The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.
CHAPTER 2

THE GENERAL PRINCIPLES OF THE LAWS OF WAR

200 WAR AND LAW

Although the resort to war is generally prohibited by the Charter of the United Nations, it is exceptionally permitted as an enforcement measure taken by or on behalf of the United Nations and as a measure of individual or collective self-defense against an armed attack. However, the distinction must be made between the resort to war and the conduct of war. Whether the resort to war is lawful or unlawful the conduct of war is regulated by the system of rules known as the laws (or rules) of war. These rules regulate the conduct of war on land, at sea, and in the air. The laws of war are designed to control and mitigate the harmful effects of war by extending, during time of war, at least a minimum standard of protection to combatants and noncombatants and to all individuals who come under the control of the belligerents. These laws are also helpful in regulating the transition to peace at the conclusion of active hostilities.

The laws of war are effective to the extent that they are obeyed by the belligerents. 1

210 THE SOURCES OF THE LAWS REGULATING WARFARE 2

The principal sources of the laws of war are custom and treaties.

211 CUSTOMARY LAW

Customary laws of war develop out of the usage or practice of states when such usage or practice attains a degree of regularity and is accompanied by the general conviction that behavior in conformity with this usage or practice is both obligatory and right. 3 In a period marked by frequent resort to armed conflict, customary law may develop within a short time. 4

212 TREATIES

Treaties, or conventions as they are sometimes called, are international agreements between two or more states. Certain conventions represent a codification of the rules of war already established by custom. There are also conventions by which new laws of war are created. Both types of conventions have provided the more important developments in the rules of war. 5

(Footnotes at end of chapter)
a. Customary rules of war are binding on all belligerents and under all conditions. Special rules apply in cases of reprisals against a belligerent for illegitimate acts of warfare. (See Section 310.)

b. Rules Established by Treaties. Rules established through a convention (treaty) are usually binding only between parties which have ratified or adhered to, and have not thereafter denounced or withdrawn from, the convention. Furthermore, the rules established through a convention are binding only to the extent permitted by the terms of the convention or by the reservations, if any, that have accompanied the ratification of or adherence to the convention. However, even when the above requirements are not met, a convention may represent, or come to represent, a general consensus as to the established law. Hence, the widespread observance of these conventional rules frequently renders them enforceable as law regardless of ratification. As occasions arise, it is the responsibility of higher authority to determine and instruct forces afloat as to which, if any, of these conventions are not legally binding between the United States and other states immediately concerned, and as to which, if any, are for that reason not to be observed or enforced for the time being.

220 THE BASIC PRINCIPLES OF THE LAWS OF WAR

Among the customary rules of warfare there are three rules frequently referred to as the "basic principles of the laws of war": military necessity, humanity, and chivalry. These rules, or basic principles, are defined as follows:

a. MILITARY NECESSITY. The principle of military necessity permits a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources.

b. HUMANITY. The principle of humanity prohibits the employment of any kind or degree of force not necessary for the purpose of the war, i.e., for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources.

c. CHIVALRY. The principle of chivalry forbids the resort to dishonorable (treacherous) means, expedients, or conduct. (See Section 640.)

221 THE DISTINCTION BETWEEN COMBATANTS AND NONCOMBATANTS

a. DISTINCTION. The traditional laws of war are based largely on the distinction made between combatants and noncombatants. In accordance with this distinction, the population of a belligerent is divided into two general classes: the armed forces (combatants) and the civilian population (noncombatants). Each class has specific duties and rights in time of war, and no person can belong to both classes at the same time.
b. Restriction of hostilities. Under customary international law individuals who do not form a part of the armed forces and who refrain from the commission of all acts of hostility must be safeguarded against injury not incidental to military operations directed against combatant forces and other military objectives. In particular, it is forbidden to make combatants the object of a direct attack by the armed forces of a belligerent, if such attack is unrelated to a military objective. Attack for the sole purpose of terrorizing the civilian population is also forbidden.

230 NEUTRALITY

a. Definition. Neutrality may be defined as the nonparticipation of a state in a war between other states. Such nonparticipation must in turn be recognized by the belligerents. In the absence of any treaty limiting the available scope of neutrality (see Article 232), whether or not a state chooses to refrain from participating in war is a policy decision. Similarly, recognition of such nonparticipation is also a policy decision.

b. Obligations and rights. Under general international law a neutral state has certain obligations and rights toward belligerents, and belligerents have corresponding rights and obligations toward a neutral (see Section 440). The principle of impartiality holds that a neutral state is required to fulfill its obligations and enforce its rights in an equal manner toward all belligerents. If a neutral state does not observe the principle of impartiality the belligerent injured by such nonobservance may consider itself to be bound no longer by its obligations toward the neutral.

231 THE DETERMINATION OF NEUTRAL STATUS OF STATES

Although it is usual, on the outbreak of war, for nonparticipating states to issue proclamations of neutrality, a special declaration by nonparticipating states of their intention to adopt a neutral status is not required. The status of neutrality is terminated only when a neutral state resorts to war against a belligerent or when a belligerent resorts to war against a neutral.

232 NEUTRALITY UNDER THE CHARTER OF THE UNITED NATIONS

The Charter of the United Nations imposes upon the member states the obligations to settle their international disputes by peaceful means and to refrain from the threat or use of force in their international relations. The obligation to refrain from the threat or use of force is modified by the right of individual and collective self-defense to be exercised in case of an armed attack until the Security Council has taken the necessary measures to restore peace and by the obligation to carry out the decisions of the Security Council. In case of a threat to or breach of the peace, the Security Council is authorized to take enforcement action, involving or not involving the use of armed force, in order to maintain or restore peace. The member states are obligated to give the United Nations every assistance in any
action it takes and to refrain from giving assistance to any state against which the United Nations is taking action. Consequently, the members of the United Nations may be obliged to give assistance with their armed forces to the United Nations in its enforcement actions, the fulfillment of which obligation is incompatible with the status of neutrality. On the other hand, member states may be obliged to give assistance to the United Nations in its enforcement actions only with measures not involving the use of armed force. In this case, they may remain neutral, since they are not obliged to participate in the hostilities, although they are obliged not to observe an attitude of impartiality toward the belligerents. These obligations of the member states, incompatible with the status of neutrality and with the principle of impartiality, come into existence only if the Security Council fulfills the functions delegated to it by the Charter. If the Security Council is unable to fulfill its assigned functions, the members may, in case of a war, remain neutral and observe an attitude of strict impartiality.19

233 NEUTRALITY UNDER REGIONAL AND COLLECTIVE SELF-DEFENSE ARRANGEMENTS

The right of individual and collective self-defense established by the Charter of the United Nations may be implemented by regional and collective self-defense arrangements. Under these arrangements the possibility of maintaining a status of neutrality and of observing an attitude of impartiality depends upon the extent to which the contracting parties are obliged to give assistance to the regional action, or in the case of collective self-defense, to the victim of an armed attack.20

240 THE LAWS OF LAND WARFARE

Naval forces operating on land will be governed by the laws and customs of war on land.21

250 THE LAWS OF AIR WARFARE

There is no comprehensive body of laws specially applicable to air warfare in the same sense that there is a comprehensive body of specialized laws relating only to sea warfare and a similar body of laws relating only to land warfare.22 There are, however, certain customary and conventional rules of a general character underlying the conduct of war on land and at sea which must be considered equally binding in air warfare.23 In addition, there are certain specialized laws of sea and land warfare which may be considered applicable to air warfare as well.24

This book applies to the whole of naval warfare and thereby includes naval air warfare. Appropriate note is taken throughout this book of the situations in which the specialized rules of naval warfare do not similarly regulate the conduct of naval air warfare. In the absence of these distinctions, operational naval commanders are to assume that the rules regulating warfare at sea are equally applicable to naval air warfare.
This statement does not refer to occasional violations of the rules of warfare. Such occasional violations do not substantially affect the validity of the law. However, the continuous violation of certain rules of warfare is a different matter, especially when such violations are not answered by protests and reprisals on the part of the belligerent against whom they are taken. Hence, reference is made here to this question: When do rules of warfare, either customary or conventional, cease to be valid for the reason that over a period of time they are neither obeyed nor applied by belligerents?

The experience of World War II, and of the war crimes trials which followed, seems to indicate quite clearly that the present principal area of uncertainty in the rules of war is that relating to the permissible methods and weapons for the conduct of actual military operations against members of the armed forces and the civilians who suffer as a result of such operations.

Section 2.10 is limited to a consideration of the international regulation of warfare, and does not cover national regulation by the United States, which is dealt with in the Uniform Code of Military Justice and U. S. Navy Regulations.

It is necessary to distinguish clearly between the usages of warfare (manner of warfare) and the customs of warfare. The development from usage to custom is a decisive one since, in a strict sense, it is only after a usage or practice has developed into a custom—i.e. only after a certain behavior is generally considered as both obligatory and right—that we are entitled to speak of legal rules of warfare.

In recent years there has been a marked tendency to include among the sources of the rules of war certain principles of law adopted by many states in their domestic legislation. In the judgment rendered in The Hostages Case the United States Military Tribunal stated:

"The tendency has been to apply the term "customs and practices accepted by civilized nations generally," as it is used in International Law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of justice which have been accepted and adopted by civilized nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of international law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified." (United States v. List et al.) Trials of War Criminals, Vol. XI (1950), p. 1235.

It is frequently difficult to determine the point in time at which a usage of war has developed into a customary rule. In addition, it has been a characteristic feature of the customary law of war that there have been numerous controversies between states over the precise content of these rules once their existence as law has been definitely established. These difficulties, among others, have led in the past to increased effort toward the codification of the law of war through written conventions (treaties).

The most recently concluded international conventions relating to the regulation of the conduct of warfare are the 1949 Geneva Conventions For the Protection of War Victims.

See Note 10 below for a discussion of the effect of the principle of military necessity upon the binding force of customary laws of war.

Numerous multilateral agreements contain a provision similar to that contained in Article 28 of Hague Convention No. XIII (1907); namely, that "The provisions of the present convention do not apply except to the contracting powers, and then only if all the belligerents are parties to the convention." The effects of this so called "general participation" clause have not been as far-reaching as might be supposed. In World Wars I and II belligerents frequently affirmed their intention to be bound by agreements containing the general participation clause regardless of whether or not the strict requirements of the clause were actually met. Furthermore, certain conventions have been generally regarded either as a codification of preexisting customary law or as having come to represent, through widespread observance, rules of law binding upon all
Both the International Military Tribunals at Nuremberg and For the Far East treated the general participation clause in Hague Convention No. IV (1907), Respecting the Laws and Customs of War on Land, as irrelevant. They also declared that the general principles laid down in the 1929 Geneva (Prisoners of War) Convention, which does not contain a general participation clause, were binding on signatories and non-signatories alike. Article 2, paragraph 3, of all four 1949 Geneva Conventions states:

"Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

8 The confusion surrounding the principles of military necessity and of humanity is due largely to the fact that they have been used in two distinctly different senses. There has been a failure to clarify these two meanings. They may be, and often are, referred to as principles or ideals which, though not possessing the status of law, have been significant in their influence upon the course of development of the law of war. On the other hand, the principles of military necessity and of humanity also form a part of the positive law of war. This is the second sense in which they may be used, and it is in this sense that these principles are referred to in Section 220.

9 An excellent definition of the principle of military necessity is found in the following quotation:

"Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone."


10 The customary rule of military necessity may be, and in many instances is, restricted in its application to the conduct of war by other customary or conventional rules. The opinion that all rules of war are subject to, and restricted by, the operation of the principle of military necessity has never been accepted by the majority of American and English authorities. Furthermore, this opinion has not been accepted by military tribunals. It has been held by military tribunals that the plea of military necessity cannot be considered as a defense for the violations of rules which lay down absolute prohibitions (e.g., the rule prohibiting the killing of prisoners of war) and which provide no exception for those circumstances constituting military necessity. Thus, one United States Military Tribunal, in rejecting the argument that the rules of war are always subject to the operation of military necessity, stated:

"It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They
comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely."

However, there are rules of customary and conventional law which normally prohibit certain acts but which exceptionally allow a belligerent to commit these normally prohibited acts in circumstances of military necessity. In conventional rules the precise formulation given to this exception varies. Some rules contain the clause that they shall be observed "as far as military necessity (military interests) permits." Other rules permit acts normally forbidden if "required" or "demanded" by the necessities of war. Rules providing for the exceptional operation of military necessity require a careful consideration of the relevant circumstances to determine whether or not the performance of normally prohibited acts is rendered necessary in order to protect the safety of a belligerent's forces or to facilitate the success of its military operations.

11 The opinion is occasionally expressed that these two principles, necessity and humanity, contradict one another in the sense that they serve opposed ends. This is not the case. In allowing only that use of force necessary for the purpose of war, the principle of necessity implies the principle of humanity which disallows any kind or degree of force not essential for the realization of this purpose; that is, force which needlessly or unnecessarily causes or aggravates both human suffering and physical destruction. Thus, the two principles may properly be described, not as opposing, but as complementing each other. The real difficulty arises, not from the actual meaning of the principles, but from their application in practice.

12 The terms "civilian population" and "noncombatants" are used interchangeably in Article 2.2.1, and refer to those peaceful inhabitants of a state who neither are attached to, nor accompany, the armed forces.

It should be observed that the term "noncombatants" also has a more restricted meaning and refers to certain categories of individuals who are attached to or accompany the armed forces of a belligerent, e. g., hospital personnel, chaplains, correspondents, etc. The status of these noncombatant categories is dealt with in the detailed provisions of the 1949 Geneva Convention for the Protection of Victims of War.

13 In land warfare the noncombatant population must not, as a rule, be deprived of their private property except with payment therefor when such property must be requisitioned because of military necessity. However, in naval warfare the private property of the enemy population, as a rule may be seized and condemned in a court of prize. There are certain minor exceptions to this general right of seizure of private property at sea, e. g., small coastal (not deep sea) fishing vessels may only be seized under conditions of military necessity.

14 Recent developments in the methods and weapons of warfare have decidedly affected this once fundamental distinction between combatants and noncombatants. These developments have been summarized as follows: growth of the number of combatants; growth of numbers of noncombatants engaged in war preparations; the development of aerial warfare; economic measures; and the advent of totalitarian states. (Oppenheim-Lauterpacht, International Law, Vol. II (7th ed., 1952), pp. 207–8). To the foregoing should be added the development of guided missiles and atomic and thermonuclear weapons.

The restriction of hostilities to the armed forces of a belligerent is therefore now valid subject only to far-reaching qualifications, particularly with respect to the conduct of aerial warfare (see also paragraph 503b for changes in naval warfare which presently affect the distinction between combatants and noncombatants). It should be pointed out, however, that the partial breakdown of the distinction between combatants and noncombatants applies mainly to the actual conduct of hostilities. The distinction remains quite effective insofar as it applies not to the conduct of hostilities but to the treatment of the victims of war who fall under the control of an enemy belligerent. The Geneva Conventions of 1949 have further clarified this dis-
tinction as it applies to the victims of war in the conventions dealing with the treatment of prisoners of war and with the protection of civilian persons in time of war.

15 It should be emphasized that despite recent developments in the conduct of warfare, discussed above, the prohibitions against subjecting noncombatants to direct attack unrelated to a military objective or of attacking them for the purpose of terrorization remain valid.

16 A state may be neutral, insofar as it does not participate in hostilities, even though it may be not impartial. Whether or not the successful maintenance of a position of nonparticipation is possible, in the absence of complete impartiality, is quite another question.

17 Article 2 of Hague Convention No. III (1907) Relative to the Opening of Hostilities obligates belligerents to inform neutrals of the existence of a state of war.

"Article 2. The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war."

The above Article is binding between a belligerent state which is a party to Hague Convention No. III (1907) and neutral states which also are parties to the Convention.

18 When the United States is a belligerent, the designation of neutral status of third states will be promulgated by Department of the Navy directives.

19 In the absence of a Security Council decision, states may discriminate, and even resort to war, against a state they deem guilty of an illegal armed attack. This follows from Article 51 of the Charter which stipulates the "right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations ..." (It should also be noted that under the resolution "Uniting For Peace" the General Assembly of the United Nations may, in the event of a breach of the peace, make "appropriate recommendations to members for collective measures, including . . . the use of armed force when necessary . . ." However, at present these recommendations of the General Assembly do not constitute legal obligations for the member states.) In sum, then, although members may discriminate against an aggressor, even in the absence of any action on the part of the Security Council, they do not have the duty to do so. In these circumstances neutrality and complete impartiality both remain distinct possibilities.

20 The principal effect of regional and collective self-defense arrangements is to transform the right of the parties to assist that state suffering from an armed attack into a duty to assist a state attacked. This duty may assume various forms, ranging from economic assistance to the undertaking of measures of armed force on behalf of the state attacked. Article 2 of the Inter-American Treaty of Reciprocal Assistance and Article 5 of the North Atlantic Treaty both obligate the contracting states, including the United States, to consider an armed attack against any contracting party as an armed attack against all of the contracting parties and to take any and all such measures as each state may consider necessary to assist the state so attacked.

21 A compilation of the rules of land warfare is contained in Law of Land Warfare, FM 27-10 (1956), issued by the Department of the Army, and in supplements thereto.

22 The few provisions of the Hague Conventions of 1899 and 1907 pertaining to the conduct of aerial warfare are generally recognized as no longer valid. The Rules of Aerial Warfare of February 19, 1923, drafted by the Commission of Jurists at The Hague, were never ratified by any of the participating states.

23 An example of a customary rule of war applicable to aerial warfare is the prohibition against "wanton destruction of cities, towns, or villages, or devastation not justified by military necessity." (See subparagraph 32ob(6) and Article 62.1). Equally applicable is the customary rule forbidding the denial of quarter unless bad faith is suspected; though, given the peculiar conditions of aerial warfare, this rule is frequently difficult to carry out in practice. The relevant Geneva Conventions of 1949, governing the treatment of the sick and wounded and of prisoners of war, are conventional rules of a general character applicable to air warfare.
Caution must be exercised in indiscriminately attempting to apply "by analogy" these specialized rules of land warfare to air warfare. The peculiar conditions of aerial warfare have occasioned practices unique to this form of warfare. Consequently, the attempt to apply "by analogy" the specialized rules of land and sea warfare to air warfare may lead frequently to a disregard of these practices and to this extent be quite misleading. For example, the distinctions made between legitimate ruses and forbidden perfidy are different in land and in naval warfare. Yet neither the distinctions made in land warfare nor the distinctions made in naval warfare have been in accordance with the practices of air warfare.