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Targeting Enemy Merchant Shipping
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Chapter I

Targeting Enemy Merchant Shipping: An Overview of Law and Practice

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The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

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I. Introduction

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

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

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

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

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

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

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

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

II. "The Seas' Fellowship"

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

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

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

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

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

III. Three Dimensional Warfare at Sea

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

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

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

IV. A Retrospective

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

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

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

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

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

The following are accepted as established rules of International Law:

(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

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

The High Contracting Parties invite all other Powers to express their assent to the above rules.¹⁷

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

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

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

B. The Challenge in the Mediterranean, 1937.

(1) The Problem

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

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

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

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

(2) *The Nyon Arrangements*

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

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

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

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

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

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

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

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

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

V. World War II and the Nuremberg International Military Tribunal³⁵

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

A. An Issue of Discrimination?

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

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

B. Judging Submarine Warfare at Nuremberg

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

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

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

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

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

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

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

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

VI. A “Dip into the Future”⁴⁴

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

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

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

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

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

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

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

A. The Falklands (Malvinas) Conflict, 1982

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. A Brief Reprise and Review

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

VII. "Starvation Blockade"

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

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

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

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

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

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

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

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

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

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

VIII. Conclusion

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

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

Notes

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

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

17. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31. *Id.* provision I.

32. *Id.* provision III.

33. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46. *Id.* at 213-265.

47. *Id.* at 274.

48. *Id.* at 266-75.

49. *Id.* at 275.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

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

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

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

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

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

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

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

66. *Id.*

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

68. *Id.*

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

70. 830 F.2d 421, 423.

71. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Quoted in Rauch, *id.* at 89–90.

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

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

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

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

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

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

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