

Chapter VIII

The Law of Submarine Warfare Today

by
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Introduction

The roles of military submarines have evolved throughout the twentieth century. In wartime, these roles have included coastal defense, harassment of enemy fleets, and, especially in World War II, hunting and destroying the seaborne commerce that supported the enemy's war efforts. Today, two principal roles for U.S. submarines, at least in any future war with the Soviet Union, are probably as anti-submarine weapons (attack submarines) and as strategic weapons platforms (ballistic missile submarines). Other missions, however, could include coastal defense, attacks on the enemy's surface fleet, projection of force ashore, and commerce warfare.¹

The laws of war have never been comfortable with the submarine's unique combination of stealth and vulnerability. As will be explained below, it is this peculiar mix of strength and weakness that can be blamed as the root cause of the legal dilemma, particularly as it relates to the submarine's role as a commerce raider. The legal responses to this twentieth-century weapons platform have ranged from early proposals for its abolition to justification of its use under the rules of reprisal to tolerance of it as an effective war machine with characteristics that regrettably require some adjustments in the traditional laws of war.

The U.S. Navy's new *Commander's Handbook on the Law of Naval Operations* (NWP 9) includes references to the laws of naval warfare that specifically address the submarine weapons system and also rules that apply, or can apply, to submarines and their roles in wartime. The ultimate purpose of this chapter is to analyze these direct and some of the indirect references to the law of submarine warfare. Before that discussion, however, the chapter will first briefly review the history of both the submarine as a weapons system and earlier approaches to the legal dilemma presented by the submarine and its wartime uses. Next, today's submarines and their wartime roles will be described. This will be followed by a discussion of the present state of the law of submarine warfare. Finally, the chapter will point out and analyze the submarine references in the *Commander's Handbook*.

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.

History²

The submarine is a war machine of the twentieth century. Although documented uses of submersible devices against the enemy in wartime occurred as early as the American Revolutionary War, and in fact the submarine's legality was considered at the 1899 Hague Peace Conference, deployment of submarines as a significant part of a nation's naval forces began only in the early years of the present century. Certainly the international law issues that form the core of the current chapter achieved real significance only with the conduct of naval warfare during the First World War.

The main advantage of a submarine over a surface warship is, of course, its underwater capability. Militarily, this translates into the ability to hide from the enemy and the ability to approach a target from its hidden position to carry out surprise attacks. The disadvantages of the submarine can be viewed as the price it must pay for the principal advantage of stealth, and these disadvantages, especially for earlier submarines, have been considerable. Submarines used by the belligerents in both world wars were small and cramped. They were slow when running submerged on batteries, which they could not do for long periods of time without coming to the surface to recharge, and were not all that fast when running on the surface under diesel power. Moreover, unlike heavily armed surface warships, the submarines of the world wars were vulnerable on the surface to attacks, even from lightly armed merchant vessels, and to ramming. While these submarines were armed with deck guns and were also capable of laying mines, their principal weapon was the self-propelled torpedo.

At the start of the First World War, submarines were assigned the roles of coastal defense against enemy warships and harassment of enemy warship fleets. Partly because of their disadvantages—low escape speeds, limited submerged times, vulnerability to attack on the surface—they were soon assigned the task of interdicting the seaborne commerce traffic that supported the enemy's war effort. This role of commerce raider then became the main wartime assignment for German submarines in World War I and the submarines of most of the belligerents in World War II. As we shall see, it is the anti-commerce role that has created the largest set of legal controversies concerning the military uses of submarines.

Since the Second World War, the evolution of the military submarine has proceeded in giant strides. With new developments have come new projected wartime roles and reconsideration of some of the earlier roles. The harnessing of nuclear energy, for propulsion and for weapons, has probably affected the nature and role assignments of the submarine more than any other preexisting war machine. Nuclear powered submarines are relieved of the necessity to surface or come to shallow snorkel depth to recharge batteries and can consequently remain in submerged hiding for extremely long time periods

and underwater transits. And, because the undersea remains an excellent place of concealment despite improved anti-submarine-warfare (ASW) devices and techniques, modern nuclear powered submarines have proved effective in their postwar deterrent role as roving submerged platforms for nuclear-armed ballistic missiles.

Other new developments in the design and construction of submarines have provided them with greater underwater speed, enough speed to match that of most surface warships (although this comparison probably says as much or more about the development of surface fleets as it does about submarine advances). Weaponry for submarines has also expanded in variety and range. While presumably only strategic missile submarines (SSBNs) are armed with ballistic missiles for their special deterrent role, the other principal category of submarines, attack submarines (SSNs, if nuclear powered, almost exclusively the case in the U.S. Navy today; SSs, if diesel-electric powered) have had their weapons array and targeting systems enhanced in recent years. Torpedoes have been greatly improved, of course, but modern attack submarines are now capable of launching a variety of anti-ship, anti-submarine, and land-target missiles, including cruise missiles, with conventional or nuclear warheads. Moreover, most of these weapons can be launched at much greater distances from the targets—even over the horizon—than was true for submarine weapons during the world wars. Today's submarines are also capable of sophisticated mine-laying.

Because of these advances, today's fighting submarines are in many respects as different from those that fought in World War I as those early submarines were different from the surface naval vessels that preceded and coexisted with them. But it is this earlier distinction that caused the initial legal controversy, a dispute that continues to this day. Indeed, the entire twentieth-century history of the submarine as a major implement of naval warfare has occurred in the face of attempts to apply to submarines laws of war that were essentially devised to regulate the use of latter-nineteenth-century surface warships, and in particular the interaction of these surface vessels with merchant shipping of the same time period. It is not surprising that some legal friction has resulted.

Arising out of the closely related principles of military necessity and humanity, the relevant laws of war were, and are, designed to protect noncombatant crews and passengers aboard merchant ships where circumstances make these vessels legitimate objects for destruction by a belligerent in wartime. The 1908 Declaration of London stated the rule that a neutral merchant vessel (assuming it was otherwise lawful to sink it) could be sunk by a belligerent ship only after the warship had provided for the safety of the passengers and crew.³ This might be accomplished by taking the protected persons on board the warship or another vessel and later transporting them to an appropriate port or, where geography and sea

conditions were favorable, placing the passengers and crew members in the merchant ship's lifeboats with some good assurance that they could safely reach a nearby shore. Although this rule said nothing about enemy merchant ships, other rules of naval warfare of course generally allowed the sinking of an enemy warship in non-neutral waters without warning or removal of combatant crew members.⁴

The First World War provided the test for compliance with these rules by submarines. As noted above, the main advantage of the submarine is its capability for surprise attack from its underwater hiding place. Because of its slow underwater speed, its limited submerged time, and its vulnerability on the surface, however, the World War I submarine was usually not much of a match for the warships of the enemy's surface fleet. Surface warships were too fast for a submarine running submerged, and the most important targets—battleships—were very difficult to sink. Even if a submarine was successful in striking a legitimate warship target, other ships in the enemy fleet were likely to detect and chase down the submarine and attack it with depth charges or force it to the surface, where its destruction or capture was virtually assured. Isolated, older second-line warships and, then, merchant ships thus became the preferred targets for submarines.

In accordance with the traditional rules reflected at least in part by the London Declaration of 1909,⁵ a merchant vessel that was found to be in some way supporting the enemy's war effort—for example by carrying a cargo of contraband arms to the enemy—and which could not safely be escorted to port for adjudication as a prize of war, could be sunk after the safety of the passengers and crew had been provided for. The rules allowed a belligerent warship to stop a suspect merchant ship and conduct a visit and search to determine its involvement in the enemy war effort and then, if circumstances warranted, either capture it as a prize or take the noncombatants off board and sink it.⁶ This scenario was, of course, somewhat unrealistic if the warship was a submarine. Surfacing to conduct visit and search procedures not only sacrificed the submarine's main advantage of surprise attack but also made it vulnerable to ramming even by an unarmed merchant vessel. Furthermore, surface escort of the merchant to port for prize adjudication was obviously dangerous for the submarine and generally interfered with its military mission, while the alternative of sinking was made impracticable by the inability of the already cramped submarine to provide space for the merchant ship's crew and any passengers, and, where another suitable vessel was not available to take these persons to port, weather and geography did not often combine to allow them to be left safely in the ship's lifeboats.

Despite these difficulties, Germany directed its submarines to comply with the traditional prize rules during the early part of the First World War, and in fact German commanders made efforts to comply. However, by January, 1917, the difficulties already noted had combined with other circumstances

to cause Germany to rescind its earlier directive and institute unrestricted submarine warfare, including the sinking without warning of neutral merchant ships, in a self-declared war zone. These “other circumstances” included a British directive to its merchant ships to disguise themselves as neutrals and to ram submarines. Britain also apparently armed its merchant ships and ordered them to open fire on German submarines. Thus, Germany attempted to justify its decision to wage unrestricted submarine warfare in its war zone on the ground that it was carrying out a reprisal against these British violations of the traditional laws of naval warfare.⁷

Whatever the merits of this German justification (and it probably had some technical merit),⁸ German U-boat attacks on merchant vessels without prior warning or provision for the safety of crew and passengers led not only to United States entry into the First World War but also to widely felt consternation over the submarine as a military weapon, consternation that continued beyond the conclusion of the war. The naval warfare experience of the war led to renewed proposals for the submarine’s abolition in the postwar period. To some—especially the British, joined at times by the United States—the submarine had proved itself a horrifying offensive weapon, generally ineffective except when used against merchant shipping in violation of the humanitarian principles that rightly formed the core of the international laws of war, a use for which pronounced tendencies developed, and therefore an instrumentality of war that must be outlawed.⁹ While not condoning German behavior during the war, others contended that the submarine had demonstrated its efficiency as a defensive weapon even when confined to “honorable warfare” and should consequently be restricted but not abolished.¹⁰ In the naval conferences that followed World War I, the abolitionists failed to achieve their goal, but the submarine, along with other naval warships, was eventually the subject of limitation and restriction. Thus, article 22 of the 1930 London Naval Treaty,¹¹ reaffirmed in the London Protocol of 1936,¹² states:

The following are accepted as established rules of International Law:

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

The 1936 Protocol maintains this provision in effect. The United States remains a party to the Protocol, as do the Soviet Union and over 40 other

states,¹³ despite the article's seeming inconsistency with the practices of belligerents, including the United States, in the Second World War.

At the beginning of World War II, Germany again attempted to abide by the submarine warfare rules, as then and now set forth in the London Protocol. Again, however, this attempt was thwarted by the arming of British merchant vessels and the practice of convoying merchant ships under the protection of surface warships and aircraft, and the order from the British government to its merchant ships directing them to fire on or ram submarines on the surface. Moreover, Britain ordered its merchant vessels to provide intelligence on the positions of any sighted submarines. In many other respects, it can be said that the British government, by these directives and by otherwise exercising effective wartime control over the British merchant fleet, largely incorporated all of its merchant ships into its war-fighting efforts. Under these circumstances, it became possible to argue that these vessels were no longer "merchant vessels" or "merchant ships" as those terms were used in the Protocol to describe the ships entitled to the protections there set forth.¹⁴ In response to the British practices, Germany soon directed its U-boats to wage unrestricted warfare in broadening ocean zones. As in the case of Germany's First War practices, some analysts have suggested that this Second War response was a legitimate reprisal.¹⁵

As World War II continued, other belligerents also adopted unrestricted submarine warfare methods against enemy merchant ships (though most also achieved greater success in pitting their submarines against enemy warships than was true for the belligerents in the First World War).¹⁶ The most prominent example is that of the United States, which ordered unrestricted submarine attacks against all Japanese shipping in the Pacific at the very beginning of its involvement in the war.¹⁷ United States submarines in fact waged unrestricted war against the Japanese, including the sinking of merchant ships without warning, throughout the war. Justifications for the U.S. departure from the traditional law of naval warfare in this respect remain unclear. The U.S. seemingly justified these attacks not on the ground of reprisal but on the fact that Japanese merchant ships were usually armed, provided intelligence to the Japanese military, and were otherwise integrated into Japan's war efforts and therefore were not entitled to the protections afforded to the "merchant ships" of the 1936 Protocol. The fact remains, however, that unrestricted submarine warfare was ordered by the U.S. against Japan throughout the Pacific Ocean within hours after the 7 December 1941 bombing of Pearl Harbor, before the U.S. could know whether Japan would enlist its merchant fleet in the war effort. The initial order was fairly clearly given in response to and in retaliation for the surprise Japanese attack on Pearl Harbor and therefore carries more than a little implication of reprisal as its justification.¹⁸

Germany's submarine warfare practices in the Second World War were the subject of the principal adjudication of the legal rules under discussion: the trial of Admiral Karl Doenitz by the International Military Tribunal at Nuremberg. Admiral Doenitz commanded Germany's submarine forces and later in the war became commander of all German naval forces. He was charged at Nuremberg with "waging unrestricted submarine warfare contrary to the Naval Protocol of 1936."¹⁹ Doenitz's counsel argued in his behalf that German U-boat attacks on British merchantmen were justified by the facts that these ships were armed or convoyed, provided intelligence to the British military, and in other ways contributed to the British and Allied war efforts.²⁰ While this argument can perhaps be characterized as one based on the law of reprisal, it more clearly rests on the notion that merchant vessels actively participating in the enemy's conduct of warfare are thereby removed from the protections afforded to true merchantmen by the laws of naval warfare as, in this case, embodied in the Protocol. The Nuremberg Tribunal did indeed accept Admiral Doenitz's defense to the extent that it refused to find that he was guilty of Protocol violations in authorizing unrestricted submarine attacks against *British merchant ships that were armed*.²¹ In this respect, the Tribunal's judgment might be interpreted to mean that enemy merchant vessels *and their passengers and crews* are legitimate targets of destruction, without warning and without provision for the safety of the people on board, if these vessels have become meaningfully integrated into the enemy's warfighting capabilities. Critics of this broad a reading of the Tribunal's judgment can protest that the result too heavily discounts the humanity side of the balance that the laws of war attempt to strike between military necessity and humanity. A more accurate analysis of the Tribunal's ruling would perhaps emphasize the immediate threat to a submarine's safety posed by the arming of enemy merchant ships or other real and imminent threats to the submarine's safety that would result from the attempt to abide by the Protocol's provisions. Cargo and passenger carriers that were armed with weapons and the intent to engage an enemy submarine might be properly viewed as combatant vessels and thus subject to surprise attack. On the other hand, the mere fact that an enemy merchant vessel was assisting the enemy's war effort in other ways would not necessarily provide justification for the destruction of the vessel without warning if compliance with the protocol would not expose the submarine to serious risk of harm.

The International Military Tribunal did find Doenitz guilty of violating the London Protocol by declaring submarine operational areas within which German U-boats could attack *neutral* merchant ships without prior warning.²² Professor Mallison has criticized the Tribunal for failing to distinguish between those neutral vessels that were helping the Allied cause and consequently, in Mallison's view, were legal targets and those that were genuinely engaged in innocent international commerce and therefore

protected from attack.²³ In any case, the Tribunal was careful to note that it was not imposing punishment for this particular violation in its sentencing of Admiral Doenitz because the British and the Americans had declared and enforced similar operational zones with like risks to neutral shipping.²⁴ Some military analysts have suggested that the Tribunal's judgment thereby recognized the legitimacy of unrestricted submarine warfare against merchant shipping and therefore that the London Protocol was no longer, or never had been, binding.²⁵ This analysis is clearly erroneous. The Tribunal without question ruled that Doenitz had violated the Protocol. Because of the Allied practices, however, his *sentence* was "not assessed on the ground of his *breaches* of the international law of submarine warfare," including among these "breaches" unrestricted submarine warfare against neutral shipping.²⁶ The clear implication is not that the Tribunal had found some sort of customary practice changing the rules of the Protocol but that all parties had violated these rules. The partial clemency granted Doenitz was due to its application of a version of the "unclean hands" doctrine and not to any recognition of the lawfulness of unrestricted commerce warfare.

The Tribunal also found Admiral Doenitz guilty of ordering his submarine commanders to refuse to rescue survivors of their sunken targets unless "their statements would be of importance for your boat."²⁷ Accepted rules of naval warfare plainly imposed on warship commanders the duty to use considerable efforts to search for and rescue survivors (including combatants),²⁸ and Doenitz was found guilty of violating these rules.²⁹ It has been pointed out that the admiral's order was in response to an unwarranted and probably illegal air attack on German submarines attempting to carry out their duty to rescue survivors of a torpedoed troopship.³⁰ It is, however, questionable whether the law of reprisal would justify such an anti-humanitarian measure.

The Tribunal refused, on the ground of insufficient evidence, to find that Admiral Doenitz was guilty of the more serious crimes of ordering German commanders to kill survivors of U-boat attacks.³¹ Helpless survivors and other shipwrecked persons, even if enemy military crews, are not lawful objects of attack, since they are not or are no longer combatants.³²

The rescue issue is complicated again by the fact that submarines of the world wars did not have adequate space for taking on board rescued persons. Further, submarines surfacing for rescue operations in World War II were vulnerable to air attack. The International Military Tribunal at Nuremberg, in fact, received evidence that the U.S. directed its submarines in the Pacific during that war to attempt survivor rescue only if this did not endanger the submarines or interfere with their military missions.³³ And, because of the limited space in the submarines, U.S. rescue efforts often consisted only of supplying survivors with rubber rafts or provisions.³⁴

What can be said of the state of the law of submarine warfare as it emerged from the experiences of the two world wars? First, it can be said that the

submarine was a lawful weapon of war and was to be treated by the laws of naval warfare generally like any other warship. Thus, in wartime it could attack an enemy warship without warning and despite the stealth element that was part of the early abolitionist reactions against this undersea weapon. On the other hand, targets that were immune from attack by any means—hospital ships and coastal fishing vessels, for example—were also illegal targets for submarines. Survivors and shipwrecked persons could not be killed.

The rules concerning merchant ship targets were, as already shown, more complicated and became considerably more so as a result of the world wars. This was true for all warships but especially for submarines because of their unique characteristics. Developments and perceptions that came about particularly during the Second World War added to the list of complexities that the nature of the submarine had already created. The distinction between merchant ships and combatants, a relatively easy one in the nineteenth century, became confused in the big wars of the twentieth century, both because belligerent governments armed their merchant fleets and took other steps to integrate them into the overall warfighting effort, and because of the new perception that entire societies, and not just their military forces, were at war. Related to this perception was the notion that a broader range of civilians were necessarily, even appropriately, exposed to the weapons of war, which probably led to a dilution of the strength of the previously felt horror at the maiming and killing of non-military crews and passengers of targetable merchant ships. The distinction between belligerent and neutral merchant vessels also became difficult to draw because of practices that developed during the world wars. Warships and belligerent merchant ships would disguise themselves as neutrals, and supposed neutrals in fact participated in various ways in the war efforts of the belligerent states.³⁵ In addition, World War II brought the real threat of air attack to add to the vulnerability of surfaced submarines.

These practices and complications placed considerable stress on the nineteenth-century-based rules reflected in the 1936 London Protocol and undoubtedly induced some significant qualifications, if not outright changes, of those rules. The major law-of-war issues raised by submarine warfare against merchant ships were, and are, three: (1) Is a merchant ship a lawful target for sinking? (2) If so, what, if any, provisions must be made for the safety of crew and any passengers? (3) Is the submarine that sinks a merchant ship required to rescue survivors? Note the dilemma posed for submarines by each of these questions: (1) Visit and search to determine targetability deprives the submarine of its stealth advantage and renders it vulnerable to attack, and determination of the legitimacy of the target by other means is often difficult or impossible. (2) Surface vulnerability and lack of space for passengers make it dangerous and nonfeasible for submarines to provide for

the safety of persons on board merchant vessels or (3) to effect rescue of survivors.

As a result of the experiences of the two world wars, including the subsequent trial of Admiral Doenitz, the post-World War II law of submarine warfare against merchant ships might be summarized as follows:

As a sort of benchmark rule, it can be noted again that submarines, like other warships, could attack *enemy warships* without warning. The successful attacker, surface or submarine, was then required to search for and provide as best as it could for the safety of survivors, although the practice of the belligerents in World War II, especially those of the United States in the Pacific, indicates for reasons already noted that submarines might not have been held to as stringent a standard for survivor rescue as surface warships.

Enemy merchant ships that were armed and ordered to fight back or attack submarines or that were convoyed under the protection of enemy warships or aircraft were arguably not true merchants and thus could be sunk without warning and without first providing for the safety of crew and passengers. But rescue of survivors was required if rescue was consistent with the safety of the submarine and its military mission.

Unarmed enemy merchant ships not under convoy protection posed a trickier targeting situation for submarines. Because the practice of the belligerents in World War II was, apparently, consistently to arm or convoy, a post-war rule might be lacking because of insufficient evidence upon which to base a rule determination. The traditional rule suggests that unprotected enemy merchant ships in wartime could be captured by a belligerent warship without the necessity of visit and search and escorted to port for adjudication as a prize. The warship could probably sink the merchant vessel if the steps required for prize adjudication would seriously endanger the warship or interfere with its military mission—but only after the safety of the merchant's crew and passengers had been provided for.

Following World War II, the notion of capture of enemy merchant vessels for prize adjudication seemed almost quaint and old-fashioned, especially for submarine warships. Enemy merchantmen were apparently presumed, because of the usual practice, to be armed or protected by enemy warships or aircraft and thus almost automatically subject to destruction or disablement. And belligerents tended to view, with some justification, all enemy merchant ships, whether or not armed or convoyed, as part of the enemy's total war effort, supporting at least the war-focused economy of the enemy nation. In addition, capture and escort to port was often infeasible, or judged infeasible, in the conduct of naval warfare in the world wars, again in particular for submarines. It might therefore be said that the law of naval warfare then allowed submarines to sink even unarmed and unprotected enemy merchant ships without much consideration in many situations for the alternative course of capture. The more difficult question concerns the duty,

if any, to provide for the safety of the civilian crews and any passengers. The International Military Tribunal gave strong indication in the Doenitz judgment that the London Protocol's rules in this regard must be observed. If the submarine commander found himself unable to provide for the safety of the persons on board a merchant ship, said the Tribunal, then he "should allow it to pass harmless before his periscope."³⁶

It should be remembered that the 1936 London Protocol itself sets forth two situations authorizing the destruction or incapacitation of a merchant vessel (enemy or neutral) without the necessity of first removing passengers and crew: "[I]n the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search."³⁷ The language of the Protocol, however, makes it clear that these are narrow exceptions; note the words "persistent," "duly," and "active."

Even if circumstances allowed a submarine commander to sink an enemy ship without warning—for example, where it was armed for attack on submarines—post-war rules still undoubtedly required that the submarine make every feasible effort to rescue survivors.

The post-war rules regarding *neutral merchant vessels* engaged in international trade and not in any way assisting the enemy war effort made them immune from attack by belligerent warships, surface or submarine. Neutral ships suspected of carrying contraband or otherwise helping the enemy, however, were subject to visit and search by belligerent warships. If the suspicions turned out, upon visit and search, to have been well founded, the warship could capture the neutral vessel as a prize of war according to traditional rules of naval warfare. Again, however, belligerent state practices in the two world wars blurred the lines not only between combatants and merchants but also between neutrals and enemies, and traditional capture and prize procedures fell somewhat out of fashion.³⁸ As a consequence, it might be said that neutral merchant ships, at least where there was evidence, by visit and search or otherwise, that they were assisting the enemy's war efforts were in general treated like enemy merchant ships. Again, the 1936 Protocol makes no distinction between enemy and neutral merchant ships in authorizing the destruction or incapacitation of merchant ships in cases of "persistent" refusal to stop when "duly" summoned or of "active" resistance to visit or search.

The most disturbing practice of belligerents in the world wars that affected neutral shipping was the declaration of *war zones or operational areas* within which, they warned, even neutral vessels were subject to destruction, without visit and search or warning. Remember that the International Military Tribunal condemned Admiral Doenitz for ordering this practice but refused to impose a sentence specifically for it because of similar practices by other belligerents in the Second War. This seeming contradiction has made it somewhat difficult to assess the state of the post-war law concerning the validity of using war zones as a means of rendering neutral (and enemy)

merchant shipping vulnerable to unwarned attack by submarines.³⁹ If a zone was given wide publicity and its size and location would not seriously interfere with innocent merchant shipping, would it be consistent with the humanitarian aspects of the laws of war to allow submarine commanders to presume that merchantmen of any flag found within the zone are legitimate targets for attack?⁴⁰ The Tribunal's judgment, read carefully, would say no, while the practice of the belligerents in World War II would seem to say yes. Certainly the efficiency of the submarine as a commerce raider would be hampered by the Tribunal's answer, since compliance with the Tribunal's strict reading of the 1936 Protocol would require the submarine commander to choose between subjecting his boat to considerable risk and allowing a possible, but not proved, instrument of the enemy's war effort to escape. Yet, when stated this way, the issue seems better resolved by the Tribunal's approach. Almost by definition, noncombatants should be entitled to greater freedom from risk of harm than are combatants, and the Tribunal's judgment seems to affirm this choice.

Submarines as Weapons Platforms Today⁴¹

Submarine and submarine-related developments in the 45 years since the end of World War II have extended the list of wartime roles for underwater weapons systems. The technological evolution has resulted in two principal categories of U.S. submarines: attack submarines, the more-or-less direct descendant of the world war submarines; and the ballistic missile submarine, a creature of the post-war nuclear age.

Increased submerged speeds, combined with the underwater staying power granted by nuclear propulsion, have made the attack submarine (SSN) a warship much more capable of operating effectively against enemy fleets. Its expanded array of weapons, complemented by long-range targeting systems, have added to this capability by allowing the submarine to launch sub-horizon or over-the-horizon attacks on surface ships, other submarines, and land targets. It can, in fact, send sea-launched cruise missiles (SLCMs), with conventional or nuclear warheads, far inland to strike selected targets. And their speed, underwater duration, increased diving depth, and silenced running have rendered today's submarines less vulnerable than their world war counterparts to destruction by enemy warships in spite of advances in ASW capabilities. In sum, most of the reasons that the submarines of the world wars were relatively ineffective weapons against most targets other than merchant ships no longer exist or are disappearing. It should be noted, however, that the new relative invulnerability is basically due to better abilities to escape and hide underwater. A surfaced submarine is still no match for a surface warship—and, for that matter, probably not much of a match for an armed merchant ship—because the modern submarine's weapons are

apparently designed almost exclusively for underwater launching. There is indeed no indication that the advances in submarine technology and design assume any important combat role for a submarine on the surface. There is no suggestion, for example, that the experiences of the two world wars have led to submarine designs that add onboard accommodations for crews and passengers of targeted merchant ships or deck-mounted weapons that will give the submarine an adequate sense of security against attack while it carries out survivor rescue operations on the surface.

The other principal category of U.S. submarines, the ballistic missile submarine (SSBN), was of course nonexistent in the world wars. The main role of SSBNs is, in reality, a peacetime role: that of deterring nuclear attack on the United States or its allies by assuring devastating retaliatory nuclear ballistic missile attack. Nuclear powered submarines, roving undersea over broad ocean areas, are excellent platforms for this role because it is effectively impossible for a potential enemy to detect and destroy them, or enough of them, as part of a first strike. The Soviet Union also deploys ballistic missile submarines.

Although this deterrence role can continue from peacetime into wartime, a presumable wartime role of a nuclear ballistic missile submarine is actually to launch its nuclear-warhead missiles against enemy military targets—principally land-based launch sites for the enemy's strategic nuclear weapons—and against population centers in the enemy's homeland. While the target accuracy of submarine-launched ballistic missiles is improving, it probably does not yet match the accuracy of strategic missiles launched from land.

Added together, the basic naval warfare roles of both major categories of modern underwater weapons—attack submarines and ballistic missile submarines—currently number six, according to a recent study: (1) coast defense; (2) attrition attacks on enemy naval forces; (3) commerce warfare; (4) projection of power ashore; (5) engagement of enemy fleets; and (6) assured destruction (SSBNs).⁴² According to the author of the study, the last three roles came to fruition only in the 1960s, "after a long period of relative equilibrium in submarine technology that lasted well into World War II."⁴³ The author also asserts that submarine developments in the near future will probably include "a decline in the capacity to wage commerce warfare" but increased capabilities against other warships, surface and submarine, and other military targets.⁴⁴

In the war most contemplated by U.S. military strategists, one against the Soviet Union, the main assignment for U.S. attack submarines, at least in the early stages, will probably be to attempt quickly to destroy Soviet ballistic missile submarines and also Soviet attack submarines that threaten our own SSBNs and other naval forces.⁴⁵ If such a war were not terminated early by strategic nuclear exchange but were to continue with conventional weapons

and possibly tactical or intermediate-range nuclear weapons, other roles for U.S. attack submarines would be likely to emerge. These would certainly include coastal defense, projection of force ashore against military targets, and operations against the enemy's surface fleet.⁴⁶ The submarine role that presented the most troublesome legal issues in the two world wars—that of commerce raider—will probably not be nearly as significant in the future, at least in the contemplated war with the Soviet Union.⁴⁷ For one thing, NATO forces will probably be much more dependent on merchant shipping than the opposing forces, which suggests the possibility that Soviet attack submarines could be assigned a major anti-commerce role in such a protracted war.⁴⁸ For a complex of other reasons, however, submarines will be much less effective as commerce warfare weapons in the foreseeable future.⁴⁹ To the extent that submarines of either side are given missions to attack merchant shipping, the experience of World War II can lead us to expect that merchantmen targets will be armed and convoyed and otherwise protected by highly sophisticated ASW technology and techniques, including aircraft and attack submarines of the protecting forces.

As the 1982 United Kingdom-Argentina war for the Falklands has demonstrated, exclusion zones or war zones are a likely part of any future war, perhaps especially a limited war.⁵⁰ The prominent practice by the world war belligerents of declaring war zones suggests that these will also be a component of any future global war—at least a protracted world-wide war fought with conventional weapons. Although the purposes of declaring such zones in wartime can be several, an apparently intended effect of the zones for the warships, including submarines, of the declaring belligerent party is to shift or ease the burden of proof under the rules of engagement. In the absence of the zone, or outside it, the warship commander bears the heavy burden of establishing the legitimacy of his contemplated target, while the terms of the zone declaration usually purport to allow him to more readily presume targetability. As already noted, the Nuremberg Tribunal refused to condone the practice of declaring a war zone insofar as its effect was to relieve the burden of complying with the laws of naval warfare protecting neutral shipping. The Falklands War showed, however, that a war zone may also have as its purpose, or one of its purposes, the shifting of the burden of identifying a proper target and showing imminently hostile intent of another state's warship or aircraft.⁵¹ Thus the controversial sinking of the Argentine cruiser, the *General Belgrano*, by a U.K. submarine outside the British-declared exclusion zone⁵² was not necessarily illegal, though the submarine commander's burden of showing hostile intent was the normally heavy one. Whether the declaration of a war zone is a lawful means of shifting the burden remains an open question. Still, it can be assumed that future belligerents will engage in the zone-declaring practice and that the terms of the zones will affect the engagement decisions of their submarine commanders.

The Current State of the Law of Submarine Warfare

It has been said that the laws of warfare attempt to achieve proper balance between military necessity and humanity.⁵³ This approach generally translates into, *inter alia*, rules designed to protect noncombatants—civilians, prisoners of war, survivors of attacks on ships, and so on—and restrictions against excessive force and inhumane weapons. Difficult legal questions surround decisions on whether or to what extent it is permissible to inflict civilian casualties in attacks on military targets. It is perhaps ironic that the humanity side of the military necessity/humanity formula was considerably degraded in the very war that gave rise to the still-current and widespread declaration of support for individual human rights and freedoms.⁵⁴ In World War II, civilian populations in enemy cities became legitimate targets for aerial bombardment, at least in reprisal or as “incidental” casualties of targeting military installations. And, as we have seen, noncombatant crews and passengers of merchant ships, even neutral ships, became acceptable victims of submarines’ torpedoes. The habit of justifying the killing and maiming of civilians in wartime, for example, by reason of the circumstance that they happened to be in the vicinity of almost any military target has, to some extent, continued from World War II to present times, even in limited wars where the objective is not national survival. The idea that entire societies participate in the militaristic schemes of their political and military leaders, another Second World War notion, has also undoubtedly made it possible for today’s military planners to contemplate the intended destruction of an enemy’s population centers. To some, apparently, almost any characterization of military necessity rationalizes the disregard or discounting of any humanity considerations. This is an unfortunate twentieth-century trend. It is understandable that military commanders will in general prefer a broader rather than narrower range of legitimacy for their actions and the easing of the tremendous burden that often comes with engagement decisions where humanitarian and military considerations intermingle. Decision dilemmas are, however, the essence of command, and military officers necessarily bear the brunt of these terrible dilemmas of their national governments.

The government of the United States has, especially in the years since the Second World War, consistently placed itself in the forefront of those governments promoting humanitarian values and the rights and freedoms of individuals everywhere. Most governments of the international community subscribe to these values (by words if somewhat haphazardly by deeds),⁵⁵ and these are essentially the same values that account for the humanity side of the laws of war formulations. Can it be said, therefore, that the international community, led by the U.S and others, has implicitly indicated that humanitarian factors are now entitled to renewed weight in the military decision process despite the degradation of these factors in the world wars?

Or have the modern warfighting conditions and perceptions that developed during those wars continued to affect military decisions that might put civilians at risk?

These are questions that raise important matters, the full analysis of which is beyond the scope of this chapter but which are nevertheless central to the discussion of at least some of the issues in this part of the chapter: the present state of the law of submarine warfare. All belligerents in World War II justified in some manner surprise submarine attacks on merchant ships without the necessity of providing for the safety of crews and passengers who were not formally part of the armed forces of an enemy. To what extent these practices are justified under current law will be one of the questions discussed in the following paragraphs. Other issues will include the legality of submarines as such, other targets of submarines and their modern weapons, the lawfulness of their weaponry itself, and the effects of declaring operational areas or exclusion zones. This section will then set forth a brief note on submerged navigation under current law. It will also refer, where appropriate, to three distinctions that the previous discussions have alluded to: between belligerent and neutral vessels; between combatant and merchant ships; and between general (but conventionally fought) wars and limited wars.

Are submarines legal? This question, one that concerned delegations to conferences on the laws of war earlier in the century, can now be answered. Like other warships, submarines are legal weapons but, like other warships, are subject to some restrictions.⁵⁶ The best evidence for their legality is the Nuremberg Tribunal's judgment in the case of Admiral Doenitz where the Tribunal necessarily assumed the basic legality of submarines, while condemning certain uses of them in wartime.⁵⁷

Targeting other warships. As a basic proposition, enemy warships found outside neutral waters are legitimate targets for a belligerent warship, including a submarine, and can lawfully be attacked by the latter without either warning or precautions for the safety of the combatant crew members.⁵⁸ It is not among the purposes of this chapter to examine the problems for this rule caused by the practice in recent decades of entering into hostilities without formal declarations of war, declarations that formerly assisted considerably the process of deciding who is the "enemy." Once that decision has been made, by whatever process, "warships" ought to mean those clearly designated as such by their weaponry, their operation by uniformed members of an enemy's armed forces, and their required markings.

The conduct of warfare in the post-World War II years, however, has called into question even the basic proposition, thus defined. There has not been a global war, with national survival as an objective, since the Second World War. Limited war has been the recent warfighting experience. This has usually meant limited in objective or geographical scope or both.⁵⁹ For example, the belligerents in the war for the Falklands expressly and implicitly

limited both the objectives and the geographical scope of their conflict. Each state seemed to concede that an attack on one of the other's warships outside the zone of conflict was not permissible in the absence of factors giving rise to the right of self defense, such as an initial attack or other indication of imminent hostile intent on the part of the enemy's warship. Moreover, the negative international community reaction to the sinking of the *General Belgrano*, an Argentine warship, outside the United Kingdom's self-declared exclusion zone seemingly supported this legal effect of limiting hostilities.⁶⁰ This reaction can probably be attributed in part not only to the geographical limitation inherent in the nature of the war, as well as in the U.K.'s declaration, but in the perception of disproportion between the U.K.'s military objective—the retaking of the islands—and the loss to Argentina—368 lives.⁶¹ It is also possible that the negative reaction is attributable in part to the fact that the *Belgrano* was sunk in a stealthy surprise attack by a submarine rather than in open combat with a U.K. surface ship.

The practices of belligerent states in the limited wars of this half-century provide indications, therefore, that enemy warships are not always and everywhere lawful targets for a belligerent's surface warships or its submarines. Formulators of rules of engagement for limited hostilities should give consideration to restrictions arising from geographical scope and proportionality to the military objective or objectives. The practices of belligerents in a war fought on a global scale and with national survival among the objectives are not necessarily appropriate precedents for the laws of naval warfare in a limited war.

Only in such a global war, therefore, might it be said without qualification that enemy warships in non-neutral waters are open, unrestricted targets for submarines (or other belligerent warships). But where circumstances allow submarine attack on an enemy warship, the submarine commander can pursue his attack without warning and without first providing for the safety of the target's crew. For example, shortly after the commencement of a war between the United States and the Soviet Union (something fortunately not likely at the present stage of U.S.-U.S.S.R. relations and, it is hoped, something that will never occur), American submarines will be able lawfully to carry out their presumed ASW and anti-surface-fleet roles through surprise attacks.

But what of survivors of submarine attacks on enemy warships? The implication (somewhat confused) of the judgment of the International Military Tribunal in the *Doenitz* case would require submarine commanders to make substantial efforts to search for and rescue the survivors of the ships they have sunk, at least if such efforts would not expose rescuing submariners to undue danger. Even in World War II it was risky and often impracticable for submarines (as contrasted to larger and more heavily armed surface ships) to effect rescue of survivors, although evidence presented to the Tribunal

indicated that some efforts were made. Presumably, over-the-horizon targeting today makes it both less practicable and more dangerous for submarines to attempt to rescue survivors of their attacks: the sinking is more likely to occur at some distance from the position of the attacking submarine and the surfaced submarine engaged in rescue would itself be vulnerable to surprise (even if unlawful) attack. Another consideration should be an assessment of the enemy's capabilities to effect rescue of its own people.

The best that can be said for the current rule on the obligation to rescue survivors is that such an obligation still exists, with new circumstances qualifying—and, especially in the case of submarines, probably effectively reducing—the extent of the duty. In situations where it is feasible and not unreasonably dangerous to rescue, either by taking survivors on board the submarine or other vessel or by supplying them with life rafts and provisions (in accordance with U.S. precedent in the Pacific in World War II), the current law of submarine warfare probably requires that these steps be taken.

Targeting merchant ships. This, of course, presented the major legal issue concerning the use of submarines in the two world wars. As stated above, the law of submarine warfare after the Second World War remained based on the London Protocol of 1936, but with some practical qualifications attributable to nontraditional practices of the belligerents in their conduct of that war. These practices, it will be recalled, resulted in the blurring of distinctions between merchant ships and warships, between neutral merchant ships and enemy merchant ships, and, in general, between combatants and noncombatants. It must be noted, though, that these practices were in large measure a consequence of the correct perception by each belligerent state that it was engaged in a global-scale war and fighting for its national survival. Thus all segments of a belligerent's society were in some manner engaged in the fighting, including its merchant fleet and, where it could enlist or intimidate them, the merchant fleets of technically neutral states. While we can expect the same to be true for the belligerents in any future general war of similar or greater magnitude, it will not necessarily be true for the wars of lesser scale that have constituted the belligerency experiences since the Second World War.

What, then, can be said for the current state of the law of submarine warfare regarding the targeting of merchant vessels? In general, submarines are undoubtedly subject to the same rules as surface warships in this regard. The practices of World War II suggest that in a war on a global scale with national survival of the belligerents at stake, it is permissible for belligerent warships to capture or, where capture is not feasible, to sink enemy merchant vessels on the assumption, in such a war, that these vessels are part of the enemy's warfighting efforts. This is probably the rule for general war today (assuming it would proceed for a time without resort to strategic nuclear weapons). It is by no means clear, however, that this is the rule for today's

popular *limited* wars. Outside the area of any legitimate blockade or legal exclusion area, visit and search should be the rule for unarmed and unconvoyed enemy merchant ships. If visit and search discloses that an enemy merchant vessel is then and there supporting the enemy's conduct of the limited war, it is subject to capture or, where appropriate, sinking or incapacitation. As a basic proposition, a neutral merchant ship must, according to the International Military Tribunal, be visited and searched to determine its susceptibility to capture or sinking even in a general war and even in a declared war zone. This should certainly be the rule for neutral shipping in a limited war. (Whether the declaration of an exclusion zone or other war zone affects the operation of this rule is an issue addressed below.)

In any case, because of the risk that perceived mistreatment of neutral vessels might lead neutral states to enter the conflict on the other side, belligerents can probably be expected to treat neutrals with better regard than that accorded to enemy merchant ships.

The status of merchant crews and passengers is of course the critical consideration. It should be recalled that the London Protocol of 1936 is technically still in force for nearly 50 States, including the United States and the Soviet Union. These States are thus arguably bound by the terms of the Protocol to provide for the safety of the crew and any passengers of a merchant ship (enemy or neutral) prior to its destruction or incapacitation unless the merchant either persistently refuses to stop after being duly summoned or actively resists visit or search. Both the *Doenitz* judgment and the practices of belligerents in World War II, however, stand for the proposition that the enemy's armed or convoyed merchant ships are lawful targets of surprise submarine attacks without the necessity of visit and search or provision for the safety of the crew and passengers. This is probably still the case under the current law of submarine warfare, at least in a general (but conventional) war, because such merchantmen are effectively part of the enemy's warfighting force. In a limited war with limited objectives, on the other hand, humanitarian principles and proportionality should require a determination by the submarine commander that even an armed or convoyed merchant ship found outside the war's geographical area is, then and there, actively and significantly a part of the enemy's pursuit of that war as a prerequisite to the merchant's destruction without warning.

Publicists who have previously analyzed the rules of submarine warfare have frequently noted the "unreality" of a requirement that submarines, as contrasted to surface warships, provide for the safety of merchant ship crews and passengers under virtually any circumstances.⁶² There is no question but that submarines, even today's relatively larger ones, have little space for taking these people on board and remain vulnerable while on the surface in an attempt to comply with the obligation. To this suggestion that submarines should therefore be exempt from the rule, the International Military Tribunal

provided a response in the *Doenitz* judgment: Comply or allow the merchant vessel to pass unharmed. The humanitarian principles that prompted this response should be no less applicable today, particularly in the case of a limited war.

The comparatively restricted capability of submarines for protecting the crews and passengers of merchant ship targets also affects their responsibility to search for and rescue the survivors of their attacks on merchant ships. Nevertheless, the duty to rescue survivors, one of the clearest obligations in the rules of naval warfare, undoubtedly applies to an even greater degree for merchant ship survivors, and submarine commanders should be expected to do everything in their power to comply with this responsibility.

Any submarine commander reading the above complex of rules, qualifications and exceptions will probably raise a legitimate and crucial question. He might well ask what he should or can do in case of doubt. What if, for example, he cannot determine whether an enemy merchant ship is armed or not? How can he tell whether a convoyed merchant ship is actively and significantly contributing to the enemy's conduct of the limited war between the belligerents, and what does he do if he suspects it is but cannot know for sure? It is common for law to provide presumptions for doubtful cases. In this case, especially for commanders of the United States military, the presumption should be clear. Any state that strongly defends and promotes humanitarian values, as does the U.S., should nearly always erase such doubts in favor of the humanity side of the military necessity/humanity formula for laws of war. The apparent fact that the presumption often went the other way, even for the U.S., in the last world war does not necessarily mean that it should do likewise in a future limited war or, for that matter, a conventional general war. (Besides, a rule giving broad protection for merchant ships against unwarned submarine attack is in the greater interest of the United States in a future war with the Soviet Union since, as already noted, the potential merchant targets will most often be assisting NATO forces.) Where belligerents perceive that their national survival is at stake, however, their practices will undoubtedly vary from the letter of many rules of warfare, including those under consideration.

The question concerning presumptions in cases of doubt raises another issue related to the targetability of merchant ships, especially neutral ships, and the responsibility for the safety of their crews and passengers. This issue is the validity of self-declared war zones or exclusion zones, a topic that will now be addressed prior to proceeding to consideration of other potential targets of submarine weapons.

Exclusion zones. Despite the International Military Tribunal's condemnation of Admiral Doenitz's declaration of unrestricted submarine warfare in operational areas or war zones, it seems clear that such zones were in World War II and continue to be established components of warfighting

practices at sea. One analyst has proposed revisions of the 1936 London Protocol that would include the following provision on exclusion zones:

Within clearly announced and defined war zones, limited by a line extending 200 miles outside the coastline of a belligerent state, 200 miles outside the coastline of an area where land hostilities are in progress, or 200 miles outside the coastline of any territory occupied by a belligerent state, all vessels, belligerent or neutral, excepting marked hospital ships and coastal fishing vessels, are subject to sinking upon sight.

. . . If a declared war zone blocks ingress to and egress from neutral territory, the belligerent declaring the zone must, upon request, provide a means of safe passage through the war zone for neutral vessels calling at and leaving the blocked neutral territory.⁶³

While it is true that an effect of declaring such a war zone or exclusion zone might very well be to warn neutral shipping away from dangerous sea areas, this is certainly not the principal reason for the zone. A clear purpose of such a zone, perhaps its main purpose, is to relieve the burden on warship commanders in a hot war area to take the difficult and often dangerous steps otherwise required to determine the legitimacy of firing on vessels of doubtful status.⁶⁴ The current popularity of exclusion zones is evidenced by their use by both sides in the Iran-Iraq war in the Persian Gulf⁶⁵ and by the United Kingdom in the 1982 war for the Falkland Islands. The U.K.'s use of exclusion zones in the latter war is especially relevant to the present discussion because it may be the only limited war since World War II in which the submarine has played a significant role.⁶⁶ However, in that case, the declaration of an exclusion zone in at least one respect operated against the interests of the declaring belligerent state by giving the impression (falsely) that no attacks would be carried out by the British outside the zone, thereby contributing to the negative reaction to the torpedoing of the *General Belgrano* just beyond the zone's outer limits.

Nevertheless, exclusion zones are indeed popular and, moreover, are apparently part of U.S. naval war plans.⁶⁷ If they are legal, they are especially valuable for submarine commanders, who have the greatest difficulty in determining targetability without sacrificing their advantage of stealth and subjecting themselves to the dangers of the sea's surface. Are exclusion zones legal? This unfortunately remains an unanswered question. Their popularity suggests that precedent is building in their favor. Yet it should be recalled that one of the principal purposes of declaring an exclusion zone is, in law of war terms, to shift the presumption in favor of military necessity and away from humanitarian considerations—at least to the extent that shifting the presumption in doubtful cases more often places civilian crews and passengers at risk of death and injury in exchange for lessening the risk to warship crews. No state that places real value in the recognition of humanitarian principles should lightly promote or easily accept a significant shift in this direction.

Exclusion zones, if they continue to be used by belligerents, should either be limited (usually in limited war situations) in placement and scale so as not greatly to inconvenience genuinely neutral shipping or include reasonable provision for safe passage for neutral vessels. As the war in the Persian Gulf clearly demonstrated, it is not in the interest of the United States or other seafaring nations to tolerate the use by belligerents of exclusion zones or other practices that unduly interfere with freedom of the seas for neutral traffic or to abide the seriously heightened risk of harm to noncombatants that can accompany the enforcement of these claimed war zones.

Other targets of submarines. There is no suggestion in current trends that hospital ships, clearly marked as such and not otherwise in violation of the relevant rules for hospital status, have lost any of their traditional immunity from attack by belligerent warships, including submarines.⁶⁸ Coastal fishing vessels that are unarmed and not otherwise assisting an enemy's war effort are probably still similarly immune.⁶⁹

As noted above, the expanded roles for today's more capable and versatile submarine weapons systems include attacks against objectives on land. In general, the lawfulness of strikes against land targets is the same whether the attacks are launched from surface warships, land-based weapons systems, aircraft, or submarines. Consequently, the legality of projection of force ashore by submarines will not be discussed in detail in the present chapter. If the land target is a legitimate one, a submarine bombardment will, in the main, be as lawful as any other attack—and, of course, the converse is true. Particular weapons in the modern submarine's arsenal and the targeting systems employed in their use, however, have been the subject of some concern and discussion, often whether the target is at sea or on land. These weapons problems are analyzed in the next section.

Submarine weaponry. The laws of war include rules designed to prohibit the employment of weapons in such a manner as to cause excessive suffering or disproportionate risk of harm to noncombatants. Thus self-propelled torpedoes, the principal weapons of submarines in the two world wars, must disarm if they miss their targets,⁷⁰ and the rules concerning the laying of stationary mines forbid their use in areas or manners that unduly endanger commercial shipping.⁷¹ Like other platforms that use these weapons, submarines must comply with the laws of war that govern them.

The legality of the tactical use of sea launched cruise missiles in naval warfare, especially those launched from submerged submarines, has been the subject of some debate. Challengers to the legality of these weapons have emphasized the risks posed to merchant ships, both neutral and protected belligerent vessels, by imperfect target identification and acquisition systems.⁷² As one of those urging the outlawing of submarine launched cruise missiles asserted in 1977:

The primary danger is that the missiles will fix on a ship other than the intended target. The threat is increased when the missile is subjected to electronic countermeasures (ECM) and other diversionary tactics employed by the target. A similar increase in threat level arises primarily from inherent design shortcomings, which at present are thought to be great.⁷³

The same writer suggested that underwater launching, using sonar detection, would heighten the chance for error.⁷⁴ Basically, the argument against the legality of the weapon focused on the disproportionality of the risk of harm to noncombatants, particularly in crowded sea lanes, compared to the military necessity of striking at the intended combatant target. A response to this position, also in 1977, contended that the proportionality of the risk to noncombatants could be controlled by rules of engagement cautioning against the use of submarine launched cruise missiles where the risk was too great.⁷⁵ This is probably an appropriate approach. Moreover, the problem should decrease in significance with (presumed) increase in the accuracy and dependability of the targeting systems.

It is beyond the scope of this chapter to discuss the lawfulness of nuclear weapons as such, as that topic is the subject of a separate chapter in the present volume as well as much intense discussion elsewhere.⁷⁶ Ballistic missile submarines provide, of course, one important type of launch platform for strategic nuclear weapons, and attack submarines are capable of launching nuclear strikes against targets at sea or on land. It can be said generally that if the use or threatened use of nuclear weapons is illegal, it is illegal for submarines to launch them or to threaten to launch them. If, on the other hand, they are legal—even though, as in the case of other weapons, their use is restricted—then submarines can use them—within the bounds of the restrictions.

Claims of illegality of nuclear weapons rely on the proposition that they are either intended for use against noncombatant civilian populations or that their awesome destructive power, combined with their radiation effects, means that their use, even against military objectives, necessarily entails disproportionate harm to noncombatants and excessive human suffering. These claims can be met in part by improvements in the accuracy of targeting systems that would minimize the risk to civilians where the target is a military objective. To the extent that subsea launches of nuclear missiles rely on targeting systems that are less accurate than those of air- or land-based platforms, the asserted legality problem is a larger one for submarines than for other platforms. The indications are that the accuracy of submarine systems is improving. If so, the legality issue may be essentially the same for all launch systems. Of course, the question of whether it is lawful to target civilian population centers as a deterrent measure or actually to launch strikes intentionally at these targets in wartime is the same for submarines as it is for land or air systems.

A Note on Submerged Navigation. On the high seas and within exclusive economic zones (EEZs), submerged navigation is a freedom of the high seas.⁷⁷ Although traditional law of the sea rules require submarines to navigate on the surface and show their flags as part of their innocent passage responsibilities in foreign coastal state territorial seas,⁷⁸ the United States takes the position that customary law of the sea allows submerged transit through straits used for international navigation, such as the Strait of Gibraltar, even if these straits are blanketed by up-to-twelve-mile territorial seas. Consistent with this position, the U.S. contends that the straits transit passage provisions of the 1982 United Nations Convention on the Law of the Sea—a treaty the U.S. has so far rejected in no uncertain terms because of its deep seabed mining rules—are merely reflections or articulations of custom.⁷⁹ Most nations probably disagree, asserting that the straits passage provisions of the 1982 Convention are not reflective of custom but are treaty law exceptions to the general rule of surface passage, negotiated by the U.S. in the Third World U.N. Conference on the Law of the Sea in exchange for, among other things, the deep seabed mining regime that the U.S. now finds unacceptable.⁸⁰ And because treaties bind and benefit only the parties to them, say these States, the U.S. will not have the right of submerged straits transit unless it becomes a party to the 1982 treaty. These States have a good case.

This controversy could be significant for U.S. submarines in wartime. While submerged passage or transit through the territorial seas of belligerents is no doubt lawful in wartime, submarines will be required to obey the general law of the sea restrictions in territorial seas of neutrals. Whatever the true state of the law on this subject, it would certainly be wise for the United States in any wartime situation, especially a limited war, to take the wishes of significant neutral States into consideration and consult with them before transiting their territorial seas in submerged modes.

The concept of “archipelagic waters,” recognized as such for the first time in the 1982 Convention,⁸¹ presents a somewhat more complex, but at the same time less controversial, issue. The treaty in general allows States composed completely of archipelagoes (island groups), such as Indonesia and the Philippines, to enclose their islands and the waters between them by a series of straight baselines, but also provides for these States to establish sea lanes through their thus-created archipelagic waters for international traffic, including submerged passage by submarines.⁸² The United States, though rejecting the 1982 treaty, expresses a willingness to recognize the establishment of archipelagic waters in accordance with the treaty’s rules.⁸³ Again, in wartime the issue would arise only with respect to the rights of neutral archipelagic States. In fact, current law of the sea, in the absence of the 1982 treaty (which is as yet not in force for any State), probably does not recognize the concept of archipelagic waters at all and would thus allow

submerged passage in any high seas areas between the islands of an archipelagic State.

The New Commander's Handbook on the Law of Naval Operations

The new *Handbook* (NWP 9)⁸⁴ appears to be a basically sound, readable guide for naval commanders. The discussion of the *Handbook* in the present chapter will be limited to the topics addressed in the preceding section of the chapter on the current state of the law of submarine warfare and will be treated in the same order. The purpose of the discussion is, of course, to assess the handbook's consistency or lack of consistency with the suggested current state of the law.

Are submarines legal? The *Handbook* does not mention this question and properly so. It is today a non-issue. Submarines as such are now clearly lawful weapons of war and the *Handbook*, by the implication of its omission, recognizes this conclusion.

Targeting other warships. The *Handbook* states that "[e]nemy warships . . . , including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory."⁸⁵ It goes on to state that "[s]ubmarines may employ their conventional weapons systems to attack, capture, or destroy enemy surface targets wherever located beyond neutral territory," and that "[e]nemy warships and naval auxiliaries may be attacked and destroyed without warning."⁸⁶ It was suggested above, however, that the allowance reflected in the latter quotation, if taken literally, might not be consistent with the present law of *limited* war. Even enemy warships, if not directly supporting the enemy's fighting of a limited war and if found outside the area of hot water, especially a war with limited objectives, might not be lawful objects of unrestricted attack in the absence of grounds for self defense. Certainly, the rule stated in the *Handbook* is appropriate for the global wars of this century, but not all of those rules would necessarily be appropriate or applicable to wars limited in geographical scope and in objectives falling short of a fight for national survival. It is by no means clear, for example, that the international community would have viewed it as lawful for an Argentine submarine to have attacked without direct provocation a British warship on a routine mission thousands of miles from the Falklands during the course of the limited war over possession of those islands. Perceptions of military necessity and proportionality in limited war may demand restraints on the use of force not called for in a world war.

The *Handbook* clearly states the obligation of our naval forces to search for and rescue the survivors of their attacks on enemy warships, in accordance with U.S. duties under the 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed

Forces at Sea.⁸⁷ This obligation is to be carried out “consistent with the security of their forces,”⁸⁸ a phrase that could be interpreted to have special meaning for submarine commanders, since their boats are particularly vulnerable while attempting to effect rescue on the surface. Consistent with this suggestion, the *Handbook* proposes the following qualification of the obligation for submarines:

To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick following an engagement. If such humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, the location of possible survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.⁸⁹

The only troublesome aspect of this interpretation is its lack of a direction to assess the proportionality of the importance of the “military exigency” or the “military mission” that will, according to the statement, authorize the departure from the general humanitarian rule of rescue. Clearly, not all military missions are so necessary or imperative that they cannot be eliminated or postponed in order to carry out the important humanitarian duty to rescue survivors. It would be better if the *Handbook* tied its special regard for submarines more closely to the safety of the submarine and its crew under the circumstances rather than the continuance of its military mission.

Of course, the *Handbook* strongly admonishes commanders against the killing, wounding or mistreating of survivors and the shipwrecked, treating them as noncombatants,⁹⁰ and in fact correctly reminds its readers that these are major war crimes.⁹¹

Targeting merchant vessels. This has been the principal issue in the law of submarine warfare. Whether it is today a major issue, in light of the expanded wartime roles for U.S. submarines, is in question. By most assessments, it will remain a significant issue for Soviet submarines.⁹²

In general, the authors of the *Commander's Handbook* have done an excellent job of restating the complex and often confusing state of the law on this difficult topic. Contrary to the view of some publicists, but consistent with the approach of this chapter, the *Handbook* considers the 1936 London Protocol as continuing to bind the parties to it, including the U.S., but suggests that the conduct of the Second World War (and unspecified practices following that war) have led to some modifications of the Protocol in its application to submarine warfare today.

According to the *Handbook*, “[t]he conventional rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict.”⁹³ Unfortunately, the *Handbook* itself contributes a bit of confusion to this already perplexing subject. In addressing the issue of targeting enemy merchant ships, it purports to excuse submarines from the constraints imposed on belligerent

surface warships because of “impracticality,”⁹⁴ but does not make clear what exactly are the constraints that submarines are excused from. By comparing the book’s designated section on submarine warfare with other provisions on surface warfare, one is led to assume that submarines are not required to make the efforts required of surface warships to determine enemy character or to capture enemy merchantmen as prizes, but this assumption is by no means obvious. The modifications to the London Protocol that the *Handbook* discovers in the “customary practice of belligerents during and following World War II” seem to be just about the same for surface warships as for submarines.⁹⁵ For submarines, the book states that the general rule, based on the Protocol, imposes on submarines the duty to provide for the safety of an enemy merchant ship’s passengers, crew and papers prior to destruction. The Protocol and the asserted subsequent practice, however, are said to provide four exceptions to this general rule.

The first exception occurs where the enemy merchant ship “refuses to stop when summoned to do so or otherwise resists capture.”⁹⁶ The Protocol itself would require for its similar exception “*persistent* refusal to stop upon being *duly* summoned” or “*active* resistance to visit or search.”⁹⁷ It is unclear why the authors of the *Handbook* would omit the emphasized qualifiers, except perhaps in the interest of saving space. The modifying adjectives and adverb, though themselves not capable of precise definition, are important for their communication of the narrowness of the exception and should not be omitted. As it stands, the *Handbook*’s statement of the exception seems to authorize destruction of a merchant ship without providing for the safety of its crew and passengers in circumstances, not unlikely to occur in wartime, where an initial warning, perhaps a confusing unorthodox order, from a submarine is met at first by an instinctive, half-hearted resistance. There appears to be no reason in post-1936 practice to lessen the stringency of this exception to the general rule of saving the civilian crews and passengers.

The second exception to this general rule set forth by the *Handbook* occurs when an enemy merchant ship “is sailing under armed convoy or is itself armed.”⁹⁸ The practice of the World War II belligerents and the International Military Tribunal’s judgment in the *Doenitz* case do indicate that this is indeed now an exception to the Protocol’s general rule regarding the safety of passengers and crew and would further allow surprise attack on enemy merchant vessels so convoyed or armed— at least in a general war. Limited warfare may require limitations of location and proportionality in favor of the humanitarian principles supporting the general rule. It should be noted again that, even where it applies, this “exception” is not necessarily a real exception. It could just as well be a legitimate interpretation of the literal words of the London Protocol: an enemy merchant ship armed or convoyed against submarines might be considered for this context an enemy warship and no longer a “merchant ship” protected by the terms of the Protocol.

The *Handbook's* third exception to the Protocol's general rule occurs when the enemy merchant ship "is assisting in any way the enemy's military intelligence system or is acting in any capacity as a naval auxiliary to the enemy's armed forces."⁹⁹ At first glance, this exception might appear to be simply a corollary of or variation on the second exception regarding armed or convoyed enemy merchantmen. But there is, or can often be, an important distinction between the two. A merchant ship armed against submarines is not only part of the enemy's fighting force but actively intends to fight submarines and, because of the submarine's vulnerability on the surface, is capable of successfully doing so. Such a merchantman is purposely prepared to prevent the submarine from carrying out the responsibilities that the Protocol otherwise requires. On the other hand, an enemy merchant ship that is "in any way" assisting the enemy's intelligence (as contrasted to, for example, calling in an air or over-the-horizon attack on the submarine) does not necessarily pose a threat of imminent harm to a surfaced submarine. The important humanitarian concerns reflected in the Protocol should not be sacrificed in order to avoid minor risks to the submarine, even if it can be established that the merchant is or has been providing intelligence in some manner not immediately threatening the safety of the submarine. And, again, this should be especially true in a limited war with limited objectives, in which proportionality considerations should allow greater relative weight for the humanity side of the balance between military necessity and humanity.

Finally, the *Handbook* would allow deviation from the Protocol's general rule where

[t]he enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.¹⁰⁰

There is much to be said for the proposition that the practices of World War II belligerents provide substantial precedent for this exception, particularly for any future general war, the sort of war in which a belligerent does integrate all assets within its control into its war efforts. In this sense, the rule exception implicitly recognizes a pertinent and valuable distinction between general war and limited war. Again, however, the last clause concerning preclusion of mission should perhaps be modified by requiring a proportionality consideration.

Despite the World War II claims threatening unwarmed attacks on neutral shipping in broad war zones, the *Handbook's* rules are generally protective of neutral merchant ships. Neutrals that have not taken on enemy character—in which case they are to be treated either as enemy warships or enemy merchant ships, depending on the nature of their support for the enemy—¹⁰¹ can be captured as prizes, but only after visit and search to establish their susceptibility to capture. Moreover, captured neutral vessels can be sunk only

after every reasonable effort has been made to avoid their destruction and only after the capturing officer is “entirely satisfied that the prize can neither be sent into a belligerent port . . . nor, in his opinion, properly released.”¹⁰² In any case where destruction of a neutral ship is ordered, the capturing officer must provide for the safety of the ship’s passengers and crew.¹⁰³ The *Handbook’s* discussion of treatment of neutral ships makes no distinction between the obligations owed by surface warships and those owed by submarines. It could be said, therefore, that in some respects the *Handbook* provides more protection for neutral shipping—in a general war, at any rate—than the current law of submarine warfare provides.

The *Handbook’s* statement of the law of naval warfare on the rescue of survivors of attack, discussed above, applies equally to survivors of attacks on merchant ships and attacks on enemy warships. Although a reasonable argument can be made for requiring even greater efforts in the case of merchant ship survivors, this is probably an accurate statement of the current rule.

Exclusion zones. As noted, the lawfulness of unilaterally declared war zones or exclusion zones or areas of operation is debatable. Such zones were used in both world wars in part to claim justification for surprise submarine attacks on merchant shipping, including neutral shipping, found within the zones. The Nuremberg Tribunal clearly ruled that such zones did not provide the right of a belligerent, even in the all-out war with which it was concerned, to wage unrestricted submarine warfare against neutral merchant ships. Perhaps in partial consequence, the *Handbook* takes a careful approach to the subject. In its discussion of the law of blockade, the *Handbook* notes attempts by belligerents in both world wars to assert “so-called long-distance blockades” that were not in conformity with the law of naval warfare allowing close-in blockade but which were justified, says the *Handbook*, upon the right of reprisal. Whatever the asserted justification (and, as pointed out above, reprisal was not the only one), these “blockades” supposedly often authorized unannounced submarine attacks on neutral shipping in the declared areas. While the *Handbook* correctly describes the difficulty, especially in current times and in a general war, to impose an effective close-in blockade, it nevertheless does not endorse the legitimacy of the extended blockades of the world wars.¹⁰⁴

Yet the *Handbook* does assert the validity of zones or operational areas “[w]ithin the immediate area or vicinity of naval operations” where a belligerent may impose “special restrictions” on neutral traffic, including prohibition from entering the areas.¹⁰⁵ The belligerent cannot, however, “purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.”¹⁰⁶ Although the *Handbook* rules state that a neutral merchant ship is liable to capture for, among other

activities, violating the regulations established by the belligerent for such a zone, it is, apparently, not liable to sinking without warning *unless* it fails to conform to the belligerent's instructions concerning communications, in which case it "may thereby assume enemy character and risk being fired upon or captured."¹⁰⁷ It is by no means clear that these asserted rules, though admirable in their restraint, are consistent with the current law of naval warfare. To the extent that such areas of operation would ever purport to authorize the sinking of neutral merchant ships without warning, they would run up against the judgment of the International Military Tribunal in the *Doenitz* case.

Because we can expect that exclusion zones or zones of operation will continue to be asserted, in particular in limited wars, perhaps it would be worth the effort to attempt to provide by treaty a set of negotiated rules that balance the perceived needs for protection of belligerent forces in the modern age of long-distance targeting, the interests of neutral shipping, and the humanitarian principles that led the Nuremberg Tribunal to condemn unrestricted naval warfare zones.

Other targets of submarines. The *Handbook's* rules on enemy vessels that are immune or exempt from targeting are the same for surface warships and submarines and therefore receive no detailed discussion here. The *Handbook* does make it clear that enemy hospital ships complying with the appropriate rules on marking and behavior are not lawful targets for surface warships or submarines. Other enemy vessels immune from attack, according to the *Handbook*, include coastal fishing vessels and small coastal traders. Civilian passenger vessels are said to be subject to capture but exempt from destruction.¹⁰⁸

The *Handbook's* treatment of the law of conventional-weapon naval bombardment of land targets again makes no distinction between surface ships and submarines (or, for that matter, aircraft).¹⁰⁹ In general, the stated rules set forth the particular prohibitions on targeting civilian populations, inflicting unnecessary suffering, and wanton destruction of property. There is no suggestion that these rules present special issues for submarines.

Submarine weaponry. The *Handbook* also makes no distinction between surface ships and submarines in discussing the law of mine-laying. It basically sets forth the rules derived from the Hague Convention (VIII) of 1907,¹¹⁰ to which the U.S. remains a party. In order to comply with the rule that torpedoes disarm after missing their intended targets, the *Handbook* states that "[a]ll U.S. Navy torpedoes are designed to sink to the bottom and become harmless upon completion of their propulsion run."¹¹¹ It would seem that the duration of the propulsion runs of the array of modern torpedo weapons would be an important consideration for promulgating rules of engagement for submarines.

The *Handbook* contains only one sentence that might be deemed a specific response to the above-noted debate on the lawfulness of submarine-launched cruise missiles. It states in full:

Missiles and projectiles dependent upon over-the-horizon or beyond-visual-range guidance systems are lawful, provided they are equipped with sensors, or are employed in conjunction with external sources of targeting data, that are sufficient to ensure effective target discrimination.¹¹²

This sentence, however, purports to be an extension of the general obligation of belligerents, recognized in the *Handbook*, to avoid weapons that are indiscriminate in their effect. But a weapon is not indiscriminate “simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the military advantage expected to be gained.”¹¹³ This is apparently another reference to the military necessity/humanity formula and perhaps deserves a little more explanation, including the concept of proportionality and doubt-erasing presumptions. Otherwise, the discussion is probably an accurate restatement of the general rules on conventional weapons and weapons systems.

Nuclear weapons present quite another problem, one which the *Handbook*, like the author of this chapter, largely avoids. It does, however, state a position, unlike the author. It states that “[t]here are no rules of customary or conventional international law prohibiting nations from employing nuclear weapons in armed conflict.”¹¹⁴ Thus, the *Handbook* concludes that the use of nuclear weapons “against enemy combatants and other military objectives” is legal. But launch of attacks against civilian populations “as such” is not lawful.¹¹⁵ Because United States submarines are among our most important launching platforms for nuclear weapons, this issue is one of importance to the law of submarine warfare. It is to be expected that a U.S. Navy guidebook on the law of naval warfare would take the position that these awesome weapons, so significant in the very definition of our defensive forces if not our nation itself, are legal weapons of war. But, of course, the question is far more complex and confused than the *Handbook* suggests.¹¹⁶ The full analysis of the question is, however, beyond the scope of the present chapter.

Submerged passage. On this, another controversial issue, the *Handbook* again takes the expected position: submerged transit through neutral territorial seas that form all or part of a strait used for international navigation is permitted in accordance with the customary rules articulated in the 1982 Convention on the Law of the Sea.¹¹⁷ As noted above, this is not necessarily the rule; instead, the general innocent passage requirement that a submarine surface and show its flag in neutral territorial seas could well be the current law.

Regarding archipelagic sealanes passage, the *Handbook* restates the U.S. position that it is willing to recognize the right of archipelagic states to establish archipelagic waters, provided they do so in accordance with the

provisions of the 1982 treaty, which, in the U.S. view, allow submerged passage, even in wartime, through designated sea lanes.¹¹⁸ This position does not seem to be inconsistent with international law.

Conclusion

Naval command in modern wartime unquestionably carries a terrible burden of responsibility—to superior officers, to those commanded, to the ship, to the mission, to the nation, and to those innocent persons who somehow might come within the broad zones of danger posed by today's weapons systems. Many rules guide the commander's decisions as he attempts to cope with his tremendous burden. Not all of these rules are called "law," but even those that are so designated are recognized because they are in the national or military interest or both. The nature of the submarine as a weapons system makes the submarine commander's wartime task of attempting to comply with the traditional law of naval warfare an especially difficult one. As this chapter has tried to explain, the submarine's nature and the experiences of the two world wars have led to some modifications of the traditional law, particularly regarding the submarine's role as commerce raider.

The U.S. Navy's new *Commander's Handbook on the Law of Naval Operations* presents an impressive exposition of the law of naval warfare as it relates to submarines. It is concise, readable, and, for the most part, an accurate reflection of the current law. The few specific comments and criticisms set forth in this chapter are not, in light of the overall scope of the book's treatment of the topic, highly significant. Two larger matters, however, remain bothersome, though they each go beyond the submarine topic.

First, the *Handbook* seldom refers to any clear distinction between rules that apply in total wars, such as World War II, and today's more likely armed confrontation, a war that is limited in geographical scale or objectives or both. The distinction is particularly critical for the issues that surround the conduct of submarine warfare. Warfighting conduct that might be expected, even appropriate (perhaps even lawful), during a global conflagration in which warring nations struggle for their very existence does not necessarily provide precedent for the conduct of limited war, as recent events probably confirm. Some aspects of the traditional laws of naval warfare that seemed so outmoded or obsolete in the context of World War II—for example, the provisions of the 1936 London Protocol—might make sense again in the context of limited war.

The second problem is one that naval commanders, including especially submarine commanders, must anticipate: what to do in cases of doubtful targetability. Where the hard choice is between military necessity and humanity, which side wins? Where lies the presumed answer? The rules that attempt to balance military necessity and humanity are many and complex.

It is obviously one thing to state them or even know them in all their exception- and qualification-festooned glory; it is undoubtedly quite another actually to attempt to apply them in instant decision under the stress of imminent hostile engagement. As suggested in earlier discussion, anticipation of the dilemma calls for a presumption or set of presumptions designed to guide decision in doubtful cases, and the *Handbook* could benefit from the inclusion of a section on this problem.

Notes

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1. Karl Lautenschlager, "The Submarine in Naval Warfare, 1901-2001." *International Security*, Winter 1986-87 (v. 11, no. 3), pp. 94-140.

2. Sources for the general historical and technical background contained in this section include *Jane's Fighting Ships 1987-88* (London: Jane's Publishing Company, Ltd., 1988), pp. 696-718; Norman Friedman, *Submarine Design and Development* (Annapolis: Naval Institute Press, 1984); W.T. Mallison, Jr., "Studies in the Law of Naval Warfare: Submarines in General and Limited War," *International Law Studies 1966* (Washington: U.S. Govt. Print. Off., 1968), v. 58; Lautenschlager, *supra* note 1; Horace B. Robertson, Jr., "Submarine Warfare," *JAG Journal*, November 1956, pp. 3-9; Jane Gilliland, "Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare," *Georgetown Law Journal*, v. 73, pp. 975-1005 (1985).

3. See Mallison, *supra* note 2, pp. 104-05; Gilliland, *supra* note 2, pp. 976-77.

4. Mallison, *supra* note 2, p. 106.

5. Naval Conference of London, "Declaration (II) Concerning the Law of Naval War," reprinted in Dietrich Schindler & Jiri Toman, ed., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed. (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), ch. IV., pp. 852-53 (hereinafter Schindler & Toman). The Declaration was not ratified by any of the ten signatories, but the rules contained in it were recognized by several of the belligerents in World War I.

6. Mallison, *supra* note 2, pp. 103-05; Gilliland, *supra* note 2, pp. 976-77.

7. Mallison, *supra* note 2, pp. 62-74; Gilliland, *supra* note 2, pp. 984-85.

8. See Mallison, *supra* note 2, pp. 65-69.

9. *Id.*, pp. 31-51; Gilliland, *supra* note 2, pp. 976-77.

10. Mallison, *supra* note 2, p. 38.

11. U.S. Laws, Statutes, etc., "Treaty for the Limitation and Reduction of Naval Armaments," art. 22, *U.S. Statutes at Large*, 71st Congress (Washington: U.S. Govt. Print. Off., 1931), v. 46, pt. 2, pp. 2881-2882; reprinted in Schindler & Toman, *supra* note 5, pp. 881-82.

12. See "Process-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930," *American Journal of International Law, Supp., Official Docs.*, v. 31, pp. 137-39 (1937), reprinted in Schindler & Toman, *supra* note 5, pp. 74-75; Mallison, *supra* note 2, pp. 79-80.

13. U.S. Dept. of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1989* (Washington: U.S. Govt. Print. Off., 1989), p. 365.

14. Mallison, *supra* note 2, pp. 80, 117-21; Gilliland, *supra* note 2, p. 984; Charles J. Weiss, "Problems of Submarine Warfare Under International Law," *Intramural Law Review of New York University*, v. 22, 1967, pp. 136, 137-138.

15. Mallison, *supra* note 2, p. 78; Gilliland, *supra* note 2, p. 985.

16. Lautenschlager, *supra* note 1, p. 107.

17. According to Professor Mallison, "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." Mallison, *supra* note 2, p. 87.

18. See International Military Tribunal, "Testimony of Fleet Admiral Nimitz, U.S. Navy, 11 May 1946, Regarding Naval Warfare in the Pacific from 7 December 1941, Including the Principles Governing the Rescue of Survivors of Sunk Enemy Ships (Exhibit Doenitz-100)," *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg: International Military Tribunal, 1949), v. 40, pp. 108-111 (hereinafter cited as International Military Tribunal).

19. *Id.*, v. 1, p. 311.

20. *Id.*, v. 18, pp. 312-23.

21. *Id.*, v. 1, p. 312.

22. *Id.*, pp. 312-13.

23. Mallison, *supra* note 2, p. 81.

24. International Military Tribunal, *supra* note 18, v. 1, p. 313. It has been suggested, however, that in fact the risk to neutral vessels as a result of the U.S. declaration of unrestricted submarine warfare in the Pacific was not as great because of the relative scarcity of neutral shipping in the Pacific zones during World War II. Robertson, *supra* note 2, p. 8.

25. W. Hays Parks, "Submarine-Launched Cruise Missile and International Law: A Response," *U.S. Naval Institute Proceedings*, September 1977, p. 120; Alex A. Kerr, "International Law and the Future of Submarine Warfare," *U.S. Naval Institute Proceedings*, October 1955, p. 1107.

26. International Military Tribunal, *supra* note 18, v. 1, p. 313.

27. This was the infamous "Laconia Order." Mallison, *supra* note 2, p. 137.

28. International Military Tribunal, *supra* note 18, v. 1, p. 313. The source of the rule on rescue of survivors is the "Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *United States Treaties and Other International Agreements*, T.I.A.S. No. 3363 (Washington: U.S. Dept. of State, 1955), v. 6, pt. 3, pp. 3217-3693.

29. The Tribunal's judgment is confusing on this point. In its short discussion of the charge that Doenitz, by the "Laconia Order," forbade submarine commanders from complying with the international law duty to rescue survivors of sunken ships, the Tribunal ends up again referring to the 1936 Protocol's provisions on the "rescue" of merchant ship crews and passengers prior to sinking, clearly a separate issue. International Military Tribunal, *supra* note 18, v. 1, p. 313.

30. Mallison, *supra* note 2, pp. 84-86, 137-38.

31. International Military Tribunal, *supra* note 18, v. 1, p. 313.

32. Mallison, *supra* note 2, pp. 139-43.

33. Nimitz Testimony, International Military Tribunal, *supra* note 18, p. 110.

34. *Id.*

35. Robert W. Tucker, "The Law of War and Neutrality at Sea," *International Law Studies 1955* (Washington: U.S. Govt. Print. Off., 1957), v. 50, pp. 181-195.

36. International Military Tribunal, *supra* note 18, v. 1, p. 313.

37. The Protocol is quoted in the text accompanying note 12, above.

38. Tucker, *supra* note 35, pp. iv-v; Mallison, *supra* note 2, pp. 129-32.

39. See Gilliland, *supra* note 2, p. 989.

40. See Weiss, *supra* note 14, p. 149; Gilliland, *supra* note 2, p. 1002.

41. General sources for this section include *Jane's Fighting Ships*, *supra* note 2, pp. 696-718; Friedman, *supra* note 2; Mallison, *supra* note 2; Lautenschlager, *supra* note 1; Gilliland, *supra* note 2; Jon Boyes and W.J. Ruhe, "The Role of U.S. Submarines," *The Submarine Review*, October 1987, pp. 15-23; Admiral Ronald Hayes, USN, "CINCPAC's Submarine Views," *The Submarine Review*, January 1987, pp. 44-48.

42. Lautenschlager, *supra* note 1, p. 95.

43. *Id.*

44. *Id.*

45. Boyes and Ruhe, *supra* note 41, pp. 15-16.

46. *Id.*, pp. 19-23; Lautenschlager, *supra* note 1, p. 95.

47. Lautenschlager, *supra* note 1, pp. 134-38.

48. *Id.*, p. 134; Robertson, *supra* note 2, pp. 8-9.

49. For a presentation and analysis of these reasons, see Lautenschlager, *supra* note 1, pp. 134-38.

50. See Samuel L. Morison, "Falklands (Malvinas) Campaign: A Chronology," *U.S. Naval Institute Proceedings*, June 1983, pp. 119-24.

51. Gilliland quotes from remarks made by Captain Louis Chelton, former Chief Naval Judge Advocate of the Royal Navy (U.K.), in confirming that British exclusion zones in the Falklands War were designed to allow Royal Navy commanders "to engage a militarily important target without undue hesitation, or the need for the sort of position [*sic*; positive?] identification criteria, the obtaining of which could have hazarded unduly the ship's safety." Gilliland, *supra* note 2, p. 1003, note 182.

52. Morison, *supra* note 50, p. 121.

53. E.g., Mallison, *supra* note 2, p. 16; Gilliland, *supra* note 2, p. 979.

54. The United Nations Charter (1945), the Universal Declaration of Human Rights (1948), and at least 16 subsequent human rights treaties, to most of which a majority of the world's states are parties, attest to this. See the list set forth in Louis Henkin et al., *International Law: Cases and Materials*, 2nd ed. (St. Paul: West Publishing Co., 1987), pp. 991-92.

55. See *Id.*, pp. 991-992.

56. Mallison, *supra* note 2, pp. 29-53.

57. International Military Tribunal, *supra* note 18, v. 1, pp. 311-13.

58. Mallison, *supra* note 2, p. 106.

59. The contrast is, of course, to the two great wars of this century, each fought on a global scale, with national survival an objective of the belligerents. In a global war on our ocean planet, true neutral shipping is both less likely to exist and, where it does exist, more understandably subject to belligerent restriction and risk of harm. In a war fought for national survival, belligerents are more likely to commit and justify actions that cause injury and death to civilian populations of their enemies. Clearly, a limited war can be one of limited geography, but in which national survival of the belligerents is at stake; the Iran-Iraq War is a current example. This chapter makes no special effort to attempt to draw distinctions between types of limited wars as grounds for differing rules of submarine warfare. Perhaps such distinctions are appropriate. The main purpose of this chapter in contrasting general wars and limited wars is to suggest that conduct during the World Wars, which were both global and fought for national survival, is not necessarily a precedential basis for formulation of warfare rules for today's limited wars regardless of the nature of the limitation.

60. *The New York Times* reported the reaction as one of "shock and dismay." William Borders, "Falklands Casualties Bring Dismay in Europe," *The New York Times*, 5 May 1982, p. A1: 4-6. See also Gilliland, *supra* note 2, p. 994, note 130.

61. Morison, *supra* note 50, p. 121.

62. *E.g.*, Weiss, *supra* note 14, pp. 148-49; Gilliland, *supra* note 2, pp. 978-79.

63. Weiss, *supra* note 14, pp. 148-49. Gilliland, *supra* note 2, discusses Weiss' proposal at pp. 996-1005.

64. See Gilliland, *supra* note 2, p. 1003, note 182.

65. See Thomas M. Daly, "The Enduring Gulf War," *U.S. Naval Institute Proceedings*, May 1985, pp. 148-61.

66. See Mallison, *supra* note 2, pp. 52-53.

67. The United States has claimed exclusion zones during the Korean War and during the Cuban Missile Crisis. Gilliland, *supra* note 2, p. 992; John W. Robertson, "Blockade to Quarantine in International Law," *JAG Journal*, June 1963, v. 17, p. 87.

68. Mallison, *supra* note 2, pp. 124-25. Hospital ship markings are designated in the 1949 "Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea," *United States Treaties and Other International Agreements* (U.S. Govt. Print. Off., 1955), v. 6, p. 3217, T.I.A.S. No. 3363, reprinted in Schindler & Toman, *supra* note 5, p. 401.

69. Mallison, *supra* note 2, pp. 126-28. The leading case supporting the immunity of coastal fishing vessels from capture or destruction remains *The Paquete Habana*, 175 U.S. 677 (1900).

70. This rule is found in the 1907 "Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII)," Oct. 18, 1907, art. 1, par. 3, U.S. Statutes at Large, v. 36, p. 2332, reprinted in Schindler & Toman, *supra* note 5, p. 803.

71. See Howard S. Levie, "Mine Warfare and International Law," Richard B. Lillich and John Norton Moore, eds., *Readings in International Law from the Naval War College Review 1947-1977*, v. II (International Law Studies v. 62, Newport, R.I.: Naval War College Press, 1980), pp. 271-79.

72. D.P. O'Connell, "The Legality of Naval Cruise Missiles," *American Journal of International Law*, v. 66, p. 785 (1972); Scott C. Truver, "The Legal Status of Submarine-Launched Cruise Missiles," *U.S. Naval Institute Proceedings*, August 1977, pp. 82-84.

73. Truver, *supra* note 72, p. 83.

74. *Id.*

75. Parks, *supra* note 25, pp. 120-22.

76. See Howard S. Levie, "Nuclear, Chemical, and Biological Weapons," *infra*, Chapter 11. See also, *e.g.*, Istvan Pogany, ed., *Nuclear Weapons and International Law* (New York: St. Martin's Press, 1987); Arthur Selwyn Miller and Martin Feinrider, eds., *Nuclear Weapons and the Law* (Westport, Conn.: Greenwood Press, 1984); Ian Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons," *International & Comparative Law Quarterly*, v. 14, p. 437 (1965).

77. See the 1958 Geneva "Convention on the High Seas," *United States Treaties and Other International Agreements*, T.I.A.S. No. 5200 (Washington: U.S. Dept. of State, 1962), v. 13, pt. 2, p. 2312, art. 2. The current customary law concerning freedom of navigation within exclusive economic zones is probably reflected in the United Nations Conference on the Law of the Sea, 3d, *United Nations Convention on the*

Law of the Sea, A/CONF. 62/122 (n.p.: 1982), art. 58. This treaty was adopted in 1982 but is not yet in force.

78. See "Convention on the High Seas," *supra* note 77, art. 6.

79. See e.g., "Discussion," John M. Van Dyke, ed., *Consensus and Confrontation: The United States and the Law of the Sea Convention* (Honolulu: Law of the Sea Institute, 1985), pp. 292-311; Jon L. Jacobson, "Law of the Sea—What Now?" *Naval War College Review*, March -April 1984, p. 96. The 1982 treaty's provisions on straits transit are found in *United Nations Convention on the Law of the Sea*, *supra* note 77, arts. 37-44.

80. See sources cited in the preceding note.

81. *United Nations Convention on the Law of the Sea*, *supra* note 77, arts. 46-54.

82. *Id.*, arts. 47, 53-54.

83. See "Discussion," *supra* note 79, p. 293.

84. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: 1987).

85. *Id.*, par. 8.2.1.

86. *Id.*, par. 8.3.

87. *Id.*, pars. 5.4.2 and 11.6.

88. *Id.*, par. 11.6.

89. *Id.*, par. 8.3.

90. *Id.*, pars. 5.4.2, 6.2.3.2, 11.6.

91. *Id.*, par. 6.2.5.

92. See, e.g., Gilliland, *supra* note 2, p. 987, note 77 and sources there cited.

93. NWP 9, *supra* note 84, par. 8.3.1.

94. *Id.*

95. Compare *id.*, par. 8.3.2 with par. 8.2.3.

96. *Id.*, par. 8.3.1. By contrast, the *Handbook*, in paragraph 8.2.2.2, states that the comparable exception occurs for *surface* warships when the merchant vessel is "[a]ctively resisting visit and search or capture," or "[r]efusing to stop upon being summoned to do so." It is probable that the differences in wording result because the *Handbook's* authors were in each case attempting merely to restate the Protocol's rules in a general way and that, therefore, the differences are not in themselves significant. It might be preferable to quote the Protocol's words verbatim.

97. The Protocol is quoted in the text accompanying note 12 *supra*.

98. NWP 9, *supra* note 84, par. 8.3.1.

99. *Id.*

100. *Id.*

101. *Id.*, par. 7.5.

102. *Id.*, par. 7.9.1.

103. *Id.*

104. *Id.*, par. 7.7.5.

105. *Id.*, par. 7.8.

106. *Id.*

107. *Id.*, par. 7.8.1.

108. *Id.*, par. 8.2.3.

109. *Id.*, par. 8.5.

110. "Convention Relative to the Laying of Automatic Submarine Contact Mines," *supra* note 70.

111. NWP 9, *supra* note 84, par. 9.3.

112. *Id.*, par. 9.7.

113. *Id.*, par. 9.1.2.

114. *Id.*, par. 10.2.1.

115. *Id.*

116. See Pogany, *supra* note 76; Miller and Feinrider, *supra* note 76; Brownlie, *supra* note 76.

117. NWP 9, *supra* note 84, par. 7.3.5.

118. *Id.*, pars. 1.4.3, 7.3.6. The *Handbook* does recognize that "[t]he balance of neutral and belligerent rights and duties with respect to neutral waters is, however, at its most unsettled in the context of archipelagic waters." *Id.*, par. 7.3.6.