 132, 139; 1 \textit{Reps. U.N. Comm.} 12–13.

\textsuperscript{218} \textit{Ibid.}

\textsuperscript{219} The related Case of Dithmar and Boldt (the \textit{Llandovery Castle} case), German Reichsgericht (July 16, 1921), reported in 16 \textit{A.J.I.L.} 708 (1922), concerned the situation of a German submarine firing upon the lifeboats of a sunken British hospital ship and resulted in the conviction of two officers of the submarine who acted under the orders of the captain (who was not before the court). This case was decided by a municipal court applying international law doctrines. It is an apt precedent for the
not justify the actions of the other defendants since Eck’s orders were illegal upon their face.

The judgment of the International Military Tribunal for the Far East states:

Inhumane, illegal warfare at sea was waged by the Japanese Navy in 1943 and 1944. Survivors of passengers and crews of torpedoed ships were murdered.\(^2\)

The Far East Tribunal judgment quotes a command in an order issued by the Commander of the Japanese First Submarine Force at Truk on March 20, 1943:

All submarines shall act together in order to concentrate their attacks against enemy convoys and shall totally destroy them. Do not stop with the sinking of enemy ships and cargoes; at the same time, you will carry out the complete destruction of the crews of the enemy’s ships; if possible, seize part of the crew and endeavor to secure information about the enemy.\(^2\)

There is convincing evidence that this order was carried out on several occasions. A number of examples are referred to in the judgment of the Far East Tribunal.\(^2\) One which is summarized involved the sinking of the United States Liberty-type merchant ship *Jean Nicolet* which had an armament manned by a U.S. Navy Armed Guard.\(^2\) The judgment states:

The massacre of survivors of the American ship “*Jean Nicolet*” is another example of methods employed by the Japanese Navy. This ship was travelling from Australia to Ceylon in July 1944 when she was torpedoed at night by a Japanese submarine while some 600 miles from land. Her ship’s company was about 100 of whom about 90 were taken aboard the submarine. The ship was sunk and her boats were also smashed by gun fire although all did not sink. The hands of the survivors were tied behind their backs. A few of the officers were taken below and their fate is not known to the Tribunal. The remainder were made to sit on the forward deck of the submarine as she cruised searching for survivors. During this time some were washed overboard and others were beaten with wooden and metal bludgeons...

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\(^1\)decision in the *Peleus* case and was so argued by the prosecution. 1 *War Crimes Trials* 117-19; 1 *Reps. U.N. Comm.* 19, 20.

The *Baralong* incident should also be mentioned. It was alleged that this British Q-ship killed German submarine survivors in the water. Oppenheim-Lauterpacht 510, n.2; Sheer, *Germany’s High Sea Fleet in the World War* 232 (1920); [1915] *Foreign Rel.* U.S. Supp. 527-29, 575-77, 650-51 (1928).

\(^2\) *F.E.I.M.T.* Judg. p. 1,072 (one thousand seventy-two).

\(^3\)Id. at p. 1,073.

\(^4\)Id. at pp. 1,073-74.

and robbed of personal property such as watches and rings. Then they were required to proceed singly towards the stern between lines of Japanese who beat them as they passed between their ranks. Thus they were forced into the water to drown. Before all the prisoners had been forced to run the gauntlet the vessel submerged leaving the remaining prisoners on her deck to their fate. Some, however, did survive by swimming. These and their comrades whom they kept afloat were discovered the next day by aircraft which directed a rescuing ship to them. Thus twenty-two survived this terrible experience, from some of whom this Tribunal received testimony of this inhumane conduct of the Japanese Navy.\footnote{F.E.I.M.T. Judg. pp. 1074–75.}

The attacks upon the surviving personnel of the \textit{Peleus} and the \textit{Jean Nicolet} have been examined here because both of the incidents have major significance for the international law of sea warfare. The central point is that the enemy, particularly when he is helpless and struggling for survival, must be regarded as within the broad scope of the common humanity of all mankind.\footnote{Beach, \textit{Run Silent, Run Deep} 319–22 (Permabook ed. 1956) describes a United States submarine sinking by ramming each of the lifeboats of a sunken Japanese Q-ship. Even though the account appears in a novel, it provides accurate illustration of the murder of survivors and the psychological attitudes which cause it.} Only when the victims are dehumanized in the view of their enemy are they likely to be treated as were the survivors of the \textit{Peleus} and the \textit{Jean Nicolet}. There is the urgent need for worldwide recognition and effective implementation of the right of all individuals to fair and non-discriminatory treatment, even in situations of coercion and violence. A concrete step toward this goal can be achieved by enforcing the Geneva Conventions for the Protection of War Victims and the elementary prohibition of killing survivors.

\section*{6. Objects and Methods of Attack in Future General War}

The same types of general war which have been postulated previously in this study are now employed to appraise objects and methods of attack. These types are a nonnuclear general war similar to the World Wars or the same type of war with a restricted use of nuclear weapons.\footnote{From your perspective or mine the creative opportunity is to achieve a self-system larger than the primary ego; larger than the ego components of family, friends, profession, or nation; and inclusive of mankind. Lasswell, “Introduction: Universality Versus Parochialism,” in McDougal & Feliciano xix, xxiv.} The principal legal issue arising concerning the objects and methods of attack of

\footnote{Admiral Biorklund of the Swedish Navy postulates a general war involving restricted use of nuclear weapons in which merchant ships would be principal objects of attack in “Sea-Air Strategy and Submarine Warfare II,” 104 \textit{J. Royal United Serv. Inst.} 203 (1959).}
submarines in such a future war is whether or not merchant ships participating in the naval war effort may be attacked lawfully without warning. In resolving this issue, appropriate weight must be accorded to the past process of legal decision in general war.

During the First World War there was, without doubt, widespread shock and revulsion at the destruction of the “noncombatant” human values involved in the German use of submarines. In commenting upon that German unrestricted submarine warfare, Professor Garner has written:

The rule referred to [concerning safety] was adopted for the protection of innocent non-combatants, not for the benefit of belligerents, and it cannot be admitted that the invention of new instruments repeals or modifies the rule. The use of the [submarine] instrument must be adjusted to the requirements of the law of nations and of humanity and not they to the instrument.

There can be no dispute concerning the desirability of according priority to the principle of humanity. It is apparent, nevertheless, that enforceable legal doctrines which accord some consideration to humanity are better than unenforceable ones which accord all consideration to it. The only difficulty presented by Professor Garner’s demand for humanity is that it cannot be enforced in combat situations, even to a modest degree, without taking full account of the complementary principle of military necessity.

In the Second World War the United States adopted the same methods of submarine warfare which it had regarded as indefensible in the earlier war. The military utility of the submarine against the merchant ship when attacks were made without warning was of decisive importance. Even if doubt remained after the First World War, it is clear now that the principle of humanity has been adjusted to the requirements of the efficient military use of submarines. As Professor Lauterpacht has recognized, the problem of “unrestricted submarine warfare” is a part of the larger question concerning the validity of the combatant-noncombatant distinction in general war. In referring to civilians on land who were the victims of the long-distance blockade, he has stated:

The practice of two world wars was based on the view that no such sacrosanctity attaches to the civilian population at large as to make illegal the effort to starve it alongside the military forces of the enemy as a means of inducing him to surrender.

It is certainly regrettable, but nevertheless a fact, that civilians who have

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226 Concerning the sinking of the Lusitania: “The American public was horrified.” Buehrig 30.
227 1 Garner 378.
229 Ibid.
embarked upon merchant ships which are engaged in the naval war effort in one way or another have shared the fate of those ships.\textsuperscript{230}

In identifying objects of attack in the event of a future general war, it must be recalled that the nuclear-powered and nuclear-armed attack submarine is a much more efficient combatant unit than its predecessors of the World Wars. In general war it is most unlikely that other considerations will be given priority over those concerning military efficiency in the use of such submarines. It is probable, therefore, that merchant ships participating in the naval war effort of one belligerent will be subject to attack without warning by the submarines of the opposing belligerent. This has been appraised as lawful under the Protocol in World War II and it will be lawful also in a future general war if the past process of decision is a reliable guide.\textsuperscript{231} The destructiveness of human values involved in the use of nuclear attack submarines would be even less disproportionate to their military efficiency than was the situation involving the use of traditional submarines in both World Wars.

Writing in 1934, Admiral Richmond stated:

Effective as the submarine may be in attack upon mercantile shipping, she is of negligible use in its direct defense. A convoy cannot be defended by submarines. . . .\textsuperscript{232}

The statement was not only accurate when made but remained valid during World War II. The advent of nuclear-powered submarines with high underwater speeds has probably changed the situation drastically. The contemporary nuclear attack submarine may be susceptible of efficient utilization in protecting surface merchant ships from enemy attack submarines. If submarine merchant ships and nonpowered towed submarine cargo carriers\textsuperscript{233} are to be escorted effectively, the escorts must be submarines. In this context of possible future submarine warfare it is probable that submarine merchant ships will be subject to sinking without warning as their surface predecessors have been in two World Wars. There is no basis upon which to conclude that such sinkings would be a violation of the Protocol if the objects of attack were participating in any way in the war or hostilities.\textsuperscript{234}

The world community interest in limiting violence is not advanced by

\textsuperscript{230} See the text accompanying \textit{supra} notes 81, 82.

\textsuperscript{231} Compare the view in Barnes, “Submarine Warfare and International Law,” \textit{2 World Polity} 121, 189–90 (1960): “International Law as pertaining to submarine warfare would be immediately and consistently violated [in a future war].” “A change in the law of the sea, encompassing the submarine problem, is badly needed.” \textit{Id.} at 201.

\textsuperscript{232} Richmond, \textit{Sea Power in the Modern World} 177 (1934).

\textsuperscript{233} Towed submarine cargo carriers were employed by the Japanese in World War II as stated in the text of Ch. I accompanying note 29.

\textsuperscript{234} See the discussion in Hyde 1992–93.
the practice of subjecting merchant ships participating in the war or hostilities to submarine attack without warning even though the practice must be appraised as lawful. This situation is, however, only a part of the overall community interest. This broader community interest in limiting violence is not advanced by general war. The attempt to find a further limitation of violence in submarine warfare must be made in the context of limited war.

C. CLAIMS CONCERNING OBJECTS AND METHODS OF ATTACK IN LIMITED WAR

The Harvard Research, Rights and Duties of Neutral States in Naval and Aerial War states:

It seems obviously impossible to distinguish in a Draft Convention between “small” wars and “large” wars and it is accordingly impossible to lay down two set of rules applicable to the two different types of situations.235

Draft conventions and other “restatements” often reveal excessive concern with abstract doctrinal formulations without sufficient regard to the great variations in the factual context which exist.236 Considering the importance of the human values which are involved, it is worth the effort to consider objects and methods of attack in limited war situations. In addition, Professor Osgood has stated the important point that: “The decisive limitation upon war is the limitation of the objectives of war.” 237

The same two types of limited war context which have been considered previously will be employed again.

1. Claims by Major Powers in Limited War

In a limited war between major powers involving the use of submarines, it may be confidently predicted that the newest and most efficient

235 Harvard Research, Naval War 487.

It is apparent that the Restatement format does not lend itself well to the clarification of the law in an area as rapidly changing and as little developed by judicial authority as that of international agreements. The Restatement format makes impossible a really challenging and enlightening discussion of the many uncertainties and the probable direction of development of the law in light of the needs of the world community. . . . The result is an unfortunate impression of dogmatism and of a static conception of a highly dynamic branch of law—in short, of “a frozen cake of doctrine”.
237 Osgood 4.
types of nuclear attack submarines will be involved.\textsuperscript{238} The central question concerns the mutual restraints relating to objects of attack which the major belligerent powers would recognize. A hopeful condition which may be postulated is that the enemy commerce at sea would be likely to be a much less significant object of attack than it was during the World Wars. There are several factors which tend to make this postulate a realistic one. First, a limited war between major Powers is unlikely to require a full effort by the productive forces of the economy. Second, it would probably not be necessary to devote a large proportion of a state’s merchant marine to the functions of supplying the economy with necessary raw materials and of transporting troops and supplies to the battle areas. Third, to attempt to achieve complete interdiction of enemy commerce at sea, as was done during the World Wars, would make it very difficult to retain the limited characteristics of the war.

If the enemy commerce at sea were a less important object of attack, the risks involved in an all-out attack against enemy merchant shipping, including sinking without warning, would not be proportionate to the value of the military objective sought. In these circumstances, rational belligerents mindful of their self-interests would refrain from attacks upon enemy merchant vessels without warning.

It has been concluded that the Protocol does not extend its protection to merchant ships participating in the naval war effort.\textsuperscript{239} This interpretation was made with reference to the context of general war and should not be applied automatically in limited war. In addition, the commerce in limited war which has just been described is not participating directly in the naval war effort. The merchant ships involved are actually performing functions closer to those which are regarded as peaceful than those deemed warlike. In this factual context, there are good reasons to extend the protection of the Protocol to them. The reasons are more persuasive if it is postulated that these merchant ships present no military danger to submarines. Consequently, the Protocol should be interpreted as applying to and protecting such merchant ships.

It is probable, even where sea commerce in general is not an important object of attack, that sea transportation to the actual battle areas will continue to be militarily necessary in order to maintain a flow of troops and supplies. Merchant ships engaged in such transportation could reasonably be regarded as subject to attack without warning. Since these merchant ships are participating in the war or hostilities, they should be deemed to be lawful objects of attack without warning under the Protocol. All merchant ships would, of course, be exempt from such attack if the major belligerents agreed, either expressly or by implication, only to regard

\textsuperscript{238} See Kuenne 177–92.

\textsuperscript{239} See the text accompanying note 120 supra.
regular warships as the objects of attack without warning. If this were to be done, it would be a significant indication that the war was to be kept limited.\textsuperscript{240}

2. Claims by Minor Powers in Limited War

In this type of limited war it is also possible that the enemy commerce at sea would not be a particularly important object of attack. In addition, there are other factors which can be expected to be especially effective as to minor powers. Such powers will probably not acquire the expensive and efficient nuclear attack submarines in the near future. The relative military inefficiency of their submarines in comparison with nuclear submarines may cause them to limit the scope of the objects of attack and the severity of the methods of attack. The particular objects of attack which are selected by minor powers should be influenced by their restricted military capabilities. There is little point in proclaiming enemy merchant ships to be objects of attack without warning if there is an inadequate submarine capability to carry out such attacks.

In this type of war the dangers of escalation from sinking without warning should also be considered. Further, if neutral merchant ships are sunk without warning as a result of errors in identification it could lead to possible further military involvement by a minor power which may be already involved near the limits of its military capability. It may be expected also that minor powers must take into consideration the interests of major powers which are not participants in the war. The common interests of the world community would be served effectively if the major powers indicated as overriding interest in restricting the war or hostilities.\textsuperscript{241}

It has been suggested that there are some situations remote from the well-traveled sea lanes where the protection of the Protocol can be extended to merchant ships during a general war.\textsuperscript{242} Such situations should certainly exist in a limited war between major powers, and there should be even more opportunities to apply the Protocol in a limited war between minor powers. The principal reason for this conclusion is that such a war may well present a number of fact situations in which merchant ships are not participating in the war or hostilities. In a situation involving a single merchant ship the tactical context may permit, and even obligate, a submarine to comply with all the requirements of the Protocol applicable to


\textsuperscript{241} The role of the United States and the Soviet Union in the Anglo-French-Israeli invasion of the Sinai-Suez area is regarded as an example of the point made in the text. See Campbell, Defense of the Middle East: Problems of American Policy 109 (Rev. ed. 1960).

\textsuperscript{242} See the text accompanying note 120 supra.
merchant ships which are not participating in the war or hostilities. In such situations the submarine commander would be required to make an evaluation of the particular case, considering its tactical context and balancing and applying the principles of military necessity and humanity. The fact that such individualized evaluations were not feasible in the World Wars is not a persuasive reason to fail to attempt them in the different contexts of some limited war situations.

Finally, the obligations to survivors in this type of limited war, as well as in one between major Powers, should be emphasized. Aside from situations of urgent military necessity of the kind referred to by Admiral Nimitz \(^{243}\) which are more typical of general war situations, a legal obligation should be recognized to put personnel in a place of safety before sinking or, at the least, to rescue survivors after sinking and accord them status as prisoners of war or as protected persons.\(^{244}\)

\(^{243}\) See the text accompanying note 191 \textit{supra}.

\(^{244}\) Geneva Convention Relative to the Treatment of Prisoners of War, art. 4 (1949); Geneva Sea Convention, art. 13.