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 III

CLAIMS CONCERNING LAWFUL AREAS OF OPERATION: SUBMARINE OPERATIONAL AREAS

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

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

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

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

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

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

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

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

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

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

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

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9 The distinctions are articulated in Grotius, De Jure Belli ac Pacis Libris Tres, Bk. III, Ch. I, section 5, 2 Classics of International Law 602 (Kelsey transl. 1925).
10 Seymour, American Diplomacy During the World War 32–34 (1934).
11 See Buehrig 85–105 (Ch. 5 entitled “The Defense of Trade”) (1955). See generally Percy, Maritime Trade in War (1930):
12 Colombos 672–752; McDougal & Feliciano 488–509; Oppenheim-Lauterpacht 768–90, 848–68.
14 The procedures of visit and search are described in Harvard Research, Naval War 535–47. The black letter summary of visit and search in the Harvard Research is quoted in the text of Ch. IV, section A.
15 Traditional blockades are described in Tucker 283–95.
16 Such techniques are described in 1 Medlicott 415–29. See also Y. Wu, Economic Warfare passim (1952).
aircraft carrying them. The extreme alternative courses of action are release of the goods and craft on the one hand and destruction without warning on the other. It is obviously in the interests of a belligerent capable of rational calculations of self-interest to condemn the goods and the carrier and requisition them for his own purposes wherever possible.

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

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

19 See McDougal & Feliciano 479.
20 The German reasons for resorting to the use of submarines against commerce are set forth in Scheer, Germany's High Sea Fleet in the World War 215–58 (1920).
It is impossible to conduct anything but the most superficial search of a large merchant vessel at sea whether the warship attempting to make the search is a surface or submarine one. The surface naval powers, in consequence, adopted the technique of diversion during the World Wars.\textsuperscript{22} Under this technique a suspected merchant vessel was diverted to a designated control port where a comprehensive examination of the cargo could be made. This technique was not available to a submarine naval power since its exercise was dependent upon control of the surface of the sea.

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

The long-distance blockade enforced in the manner described was

\textsuperscript{22} See id. at 182–201.


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

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

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

\textsuperscript{1} Medlicott 23.

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

\textsuperscript{27} E.g. the passage between the Shetland Islands and Iceland. Roskill 37.
a method of commerce interdiction which was not available to Germany because of its lack of surface naval power. In response to the same realities of modern naval warfare which brought about the employment of the long-distance blockade, Germany developed the operational area enforced by submarines as its preeminent method of interdicting commerce with the United Kingdom. For a time during the First World War, Germany attempted to apply differential treatment to enemy and neutral merchant ships in the prescribed area. Only the enemy merchant ships were sunk without warning and, in theory at least, the neutrals were spared this fate. Because of the tactical difficulty, and indeed impossibility in many situations, of a submarine attempting to distinguish between neutral and enemy merchant vessels, the attempt was doomed to failure. Germany was presented with the dilemma whereby it either had to abandon submarine enforcement of its areas for all ships or apply that enforcement to all ships including neutrals. The German dilemma is reflected in the considerable diplomatic correspondence between Germany and the United States while the latter was a neutral.

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

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

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

29 See the text accompanying notes 46–48 infra.
31 Medlicott 17. The term “economic warfare” was planned as comprehensive and covering the entire field. Id. at 12–17. Narrower terms such as “blockade” were rejected as “out of date and inadequate” in reflecting the activities involved. Id. at 16. The “economic blockade” subject of Professor Medlicott’s two volumes is but a part of “economic warfare.” Id. at 17.
specific reference to the First World War has described the role of the United States:

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

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

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

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

32 Percy, Maritime Trade in War 58, 59 (1930).
In 1946 the United States Government abandoned a plan to write the history of the American role in economic warfare. 2 Medlicott x. The Medlicott study, however, is also valuable in describing the American role. See e.g. id. at 19–25; 26–62.
33 Colombos 509–10; McDougal & Feliciano 478–79; Stone 508–10; Oppenheim-Lauterpacht 796–97. Professor Lauterpacht refers to the diminished “cogency of the claim of neutrals to unimpeded commercial intercourse with the belligerents.” Oppenheim-Lauterpacht 796, n. 1.
1. German Claims

a. THE FIRST WORLD WAR

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

Just as England has designated the area between Scotland and Norway as an area of war, so Germany now declares all the waters surrounding Great Britain and Ireland including the entire English Channel as an area of war, and thus will proceed against the shipping of the enemy.

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

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

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

They therefore give notice that the whole of the North Sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft, and all other vessels will be exposed to the gravest dangers from mines which it has been necessary to lay and from warships searching vigilantly by night and day for suspicious craft. Id. at 464. Safe routes were prescribed for neutral vessels. Ibid.

In the note of Nov. 10, 1914 from the Secretary of State to the U.S. minister in Norway the United States refused to join other neutrals in protesting the British zone. [1914] Foreign Rel. U.S. Supp. 466 (1928).
was implicit. Further, the Proclamation was directed at “enemy” but not at neutral merchant shipping and safe areas were designated for the latter.³⁷ Because of the difficulties encountered by submarines in attempting to distinguish neutrals from belligerents, neutral merchant ships were sunk in the “area of war.” Neutrals, particularly the United States, claimed the illegality of the submarine operational area. This resulted in German Government vacillation in the actual application of submarine enforcement in the area.³⁸

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

In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance.⁴¹

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The German submarine forces have had, in fact, orders to conduct submarine warfare in accordance with the general principles of visit and search and destruction of merchant vessels as recognized by international law, the sole exception being the conduct of warfare against the enemy trade carried on enemy freight ships that are encountered in the war zone surrounding Great Britain . . . .⁴²

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

³⁷ Compare with the text Colombos 488.
⁴⁰ The United States made demand to Germany for disavowal, reparation, and assurances in its note of May 13, 1915. *Id.* at 393–96.
⁴² *Id.* at 257.
withdrawal of the German operational area claim of February 4, 1915 as to belligerent unarmed passenger vessels.

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

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

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

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


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

45 On the military and political factors in the decision see Buehrig 71-75; Millis, The Road to War: America 1914-1917 354-82 (1935).
and humiliation of the Central powers, Germany is unable further to forego the full use of her submarines . . . .

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

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

(1) Appraisal as Reprisal

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

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

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

47 Id. at 102.
48 Beuhrig passim sets forth various bases including United States concern over a possible German victory.
49 Tucker 305 (footnotes omitted).
50 Stone 353-56; Oppenheim-Lauterpacht 561-63. See the text of Ch. I accompanying note 89.
of reprisals in the present context must, therefore, consider the major features of British naval warfare.

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

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

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

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

\(^{53}\) If reprisals are designed to induce the opposing belligerent to give up its unlawful measures, it is desirable to direct the reprisals against the specific unlawful measures. See generally Oppenheim-Lauterpacht 563.

\(^{54}\) Admiral Scheer provides illustration:

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

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

\(^{55}\) It was indeed upon the civilian population that the [blockade] action of the Allies bore with the greatest weight; since Germany was able, thanks to her
provided adequate justification for the submarine operational area as a legitimate reprisal.

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

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

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

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


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

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

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

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

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

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

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

60 See notes 86, 87, infra.


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

The Government of the United States is also advised that the Norwegian Government has been informed that the Governments of the United States and Great Britain are engaged in laying a barrage across that portion of the North Sea lying between Scotland and Norway, which when completed will effectively prevent the passage of enemy submarines to and from the Atlantic Ocean by the northern route through the North Sea provided that they are not permitted illegal passage through the territorial waters of Norway. [1918] Foreign Rel. U.S. Supp. No. 1 vol. 2, 1782, 1783 (1933).

Prof. Hyde has written:

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

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

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

And by rigidly restricting neutral merchant shipping to certain well-defined and narrow channels they made the control of the sea-routes to Germany absolute.

From that time forward, no neutral merchant ship, even if she escaped bunker control, black lists, export restrictions and search in harbours could, without an Allied permit, hope to reach a port in a rationed neutral country. Which final denial of all neutral rights at sea was another contribution of America.

Factual description appears in the U.S. Office of Naval Records and Library, The Northern Mine Barrage and Other Mining Activities (1920).
of the German measures upon the United States and other neutrals cannot deprive these measures of their status as legitimate reprisals.

(2) Appraisal as Claim of Right

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

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

Professor Tucker has stated similar views:

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

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

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63 1 Garner 354.
64 Tucker 298 (footnotes omitted).
Prof. Stone concludes that war zones on the high seas are lawful as between belligerents. Stone 572. He does not reach a conclusion as to their lawfulness against neutrals. Id. at 574.
Prof. Lauterpacht concludes that war zones are lawful as between belligerents providing that the submarines used “comply with the laws of maritime warfare.” Oppenheim-Lauterpacht 682. In his view, the use of war zones as to neutrals “can only be justified as a reprisal.” Id. at 683–84.
Prof. Hyde states:
If, however, the belligerent can prove that its interference [through operational areas] with the neutral is inconsequential in comparison with the advantage to itself necessarily connected with the defense of its territory, the safety of which is otherwise jeopardized, the excuse is entitled to respectful consideration.
3 Hyde 1949.
Prof. Keith reached a tentative wartime conclusion in 1944:
What is clear is that the change in the nature of naval weapons and methods of warfare may compel revision of the issue of freedom of neutral navigation by sea; as custom has recognized the right of blockade and of visit, search and capture for carriage of contraband or the performance of unneutral service, so it may authorize use of the conception of war zones.
65 Colombos 467–68; Higgins, Studies in International Law and Relations 294 (1928).
that this is not an acceptable method of analysis unless novelty is to be treated as illegality. It is also difficult to accept such an analysis in view of the consistent historical record of acceptance of new methods and instruments of war which are militarily efficient. 66

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

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

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

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

66 This historical record is examined in Royse 1–21 and passim.
67 Oppenheim-Lauterpacht 796.
68 Id. at 796–97.

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

Id. at 93 (footnote omitted.) These conclusions are supported by Baty, “Prize Law and Modern Conditions,” 25 A.J.I.L. 625 (1931).
war, had no impact on the decision-making process during the war. If the argument had been accepted at that time, it seems most improbable that it would have affected decision-makers by compelling a reversion to the naval methods of the previous century since those earlier methods were no longer feasible from a technological standpoint. The net effect of reversion to the nineteenth-century methods would have been foregoing the effective use of surface naval power, not to mention losing the war. Because of this the almost certain outcome would have been that the newer methods would have been continued under the onus of illegality. The consequences would have been the enhancement of the attitude that international law is inadequate to regulate modern war and an abandonment of all restraints upon naval warfare. Such a decision, or any functionally equivalent one to conduct war outside of law, would hardly promote humanitarian objectives. Considering these factors, Professor Lauterpacht's appraisal of the long-distance blockade is preferable. In addition, a method of legal appraisal which proclaims illegality after the war but which has no impact on decision-makers during the war leaves something to be desired. This difficulty persists, of course, whether such an inadequate appraisal is made concerning surface or submarine methods of warfare.

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

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

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

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70 See the text accompanying notes 23–27 supra.
71 It is obvious that the humanitarian objectives of the laws of war must be implemented during the actual war or hostilities.
party which lacks command of the surface of the sea is an attempt to avoid the consequences of naval weakness.\(^73\)

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

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

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

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

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

\(^{73}\) Colombos 470.
\(^{74}\) Id. at 707.
\(^{75}\) Id. at 509–10.
\(^{76}\) Royse 164 (footnote omitted).
\(^{77}\) Colombos 469–70; Garner 377–80.
\(^{78}\) The technique of diversion of merchant ships was adopted because of the impracticability of visit and search at sea. See the text accompanying note 22 supra.
actually attempted visit and search by submarines and this was proven unworkable in the light of the new technology in general and the methods of warfare employed by British merchant ships in particular.\textsuperscript{79}

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

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

\textsuperscript{79} See the text accompanying notes 51, 56, and 57 supra.
\textsuperscript{80} See McDougal & Feliciano 494.
\textsuperscript{81} These sanctions were highly effective. 1 & 2 Medlicott passim.
\textsuperscript{82} This was the ultimate sanction even though the traditional texts only list capture as a sanction for breach of blockade. See, e.g., Oppenheim-Lauterpacht 788–89. The same text reveals no hesitancy in allowing an attack on a merchant ship if the attack is in response to a refusal to submit to visit. See infra note 83.
\textsuperscript{83} “Enemy merchantmen may be attacked only if they refuse to submit to visit after having been duly signalled to do so.” Oppenheim-Lauterpacht 466–67 (footnotes omitted).
\textsuperscript{84} Compare the comprehensive character of commerce interdiction sanctioned by surface naval power:
It is now not only a case of blockade, it is a case of shutting down German commerce the world over, so far as we are able to do it.
general war to both surface and submarine naval powers also supports the conclusion of the reasonableness of the submarine area.85

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

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

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

86 From June 30, 1914, to June 30, 1917, the United States shipped $506,674,000 worth of gunpowder and $665,237,000 in other explosives. Buehrig 89 (footnotes omitted). The quoted figures do not include firearms, cartridges, and various metals. Prof. Buehrig states that as to all of these (except copper—277% increase):

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

Ibid.

87 If the neutrals had in reality been content to continue their normal peacetime trade, many of the conflicts with the belligerents would not have taken place and the law of neutrality might have been shaped quite differently. Jessup, 4 Neutrality: Its History, Economics and Law (vol. 4 is additionally entitled Today and Tomorrow) 23 (1936).

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

Id. at 34.
b. THE SECOND WORLD WAR

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

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

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

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

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

> The German Government assumes no responsibility for damage

\(^{88}\) 18 I.M.T. 327.

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

\(^{90}\) 18 I.M.T. 328.

\(^{91}\) Ibid.

\(^{92}\) Id. at 328–29.

\(^{93}\) Ibid.
to ships or injury to persons which may befall them in this area.\textsuperscript{94} As the result of the developments which the war has taken during the last weeks England has been brought into the center of the war activities at sea and in the air. In the sea area surrounding the British Isles constant war action is consequently from now on to be expected which makes it impossible for merchant ships to pass through this sea area without running serious risks. The entire sea area around the British Isles has therefore become a combat zone. Every vessel which passes through this area is exposed to destruction not only by mines but also by other weapons. The German Government therefore most urgently renews its warning to neutral shipping against passing through the danger zone . . . .

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

\textit{Appraisal}

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

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

\textsuperscript{94} 6 Hackworth 485–86; it is also quoted less fully and with slight variations in wording in 18 \textit{I.M.T.} 329.

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

\textsuperscript{95} See the text at note 46 \textit{supra}.

\textsuperscript{96} See generally 1 & 2 Medlicott.

\textsuperscript{97} \textit{I.M.T.} 311–13.
claim of February 1, 1917. It will be considered further with the other issues raised before the International Military Tribunal.

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

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

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

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

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

98 See the text accompanying notes 86, 87 supra.
99 See the text accompanying notes 121-27 infra.
100 1 I.M.T. 311.
101 Stated by Sir Hartley Shawcross. 19 I.M.T. 469.
102 The "paper order" or "paper blockade" terminology was used historically to refer to a traditional blockade supported by insufficient naval power to meet the requirement of effectiveness. See Hall, The Law of Naval Warfare 198-99 (2nd rev. ed. 1921).
103 18 I.M.T. 314, 326-27.
104 The German Prize Law Code of Aug. 28, 1939 art. 74 is quoted in 7 Hackworth 248.
made such a procedure militarily impossible, and at the same time created the legal prerequisites for its modification.\textsuperscript{105}

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

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

(1) A legal trade between the neutrals and the British Isles no longer existed. On the grounds of the German answers to the British stipulations concerning contraband goods and the British export blockade, any trade to and from England was contraband trade and therefore illegal from the point of view of international law.

(2) The neutrals in practice submitted to all British measures, even when these measures were contrary to their own interests and their own conception of legality.

(3) Thus, the neutrals directly supported British warfare, for by submitting to the British control system in their own country they permitted the British Navy to economize considerably on fighting forces which, according to the hitherto existing international law, should have exercised trade control at sea and which were now available for other war tasks.\textsuperscript{109}

\textsuperscript{105} 18 I.M.T. 314.

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

\textsuperscript{107} See McDougal & Feliciano 675.

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

\textsuperscript{109} 18 I.M.T. 335.
Because of these facts, in Kranzbuhler’s view, there was no reason for the German Government to give preference to the neutrals over German military needs "in determining its operational area with a view to preventing illegal traffic from reaching England." He also pointed out that the neutral ships traveling to England, in spite of German warnings, underwent a great risk for the purpose of earning a high profit.

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

However, the proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the war of 1914–1918 by Germany and adopted in retaliation by Great Britain. The Washington Conference of 1922, the London Naval Agreement of 1930, and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the First World War. Yet the Protocol made no exception for operational zones. The order of Donitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol. The “Protocol of 1936” is, in substance, the same as article 22 of the London Naval Treaty of 1930 and provides:

1. In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.

2. In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship’s papers in a place of safety. For this purpose the ship’s boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

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10 Ibid.
11 Ibid.
12 I. M. T. 312.
13 Ibid. at 312–13.
14 The “Protocol of 1936” or the “Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930” contains the identical rules set forth in the London Naval Treaty Part IV (art. 22) and quoted in the text. Art. 23 of the London Naval Treaty provided, “Part IV shall remain in force without limit of time” (the rest of the Treaty expired on Dec. 31, 1936). In the Proces-Verbal the parties to the London Naval Treaty invited
The second paragraph of the Protocol states two exceptions to the rules: "persistent refusal to stop on being duly summoned" and "active resistance to visit or search." The Tribunal's conclusion that "the Protocol made no exception for operational zones" necessarily involves the interpretation that the stated exceptions precluded the existence of others, and that the stated ones did not cover the situation of a submarine operational area being the functional equivalent of the stated exceptions. The Tribunal's conclusion appears to be an example of mechanical interpretation or literalism.115 There is no indication that the Tribunal gave careful consideration to the alternative interpretation that the Protocol was inapplicable in operational areas since there was no international agreement on this subject. Such an interpretation was advanced by Kranzbuhler116 and it is at the very least as plausible as the interpretation selected by the Tribunal. It is more plausible if the operational area is evaluated as too important to be dealt with by implication.

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

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

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

The Proces-Verbal or Protocol of 1936 is in 31 A.I.I.L. Supp. Official Docs. 137-39 (1937); 7 Hackworth 248. 135 The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some preexisting specific intention of the parties with respect to every situation arising under a treaty. Harvard Research, Treaties 946.

116 18 I.M.T. 330.

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

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

119 1 I.M.T. 312.
network of naval intelligence." The references to merchant ships in the Protocol could, with consistency, have been interpreted as not applicable to any vessel including neutrals so integrated into the British warning network.

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

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

120 Ibid.
121 1 I.M.T. 313.
122 Under questioning by the chief British prosecutor, Admiral Donitz used a land warfare analogy in connection with such neutral vessels: "For instance, no consideration would be shown on land either to a neutral truck convoy bringing ammunition or supplies to the enemy." 13 I.M.T. 365.
123 A navicert was a "commercial passport" issued by the British Government "in respect of any consignment which did not appear liable to seizure as contraband." 1 Medlicott 94. See generally 7 Hackworth 212–17; Ritchie, The "Navicert" System During the World War (1938).
124 A ship navicert was issued when the entire cargo was covered by navicerts and was "intended to minimize further the formalities of visit and search." 1 Medlicott 96–97.
125 The ship warrant was a document issued to each neutral ship whose owner had given satisfactory undertakings to do what the British Government required.

The shipowner undertook to comply with economic-warfare regulations. . . . 1 Medlicott 442–43.
It must always be remembered that the ship-warrant system was of importance not only for economic-warfare purposes, but also for the securing of tonnage and for the furthering of other sides of Allied shipping policy.¹²⁶

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

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

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

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

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

¹²⁶ 1 Medlicott 443.

It is not surprising that the view of the German Supreme Prize Tribunal was that: [T]he introduction of ships' warrants is a measure of economic warfare, with the express purpose of getting to the greatest extent under British control those ships which were not yet in British hands. The Ole Wegger, [1943-45] Annual Digest 532, 535 (No. 193).

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

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

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

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

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

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

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

FLOTTENRICHTER KRANZBUHLER: Yes

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

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

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

129 18 I.M.T. 332–33.
130 Id. at 333.
that the legal requirements of enforcement or control could not be met by “a paper order” and submarine enforcement. Unfortunately, Kranz-buhler did not respond to the express statements in the questions and demonstrate their juridical inadequacy. Whether the quoted questions actually reveal the reasoning which was persuasive to the Tribunal or not, it is clear that the decision of the Tribunal is at least consistent with this reasoning.

c. CLAIMS TO ESTABLISH RESCUE ZONES OF IMMUNITY

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

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

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

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

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

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131 See the text at supra note 101.
132 Convention Concerning Wounded and Sick in the Field, art. 23; Convention Concerning Civilian Persons, art. 14.
133 Roskill 224.
arrived, flew around the surfaced U-boats for about an hour, and then attacked U.156 with bombs. It is as impossible to justify that act as it is difficult to explain why it was committed.135

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

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

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

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

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

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

135 Roskill 224–25.
137 Roskill 225.
Hartenstein and Donitz. There can be no doubt but that the rescue attempt was consistent with the highest humanitarian traditions even though there is no indication that the International Military Tribunal gave credit for it. Since a preeminent objective of the laws of war is to prevent unnecessary loss of life, rescue zones of immunity on the high seas should be honored and implemented by belligerent and neutral states alike in future naval wars.

2. United Kingdom Claims

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

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

Appraisal

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

139 In addition to the Roskill books cited supra see Peillard, The Laconia Affair (Coburn transl. 1963).
141 13 I.M.T. 453-54.
142 1 I.M.T. 312.
In spite of the high improbability of neutral ships in the British submarine operational area, the phrase “all ships by night” includes the claim to sink neutral ships in the Skagerrak and Kattegat during the hours of darkness. Based on its decision in the case of Admiral Donitz, the Tribunal would deem this claim directed at neutrals to be unlawful.\(^{143}\) It should be appraised as lawful where the neutral ships were participating in German economic warfare. The reasons for this conclusion have been stated in the criticism of the decision concerning neutral ships participating in the opposing belligerent’s economic warfare in the case of Admiral Donitz.\(^{144}\) In summary, the same legal appraisal which upheld the lawfulness of the German submarine operational areas in both World Wars provides an ample juridical basis for upholding the British claim in the Skagerrak and Kattegat.

3. United States Claims

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

EXECUTE AGAINST JAPAN UNRESTRICTED AIR AND SUBMARINE WARFARE.\(^{145}\)

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

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

\(^{142}\) Id. at 313.

\(^{144}\) See the text at notes 121-27 supra.

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

\(^{145}\) The text of the message is taken from a photographic copy of the original. The message was declassified on Dec. 2, 1960. It was also sent to other military addresses in the Pacific and further stated: “CINCAF INFORM BRITISH AND DUTCH. INFORM ARMY.”

Since the message was secret it could not have notified neutrals of the submarine operational area.
A. Yes. For the purpose of command of operations against Japan the Pacific Ocean areas were declared a theater of operations.

3. Q. If yes, was it customary in such areas for submarines to attack merchantmen without warning with the exception of her own and those of her Allies?
A. Yes, with the exception of hospital ships and other vessels under 'safe conduct' voyages for humanitarian purposes.

4. Q. Were you under orders to do so?
A. The Chief of Naval Operations on 7 December 1941 ordered unrestricted submarine warfare against Japan.\textsuperscript{146}

\textit{Appraisal}

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

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

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

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

\textsuperscript{146} 40 \textit{I.M.T.} 108, 109 (Document Donitz—100); the same interrogation is read into the record of the proceedings in 17 \textit{I.M.T.} 378–81.

\textsuperscript{147} It is easier, a fortiori, to uphold the reasonableness of the geographic extent of the smaller German operational areas.

\textsuperscript{148} 1 \textit{I.M.T.} 313.

\textsuperscript{149} The same conclusion is reached in Robertson, "Submarine Warfare," \textit{JAG J.} 3, 8 (Nov. 1956). Compare Smith 212–13:

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

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

Since no legal issue is presented by the application of the United States submarine operational area to Japanese warships, it will be appraised as applied to Japanese merchant ships. The Japanese merchant ships, like the British, were armed, reported submarine sightings, and attempted to ram or otherwise attack submarines. In short, such merchant ships were functionally incorporated into the Japanese naval forces. Consequently, there can be no doubt but that these merchant ships were the lawful objects of “unrestricted submarine warfare,” that is, attack without warn-
ing within the operational area enforced by submarines.\textsuperscript{154} These are the principal reasons for the conclusion of the legality of the United States submarine operational area in the Pacific.

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

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

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

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

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

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


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

\textsuperscript{155} 40 *I.M.T.* 111.

\textsuperscript{156} See the text accompanying notes 49–62 *supra.*
quoted above, there is no indication that reprisal has been used to justify the United States operational area.

4. Submarine Operational Areas in Future General War

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

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

We are not going to allow our efforts ... to be strangled in a network of juridical niceties. . . . Under existing conditions there is no form of economic pressure to which we do not consider ourselves entitled to resort.\(^{161}\)

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\(^{157}\) Such use of nuclear weapons is considered in Brodie, *Escalation and the Nuclear Option* (1966).


\(^{159}\) "Only [Soviet] submarine operations would be significant in the great oceans." Garthoff 215.

\(^{160}\) As to the surface enforced long-distance blockade, its indispensability is indicated in Prof. Medlicott's "assessment and perspective." 2 Medlicott 630–61. As to the submarine operational area, it has been indispensable to the United States as well as to other states. At the beginning of the Pacific war it was used before other offensive methods of naval warfare were available to the United States.

\(^{161}\) Quoted in Seymour, *American Diplomacy During the World War* 28 (1934)
It has been stated that the inadequacy of the International Military Tribunal's opinion in the case of Admiral Donitz is due in part to its apparent assumption that the claim to an operational area could only be upheld through the existence of sufficient surface naval power to exercise effective control. Consistent with this opinion, Mr. Colombos has, in substance, characterized submarine naval power as "naval weakness." 162

The actual success of submarines in enforcing operational areas in the World Wars does not support the charge of "naval weakness." Submarine naval power is, of course, different from surface naval power in many respects. Nevertheless, the high degree of effective control manifested in submarine operational areas should not be rendered juridically inadequate by simply testing it in terms of the method of control exercised by surface naval power. Even if it should be concluded that submarines during the World Wars did not achieve sufficient control, it is clear that contemporary nuclear-powered and nuclear-armed submarines could achieve a much greater degree of control in the operational area.

The concept of "freedom of the seas" has not outlawed submarine operational areas in past general wars. The best-known formulation of this concept appears in the second of President Wilson's fourteen points:

Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants. 163

It is not surprising that the British made a reservation to this point. 164

In attempting to reassure them and obtain their agreement, at least in principle, President Wilson explained:

Blockade is one of the many things which will require immediate re-definition in view of the many new circumstances of warfare developed by this war. There is no danger of its being abolished. 165

The outcome of President Wilson's attempt to obtain international support for the freedom of the seas 166 was that it was not included in the Treaty of Versailles. The available evidence seems to indicate that con-

(footnote omitted). President Seymour regarded Asquith's statement as going far. "towards an admission of illegality." Id. at 40.

162 Colombos 470. The sentence from which the quoted words are taken appears in full in the text accompanying supra note 73.


164 Id. at 421–23.

165 Id. at 428.

166 See the account of the attempt in Seymour, op. cit. supra note 161 at 381–89. See also 2 Savage, Policy of the United States Toward Maritime Commerce in War 158–60 (Dept. of State, 1936).
ceptions of the freedom of the seas will not outlaw submarine operational areas in future general wars.\textsuperscript{167}

To the extent that general war including naval economic warfare is a future possibility,\textsuperscript{168} claims to establish operational areas controlled and enforced by nuclear-powered submarines may be expected. The claims may be manifested in the actual conduct of operational area warfare, as was done by the United States in the Second World War, rather than in words.\textsuperscript{169} It does not seem a realistic way of promoting human values, particularly in the light of the two World Wars, to contend that this use of an efficient military technique is unlawful. It is clear that such contentions have had little impact on the actual process of decision thus far. In addition, it is of central importance that the destruction of human and material values involved in the use of such operational areas is not disproportionate to their military efficiency. Consequently, it appears that the continued legality of this method of warfare is assured in general war. Another general war based on the pattern of the two World Wars does not, however, appear to be the most probable future type of war.\textsuperscript{170}

\section*{C. CLAIMS TO ESTABLISH SUBMARINE OPERATIONAL AREAS IN LIMITED WAR SITUATIONS}

Limited wars with major powers as the participants and those with minor powers as the participants were referred to in Chapter I. The legality of submarine operational areas in each limited war category should be appraised.

\subsection*{1. Claims by Major Powers in Limited War}

It is clear that the coercive methods which are employed to achieve the objectives of limited war must be limited. Assuming that the belligerents comprise major powers with great military capabilities, each must limit the extensity of the area it uses for coercive purposes. If this

\textsuperscript{167} The doctrinal scope and content of "freedom of the seas" is indicated in 4 Whiteman 501–633; 2 Hackworth 653–710.


\textsuperscript{169} The indications are that the Soviet Union is not projecting a quick nuclear war in which economic warfare would count for little. See Garthoff \textit{passim}.

\textsuperscript{170} The United States conduct of submarine operational area warfare constituted the claim since the order to conduct such warfare was secret. See the text accompanying note 149 \textit{supra}.

\textsuperscript{170} See the projection of the U.S. Chief of Naval Operations quoted in the text of Ch. I accompanying note 115.
is not done, the result may be an extension of the area of war beyond that consistent with the limited objectives of the war. 171

The submarine operational area has been employed historically as a method of general war. The absence of claims to establish such areas should be taken as one indication that the war is to be limited in this respect. 172 It will be recalled that in general war situations, neutral interests in maintaining commerce with a belligerent were deemed to be of lesser importance than the belligerent interest in employing the submarine operational area. In limited war, the opposite result can be maintained more plausibly. It would be surprising indeed if the objectives of the belligerents, limited by definition, were accorded precedence over the interests of neutrals in maintaining commerce.

The experience in the Korean War supports this analysis. That war manifested neither submarine operational areas nor other modern methods of general war such as the long-distance surface blockade. 173 The United States, in fact, maintained a traditional close-in naval blockade. 174

In summary, submarine operational areas will most probably not be employed in limited wars between major powers because of the basic inconsistency between submarine operational areas as employed in the two World Wars and the objectives of limited war, rather than because of an interpretation of the Submarine Protocol of 1936. 175 If such areas should be employed at all they would be employed in a much more restricted manner than in the World Wars. This conclusion is also supported by the primacy of neutral commercial interests over belligerent interests in the context of limited war.

2. Claims by Minor Powers in Limited War

Some wars are limited in the sense that the belligerents are only capable of limited military efforts. In this type of war it may be predicted with some confidence that the interests of neutrals will be protected through their power and influence as opposed to that of the belligerents. The Nyon Agreement provides an illustration of this. 176 Anything except restricted submarine operational areas will probably be denied to the belligerents of they cause substantial inconvenience, much less danger, to the neutral states. It is unlikely that a minor belligerent would be permitted

171 Osgood 243–48 stresses the importance of “geographical limitation.”
172 Osgood 240 refers to “the general requirement of the formulation and communication of limited objectives. . . .”
173 See Cagle & Manson passim.
174 Id. at 281–84.
175 The International Military Tribunal’s interpretation is considered and criticized in the text accompanying notes 112–28 supra.
176 See the Nyon Agreement (1937) considered in the text of Ch. II accompanying notes 124–32.
to disrupt world trade by the employment of submarine operational areas of the kind associated with general war. If minor belligerents should make claims to establish such areas, stressing their military efficiency and necessity, the claims may well be outweighed by the claims of neutrals against their use.\textsuperscript{177} In addition, a minor belligerent would probably not have sufficient submarine naval power to maintain a submarine operational area effectively.

3. Claims to Establish Restricted "Operational Areas"

A careful legal appraisal should avoid automatically ruling out the drastically restricted use of naval power either in limited war or in coercive situations short of limited war.\textsuperscript{178} Whether it is termed "limited naval blockade," "quarantine-interdiction," some kind of "operational area," or given another label, one should be slow to condemn as illegal such limited measures especially when they are used to maintain world public order.\textsuperscript{179} This is particularly true where the principal alternatives may be the use of much more coercion including weapons of mass destruction. Whether or not submarines are employed in such uses of naval power including restricted "operational areas" would appear to make but little difference in a legal appraisal.

In describing the use of coercion in the United States quarantine-interdiction of Soviet Union missiles to Cuba in 1962, the present writer has stated:

\begin{quote}
[T]he formulation and implementation of the naval quarantine-interdiction amounted to the least possible use of the military instrument. Any lesser use would have amounted to abandonment of the military instrument and exclusive reliance upon non-coercive procedures which most certainly would have been ineffective without supporting military power.\textsuperscript{180}
\end{quote}

\textsuperscript{177} Seymour, \textit{op. cit. supra} note 161 at 29 stresses the importance of the neutral role even in general war.


\textsuperscript{179} The United Nations Charter art. 2(4) prohibits "the threat or use of force against the territorial integrity or political independence of any state. . . ." Art. 51 recognizes the existence of "the inherent right of individual or collective self-defense." Together they constitute a minimum public order system in the sense of outlawing coercion for aggressive purposes while legalizing it for defensive purposes.

This is an example of the kind of coercion which should not be condemned without consideration of the alternatives in the factual situation including the effects of other coercive methods as well as the effects of the abandonment of all coercion.\(^{181}\)

\(^{181}\) Some apparently would not agree with the textual statement. See e.g. Wright, "The Cuban Quarantine," 57 *A.J.I.L.* 546 (1963). Prof. Wright's legal analysis appears to be based upon the factual conclusion that the missiles involved only a commercial transaction in time of peace.

It is difficult to find that the Soviet Union violated any obligation of international law in shipping missiles to, and installing them in, Cuba, at the request of the Castro government. Under general international law, states are free to engage in trade in any articles whatever in time of peace. *Id.* at 548–49 (footnote omitted).