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THE LAW OF WAR AND NEUTRALITY AT SEA

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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.
IV. RULES GOVERNING WEAPONS AND METHODS OF NAVAL WARFARE

A. THE GENERAL PRINCIPLES OF THE LAW OF WAR

The guiding principle in a consideration of the rules governing the weapons and methods of naval warfare is that in the absence of restrictions imposed either by custom or by convention belligerents are permitted in their mutual relations to use any means in the conduct of hostilities. The essential purpose of the law of naval warfare is to define those actions that are prohibited to belligerents in warfare at sea. Indeed, this purpose is characteristic not only of the law of naval warfare but of the whole of the law of war. Historically, it is true that in the development of the means for waging hostilities it has been frequently asserted—both by governments and by writers on the law of war—that the introduction of a novel weapon or method must be regarded as unlawful until such time as expressly permitted by a specific rule of custom or convention. To the extent that such assertions have been based upon the alleged principle that what is not expressly permitted in war is thereby prohibited, they must be regarded as unfounded.

It is not uncommon, however, that claims as to the illegality of a novel weapon or method of war have been based upon the quite different premise that the weapon or method in question violates some general principle of the customary law of war; that although not expressly forbidden by a specific rule of custom or convention, the disputed means nevertheless falls within the purview of the prohibitions contained in one or more of these general principles. The validity of this latter claim has occasionally been obscured by its identification with the unwarranted assertion that what is not expressly permitted in war is thereby prohibited. In fact, what ought to be contended is that the lawfulness of the weapons and methods of war must be determined not only by the express prohibitions contained in specific rules of custom and convention but also by those prohibitions laid down in the general principles of the law of war.

1 It is to be emphasized that the following pages are concerned only with the mutual relations of belligerents and not with neutral-belligerent relations.

2 Erik Castren correctly expresses the point made above as follows: "The idea, entertained by some writers, that everything is allowed in warfare that is not expressly prohibited cannot be accepted, as customary law alone may condemn such acts. The approbation or rejection of new arms and new methods of waging war depends on whether they conform to the general principles of warfare." *op. cit.*, p. 187. A similar view is taken by Alfred Verdross, who
The general principles of the law of war may be briefly stated. There is, to begin with, the principle distinguishing between the armed forces and the civilian population of a belligerent. In accordance with this principle individuals who form the non-combatant population of a belligerent must not be made the object of direct attack provided they refrain from the commission of all acts of hostility, and must be safeguarded from injuries not incidental to military operations directed against combatant forces and other legitimate military objectives. There is, in addition, the principle of humanity which forbids the employment of any kind or degree of force that is unnecessary for the purpose(s) of war; force which needlessly or unnecessarily causes human suffering and physical destruction is prohibited. Finally, there is the principle forbidding the resort to treacherous means, expedients, or conduct in the waging of hostilities.

It has long been recognized that one of the primary purposes of the more specific customary and conventional rules of war has been to secure, through detailed regulations, the effective observance of these general principles. In naval warfare, for example, the specific rules governing the treatment to be accorded to enemy merchant vessels, as contrasted with the treatment accorded to warships, are based largely upon the principle distinguishing between combatants and non-combatants. In this instance, it is usual to state that the treatment of belligerent merchant vessels must be considered as the application to naval warfare of the principle distinguishing between combatants and non-combatants. Assuming this contention to be correct, it may be further stated that where the general principles of the law of war have received—through the agreement of states—detailed application in the

observes that all means which serve the purpose of defeating the enemy in war are permitted if they do not transgress either specific prohibitions or the general principles of the law of war. Volkerrecht (3rd. ed., 1955), p. 361. In this connection it is important to distinguish between the position taken in the text and the opinion—considered as incorrect—that any weapon necessary for the purpose of war may be employed by belligerents except a weapon designed solely to cause unnecessary suffering and injury to personnel. The military necessity of a weapon is not, of itself, a guarantee of its legality. The use of a weapon in war is legal only if it is not forbidden by the law of war. Such prohibition may result either from a specific rule of custom or convention or from the general principles of the law of war.

3 Law of Naval Warfare, Article 2.2.r and notes thereto. It may be observed that in Article 2.2.r the terms "civilian population" and "non-combatants" are used interchangeably. The same usage is followed throughout the present text. Strictly speaking, the distinction between "combatants" and "non-combatants" is one made within the armed forces, the latter category comprising those individuals (e. g., medical and hospital personnel, chaplains) attached to or accompanying the armed forces in a special capacity. On the other hand, the term "civilian population" refers—in this strict sense—to the population of a belligerent other than those persons making up the armed forces. Most writers use the terms "civilian population" and "non-combatants" interchangeably, however, and do not use the latter term solely in its original—and restricted—sense. This is quite unobjectionable and need not give rise to any confusion.

4 Law of Naval Warfare, Section 2.2ob and notes thereto.

5 Law of Naval Warfare, Section 2.2oc and notes thereto.
form of specific rules, the question of the proper interpretation of these general principles can only be answered by an examination of the former. Hence, to the extent that the conduct of war is increasingly subjected to such regulation resort to the general principles of the law of war must become, in turn, correspondingly less frequent. The reason for this is simply that the essential function of these general principles is to provide a guide for determining the legal status of weapons and methods of war where no more specific rule is applicable.

In a period marked by rapid developments in the weapons and methods of war—and whose regulation by specific rules of custom or convention has not as yet been achieved—it is only natural to expect that the general principles of the law of war will assume a special significance. Unfortunately, however, considerable difficulties are encountered in the attempt to apply these general principles to means for conducting hostilities that have not as yet been made a matter of common agreement among states. In part, this may be attributed to the fact that the states themselves interpret and apply these principles, and being interested parties must be expected to act in accordance with their varying interests. However, even if it were assumed that states possess a greater degree of objectivity in their interpretation of legal rules than past experience could possibly vindicate, difficulties would still remain owing to the very nature of the general principles of the law of war and their uncertain status in an era of total war.

To a certain extent the application of the general principles of the law of war has always varied, depending upon the area of warfare to which they have been applied. This disparity in application is readily apparent when comparing the methods of warfare forbidden in hostilities on land as distinguished from naval hostilities. In part, this disparity is due to differences in the conditions and circumstances attending the conduct of war on land and at sea. In part, it may be attributed simply to the peculiarities of historical development. Whatever the cause, it is hardly to be expected that these general principles will receive either a uniform or a self-evident application to novel methods of warfare in view of this past experience with respect to the traditional methods of conducting hostilities. New forms of warfare inevitably create new problems in the attempt to apply the general principles of the law of war. It may be—and is—true that the novel circumstances attending new forms of warfare do not constitute a valid reason for failing to apply these general principles. But the validity of this contention should not serve to gloss over the practical obstacles invariably encountered in all such endeavors. The meagre results to date of the attempts to apply the general principles of the law of war to the conduct of aerial warfare may serve, in this respect, as a clear warning. Elsewhere it

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6 E. g., the varying rules relating to the seizure and confiscation of enemy private property, the right of enemy merchant vessels to resort to acts of forcible resistance against a warship attempting seizure, and the disparity in the rules governing ruses in land and naval warfare.
is pointed out that when the principle distinguishing between combatants and the civilian population is applied to the particular circumstances of aerial warfare the results are likely to prove altogether different from the results of applying this same principle to land and naval warfare. 7

To the foregoing must be added a further consideration. Recent experience has made it quite clear that the general principles of the law of war depend for their application upon standards which are themselves neither self-evident nor immutable. Hence, it is not merely the application of general principles to varying circumstances that is in question but the very meaning of the principles that are to be applied. It will be apparent, for example, that the scope of the immunity to be granted non-combatants must depend very largely upon the meaning given to the concept of military objective. But the concept of a military objective will necessarily vary as the character of war varies. And even if it were possible today to enumerate with precision those targets that could be regarded as constituting legitimate military objectives there would still remain the problem of determining the limits of the "incidental" or "indirect" injury that admittedly may be inflicted upon the civilian population in the course of attacking military objectives. The answer to this latter problem may largely depend, in turn, upon the kinds of weapons that are used to attack military objectives, including weapons whose legal status is itself a matter for determination in accordance with these same general principles.

The principle of humanity raises similar considerations. As applied to weapons and methods of war not already expressly regulated by specific rules, the principle of humanity is used to determine the lawfulness of novel weapons and methods for conducting hostilities in terms of their military necessity. 8 The necessity of a weapon must be determined by the purpose—or purposes—of war. Even assuming that the purpose of

7 See pp. 146-9.
8 Mention must be made of the widely held belief that the principles of military necessity and humanity largely contradict one another, that they serve opposing purposes, and that it is the task of the law of war to attempt to balance considerations of military necessity against the requirements of humanity. A recent expression of this view is given by W. G. Downey (op. cit. pp. 160-1), who, following Spaight's earlier formulation in War Rights on Land, asks: "The question is how best to balance these conflicting interests and the problem must be answered, each time a new weapon or new projectile is developed, under the test established by Spaight: 'Does the new weapon or the new projectile disable so many of the enemy that the military end thus gained condones the suffering it causes?' " This belief must be seriously questioned. Rather than "contradict" the principle of humanity, the principle of military necessity implies the former principle. The principle of necessity does not allow the employment of force unnecessary or superfluous to the purposes of war. Nor does the principle of humanity oppose human suffering or physical destruction as such. It is the unnecessary infliction of human suffering and the wanton destruction of property that is opposed, both by the principle of military necessity and by the principle of humanity. Although generally considered as two quite separate principles these remarks suggest the conclusion that military necessity and humanity may be regarded as merely two aspects of the same principle.
war remains constant, it has never been easy to determine whether a specific weapon or method does cause unnecessary suffering or physical destruction. 9 Nor is this difficulty alleviated by the assertion that in order to determine the proper interpretation of the principle of humanity attention must be directed to the practice of states. Undoubtedly it is true that the practice of states may determine that the resort to certain means for waging hostilities is unlawful, particularly if it is assumed that such practice is constitutive of a rule of custom. But then the source of the particular prohibition would be the very practice that is considered constitutive of a rule of custom, and it is merely superfluous to cite the general principle of humanity. Thus, the contention that the use of poison gas is forbidden by the principle of humanity must be distinguished from the quite different contention that the numerous efforts by states to outlaw gas warfare is indicative of a practice that has now assumed the character of custom. Although the efforts to prohibit gas warfare may be the result, in large measure, of the conviction that gas constitutes an inhumane weapon, it would nevertheless appear that the present legal status of gas warfare must be determined by inquiry into the practice of states (specifically: by inquiring whether this practice has now become constitutive of a specific rule of custom) rather than by continued reference to the criteria contained in the principle of humanity. 10

Still more relevant in this connection, though, is the further consideration that the purposes of war have not remained constant. A war fought for the purpose of obtaining a more defensible frontier is something quite different from a war whose purpose is the complete defeat and unconditional surrender of the enemy. But if the purposes of war may vary, then the measures necessary to achieve these purposes may be equally varied. It can hardly be expected that the principle of humanity will receive the same interpretation in a war that is total, with respect to its purposes, as it has received in wars that have been fought for limited purposes.

In summary: despite their intrinsic significance and undoubted validity,
the general principles of the law of war have always suffered under certain limitations which have served to limit their potential utility. The very character of these general principles must lead to difficulties of interpretation and application. These difficulties are magnified, of course, by the fact that the principal subjects of the law normally must interpret and apply the law. The consequences of this latter condition admittedly are not without effect upon the whole of the law of war. No rule can be so specific that its interpretation and application remain unaffected by the condition of extreme decentralization characteristic of international law. Nevertheless, a measure of certainty may at least be achieved to the degree that the general principles of the law of war are given a more concrete form through the establishment of detailed rules of custom and—particularly—convention. In the absence of such detailed regulation their interpretation and application with respect to the rapidly changing weapons and methods of warfare will be—almost of necessity—a matter of endless controversy and consequent uncertainty.

B. WEAPONS IN NAVAL WARFARE

The distinction between the legality of a weapon, apart from its possible use, and the limitations placed upon the use of an otherwise lawful weapon, is frequently overlooked, despite its importance. Any weapon may be put to an unlawful use, e.g., if directed exclusively against the civilian population or if used to inflict unnecessary suffering or wanton destruction. In naval warfare there have been very few—if any—specifically naval weapons whose legality, irrespective of their possible use, has been the subject of serious dispute, though there have been numerous controversies over the uses to which weapons—legitimate in themselves—have been put. 11 However, to the extent that naval hostilities may involve the use of weapons whose principal employment is in land warfare, it is clear that the rules applicable to land forces are equally applicable to naval forces. 12

11 Perhaps the best illustration of this point is furnished by mines. As against the naval forces of belligerents the use of all types of mines has never been seriously questioned. The provisions of Hague Convention VIII (1907) did not purport to establish restrictions upon the employment of mines against enemy warships, but attempted—however inadequately—to insure the "security of peaceful shipping." Nor did the disputes arising from the belligerent use of mines during the two World Wars relate to the status as such of this category of weapons. These disputes did concern the possible use to which mines could be put, particularly when such use resulted in endangering the security of peaceful shipping (see pp. 303-5). A further illustration of the distinction drawn above is provided by submarines. As a weapon employed in naval warfare there has never been serious doubt over the legality of submarines. Instead, the controversy has concerned the particular uses to which submarines have been put or—more precisely—the methods that have characterized the use of submarines (see pp. 57-73).

12 Thus, Article 23c of the Regulations annexed to Hague Convention IV (1907), although immediately directed to land warfare, is equally applicable to naval warfare. See also Article 23a of the Hague Regulations forbidding belligerents "to employ poison or poisoned weapons."
There are three categories of weapons whose possible use in naval warfare warrants their brief consideration: weapons employing fire, poisonous and asphyxiating gases, and nuclear weapons. As employed against the naval forces of a belligerent—and it is from this point of view alone that these weapons are examined here—the first and third categories may be considered as permitted, whereas the second category must probably be regarded as prohibited.

Weapons employing fire include tracer ammunition, flame-throwers, napalm, and other incendiary instruments and projectiles. Although the use of such weapons occasionally has been questioned, principally upon the ground that they inflict unnecessary suffering, the practice of states may be considered as sanctioning their employment.  

A measure of uncertainty still characterizes the legal status of poisonous and asphyxiating gases, when employed by a belligerent not obligated by a treaty which prohibits their use. It is true that a large number of states are now bound by the provisions of the 1925 Geneva Protocol forbidding the "use in war of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials or devices," and have extended this prohibition to include bacteriological methods of warfare. However, there remain a substantial number of states, including the United States and Japan, that have never ratified the Protocol. In the absence of treaty restrictions the latter states are bound only by those obligations imposed by customary law.

Apart from treaties, it has been argued that the use of poisonous or asphyxiating gases violates at least two prohibitions of the customary law of war: the prohibition against the employment of weapons calculated to cause unnecessary suffering and the rule forbidding attack upon non-combatants.  

13 The Declaration of St. Petersburg (1868) prohibited the signatories from employing projectiles of a weight below 400 grams (14 ounces) which are "explosive or charged with fulminating or inflammable substances." It is doubtful whether the Declaration has ever been considered as applicable to aerial warfare. Article 18 of the unratified 1923 Hague Rules of Aerial Warfare stated that the "use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited," and subsequent practice has been to use such projectiles against aircraft. See Spaight, op. cit., pp. 197 ff. As for flame throwers and similar weapons, a few writers still challenge their status, maintaining that they inflict unnecessary suffering. In view of present practice, this opinion is difficult to accept. The U. S. Army Rules of Naval Warfare, paragraph 36, states: "The use of weapons which employ fire, such as tracer ammunition, flame-throwers, napalm and other incendiary agents, against targets requiring their use is not violative of international law. They should not, however, be employed in such a way as to cause unnecessary suffering to individuals." And see Law of Naval Warfare, Article 612a.

14 The report of the General Board of the U. S. Navy on the question "Should Gas Warfare be Prohibited," and submitted by the American delegation to the 1922 Washington Conference on the Limitation of Armaments, stated: "The two principles of warfare, (1) that unnecessary suffering in the destruction of combatants should be avoided, (2) that innocent non-combatants should not be destroyed, have been accepted by the civilized world for more than one hundred years. The use of gases in warfare insofar as they violate these two principles is almost uni-
been made that their use violates the rule forbidding the employment of poison or poisoned weapons.

Each one of the foregoing claims is open to question, however. The rule prohibiting poison or poisoned weapons can be considered applicable to gases only by analogy or by necessary implication. The rule forbidding attack against the civilian population is not relevant here, since the assumption is that the weapons under consideration will be employed only against combatant forces. Nor is there reason to believe that these weapons cannot be confined, in their use, to the combatant forces of a state. Whether such suffering as is caused by gas is "unnecessary" when judged by the military purposes thereby served, and therefore inhumane, is at least doubtful. Earlier discussion has pointed out that in view of the vague criteria forming the content of the principle of humanity, the decision as to whether a particular weapon is inhumane, hence forbidden, must depend upon the actual practice of states. The important question, then, would appear to be whether or not the practice of states may be considered as providing sufficient evidence that the use of poisonous or asphyxiating gases is now generally forbidden, quite apart from any specific obligations imposed by treaty.

It is believed that a review of state practice does support the conclusion that the use of poisonous or asphyxiating gases is to be regarded as presently forbidden in war to all states; that this practice—which consists of treaties, proposed drafts of treaties, and the pronouncements of states both in time of peace as well as in time of war—is constitutive of a customary rule forbidding the use of poisonous or asphyxiating gases. It is of course

versally condemned today, despite its practice for a certain period during the World War." The report went on to declare that although certain gases, e. g., tear gas, could be used without violating the two basic principles cited above, "there will be great difficulty in a clear and definite demarcation between the lethal gases and those which produce unnecessary suffering as distinguished from those gases which simply disable temporarily." For this reason the General Board recommended the prohibition of gas warfare "in every form and against every objective." U. S. Naval War College, International Law Documents, 1921, pp. 193-4.

15 It would appear that the rule prohibiting poisoned weapons would apply—if at all—only in the event a poisonous gas is both odorless and colorless. In the latter case, detection and prior warning might prove impossible and there would be clearer grounds for assimilation of poisonous gases under the rule prohibiting poison, since the latter is based principally upon the conviction that the use of poison constitutes a form of treachery. Presumably the same considerations would apply in considering the legality of bacteriological and biological weapons, even though such weapons are used only against combatant forces.

16 But see Law of Naval Warfare, Article 612b as well as U. S. Army Rules of Land Warfare, paragraph 38.—For a brief review of state practice see Stone, op. cit., pp. 553-7. Also Oppenheim-Lauterpacht (op. cit., pp. 342-4), where it is concluded that recent drafts and pronouncements "bear witness to the tendency to universality in the prohibition of chemical warfare." The broad scope of this conclusion must be questioned. The prohibition against the resort to all forms of "chemical warfare" is binding—at best—only upon the contracting parties to the 1925 Geneva Protocol. Even here there is some doubt since the English text of the Protocol prohibits "asphyxiating, poison, or other gases," whereas the French text forbids "gaz asphyxi-
true that in the absence of a system of international inspection and control of prohibited weapons the effectiveness of the rule forbidding poisonous or asphyxiating gases must depend largely upon the expectation of states that resort to these weapons will provoke retaliation in kind from an opponent.\textsuperscript{17} It is not easy to understand, however, why this fact should be considered as an argument against the position that resort to poisonous or asphyxiating gases is now prohibited in law.\textsuperscript{18} The threat of retaliation, or reprisal, must provide a decisive factor in leading to the observance of the whole of the law regulating the conduct of war. Yet it has seldom been contended that to the extent that this law is dependent for its observance upon the threat of reprisal it is thereby deprived of its validity.\textsuperscript{19}

\textsuperscript{17} Thus the 1925 Geneva Protocol was ratified by a number of states with the qualification that it would cease to be binding with respect to other ratifying states which failed to observe the provisions of the Protocol. The Protocol does not forbid the manufacture of gases and bacteria, only their use in war.

\textsuperscript{18} "Since . . . the Protocol of 1925, is subject to reciprocity, its compulsiveness as law seems difficult to distinguish from the \textit{factual} compulsion arising from the mere threat of retaliation." Stone, \textit{op. cit.}, p. 556. Precisely the same statement could be made concerning any number of the rules of war whose character as law are not questioned.

\textsuperscript{19} In this connection, it is relevant to note the reasons given by the representative of the United States in the United Nations Disarmament Commission for refusal on the part of the United States to support the proposal that the Security Council appeal to all states to accede to or ratify the 1925 Geneva Protocol. "The United States representative . . . stated that the United States did not trust the paper promises of those who bore false witness especially when the false charges provided false excuses for breaking promises—on alleged grounds of reprisals. The United States had never used bacterial warfare. It had used gas warfare only in retaliation during the First World War, when it was first used by Germany. Of the two wars in the twentieth century in which poison gas was used, it was significant that its use was inaugurated by States which had bound themselves on paper not to use it. Aggressor States which started wars in violation of their treaty obligations could not be trusted to keep their paper promises regarding the methods of waging wars, if keeping those promises stood in the way of their accomplishing their aggressive designs. If men fought to kill, it was not easy to regulate how they killed. The United States wanted to eliminate all weapons which were not expressly permitted and appropriate to support the limited number of armed forces which might be permitted to maintain public order and to meet Charter obligations. The United States, as a member of the United Nations, had committed itself, as had all other members, to refrain not only from the use of poisonous gas and bacterial warfare, but the use of force of any kind contrary to the Charter. The United States . . . would support effective
The preceding considerations relating to the legal status in war of poisonous or asphyxiating gases are not without significance in considering the legal status of nuclear weapons. In marked contrast to gas warfare there is neither any treaty expressly regulating—or prohibiting altogether—the use of nuclear weapons nor is there any evidence as yet of a practice that may be considered as constituting sufficient basis for the emergence of a customary prohibition. Whatever restriction may be applied to nuclear weapons must therefore be derived from rules already regulating war's conduct. In this connection the rules prohibiting the infliction of unnecessary suffering and requiring that a distinction be drawn between combatants and civilian population undoubtedly constitute the more general, and the more significant, grounds for questioning the legality of using nuclear weapons in war. 20

The objection that the use of nuclear weapons must cause unnecessary suffering (and destruction) deserves only the briefest comment. As already pointed out, the question as to whether or not a particular weapon is to be considered as causing unnecessary suffering is one that can be answered only by examining the practice of states. In the case of poisonous and proposals to eliminate all weapons adaptable to mass destruction, including atomic, chemical and biological weapons. But until such measures and safeguards had been agreed upon, it did not intend to invite aggression by committing itself not to use certain weapons to suppress aggression. To do so in exchange for mere paper promises would be to give would-be aggressors their own choice of weapons." Disarmament Commission, Official Records, Spec. Supp; No. 1, 2nd Report of the Disarmament Commission (1952), pp. 144-5. The resort to the unlawful use of force—aggression—does not thereby serve to justify use by the victims of aggression of weapons that are otherwise unlawful according to the law of war. If the contrary were true then it could also be argued that none of the rules regulating war's conduct bind the victims of aggression. Nor is it easy to understand the objection that the signing of "paper promises" (i. e., treaties) necessarily invites aggression, if unaccompanied by an effective system of control and inspection. Aggression is "invited" only if the treaty in question forbids the use and the manufacture of certain weapons without, at the same time, establishing an effective system of control. This is certainly not true of the 1925 Geneva Protocol.

20 Of lesser importance is the rule prohibiting the use of poison or poisoned weapons and the provisions of the 1925 Protocol of Geneva forbidding the use of gases as well as "analogous liquids, materials or devices." For a detailed consideration of atomic weapons in the light of these principles—and the conclusion as to their illegality—see A. N. Sack, "ABC—Atomic, Biological, Chemical Warfare in International Law," Lawyers Guild Review, 10(1950), pp. 161-80. The preponderant opinion among writers has not been to condemn nuclear weapons as being necessarily unlawful, however. Where doubt has been expressed it is concentrated principally upon the legitimacy of using such weapons against military objectives located in or near centers of population and the danger of obliterating completely the already threatened combatant-non-combatant distinction. This is, for example, the burden of Spaight's remarks, op. cit., pp. 273-7. On the other hand, it has been recently concluded that "the total elimination or limitation, as a matter of law, of the use of the atomic weapon cannot be accomplished by way of a restatement of an existing rule of law. Such a restatement denying the legality of the use of the atomic weapon must, of necessity, be based on controversial deductions from supposedly fundamental principles established in conditions vastly different from those obtaining in modern—total and scientific—warfare." Lauterpacht, "The Problem of the Revision of The Law of War," p. 370.
asphyxiating gases it has been suggested that the practice of staves does point to the existence of a rule of universal validity forbidding the use of such weapons as inhumane. In the case of nuclear weapons the matter is quite different. The present attitude of most of the major powers is clearly not that of considering the suffering caused by nuclear weapons as unnecessary, when judged by the military purposes these weapons are designed to serve.

It is equally difficult to accept the objection that nuclear weapons are necessarily illegal for the reason that their use must lead to the complete obliteration of the rule distinguishing between combatants and the civilian population. It is only when such weapons are used against military objectives in the proximity of the non-combatant population that this objection warrants serious consideration.21 To the extent that nuclear weapons are used exclusively against military forces in the field or naval forces at sea, they escape this objection. Nor is there reason to believe that nuclear weapons cannot be directed exclusively against combatant forces in the strict sense of the term. To the extent that they are so limited, their use at present may be considered as permitted by the law of war.22

C. THE ATTACK AND DESTRUCTION OF ENEMY VESSELS

In the following pages attention is directed to the present status of the rules governing the liability of enemy vessels—and particularly of enemy merchant vessels—to attack. It is still customary in treatises on the law of naval warfare to consider the problem of the liability of enemy merchant vessels to attack as one largely incidental to, and resulting from the exercise of, the belligerent right to seize and condemn the vessels and goods of an enemy. In view of recent developments this procedure bears a distinct element of artificiality, and this would seem so even though it be asserted that the traditional rules governing the liability of enemy merchant vessels to attack retain their validity today. At the very least, the conditions in which recent hostilities at sea have been conducted no longer permit considering the liability of enemy merchant vessels to attack as an exceptional circumstance—save perhaps in the most formal sense. Indeed, as between belligerents it is the seizure of merchant vessels that

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21 There should be little doubt that, as judged by the traditional meaning given to the principle distinguishing combatants from non-combatants, the use of nuclear weapons against cities containing military objectives must be deemed illegal. However, the same judgment would probably have to be made in considering the practices of aerial bombardment followed by belligerents during World War II, though very few writers have condemned these recent practices as unlawful, and no records of war crimes trials are known in which allegations were made of illegal bombardment from the air (see pp. 146–9).

22 See Law of Naval Warfare, Article 613 and notes thereto. Paragraph 35 of the U. S. Army Rules of Land Warfare reads: "The use of explosive 'atomic weapons,' whether by air, sea or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment."
threatens to become the exception rather than—as it once was—the normal procedure. In consequence, the once clear distinction drawn between combatants and non-combatants in naval hostilities has been placed in serious jeopardy. The events that have led to the present situation warrant careful consideration.

I. The Traditional Rules Governing the Liability of Enemy Vessels to Attack

In the period preceding the outbreak of war in 1914 the rules governing the liability of enemy vessels to attack and destruction appeared reasonably well settled. Enemy warships, that is to say all enemy vessels possessing the competence to exercise belligerent rights at sea, could be attacked on sight and, if necessary, destroyed. Privately owned and operated enemy merchant vessels were liable—with minor exceptions—to seizure and subsequent condemnation in the prize courts of the capturing belligerent. This belligerent right to seize and condemn the privately owned vessels of an enemy found at sea did not preclude the application in other—and more important—respects of the principle distinguishing between combatants and non-combatants. In particular, it did not serve to free a belligerent from the obligation to refrain from attacking the merchant vessels of an enemy so long as these vessels refrained from the performance of certain acts. It is true that a belligerent was permitted, under exceptional circumstances, to destroy seized enemy merchant vessels rather than to conduct the latter into port for adjudication. But in those circumstances where destruction was permitted it could be carried out only after the passengers and crew had been removed to a place of safety.

At the same time, it is important to observe that belligerent merchant vessels were placed under no obligation to submit to visit and search, and seizure, by an enemy. According to well established custom, belligerent merchant vessels were at liberty to use the means at their disposal in order

23 See pp. 38–41.
24 The liability to attack of other public vessels which did not form a part of the military forces of a state (e.g., customs and police vessels), and which did not fall within the category of public vessels accorded special exemption from either capture or destruction (see pp. 96–8), remained uncertain. Some writers assume that the liability to attack of such public vessels has always been substantially the same as that of warships. For example, Hyde declares that the “absence of armament on a public vessel (not exempt from capture) has not been deemed to offer a sufficient reason why an enemy force should not attack it at sight.” op. cit., p. 1993. In fact, neither Hyde nor many other writers appear to distinguish sufficiently between unarmed public vessels which do not form a part of the armed forces of a state and unarmed vessels which do form a part of these forces. Whereas the latter are always liable to attack on sight, the liability of the former to attack was not free from doubt. If anything, the preponderance of opinion seemed to incline to capture, and to attack prior to capture only if resistance were offered. See U. S. Naval War College, International Law Topics, 1914, pp. 1–34.
25 See pp. 86–98.
26 A procedure not required in the case of captured public vessels since ownership in such vessels immediately vested in the government of the captor by virtue of the fact of capture.
27 The nature of these circumstances is discussed elsewhere (see pp. 106–7).
to avoid seizure. They could refuse to stop upon being duly summoned by a warship of the enemy. They could, in addition, take measures of resistance against enemy warships attempting seizure, and for this purpose were permitted to carry defensive armament. However, in the event either of persistent refusal to stop upon being duly summoned or of active resistance to attempted seizure belligerent warships were permitted to take those measures of force necessary to compel submission. In these circumstances the rule forbidding the attack upon or destruction of enemy merchant vessels without first placing passengers and crew in a place of safety ceased to apply. Immunity from attack also ceased to apply to those merchant vessels performing acts of direct assistance at sea to the naval forces of a belligerent.

2. The Experience of World Wars I and II.

The rules outlined above represented the application to naval warfare of the general principle distinguishing between combatants and non-combatants. When the first World War broke out in 1914 these rules were accorded general recognition by the major naval powers. It soon became apparent, however, that not all of the belligerents were prepared to conduct hostilities in accordance with the traditional law. The most serious departures from the principle distinguishing between combatants and non-combatants in hostilities at sea must be attributed to Germany and to the latter's use of submarines. Despite these departures, the care with which Germany sought to justify her conduct of submarine warfare—primarily upon the right of reprisal—28—is not without a certain significance. It indicated that during the first World War, at least, the conviction strongly persisted that under normal circumstances the rules distinguishing between the treatment to be accorded combatants and non-combatants ought to be respected. The widespread opinion that Germany justified her conduct of submarine warfare simply by the proposition that new weapons create new rules must therefore be seriously questioned.29 It

28 The principal "reprisal" measures resorted to by Germany were declared in February 1915 and January 1917. On the former occasion Germany proclaimed the intention to attack and to destroy all enemy merchant vessels found within the waters surrounding Great Britain and Ireland. On January 31, 1917 the German Government announced that henceforth it would forcibly prevent "in a zone around Great Britain, France, Italy and in the eastern Mediterranean all navigation, that of neutrals included, from and to England, and from and to France, etc. All ships met within that zone will be sunk." cited in Hackworth, Digest of International Law (1943), Vol. VI, pp. 465-81. For a further discussion of these measures, see pp. 296-305.

29 It is quite true that isolated expressions to this effect may be found. Thus, in a memorandum of March 8, 1916, from the German Ambassador to the American Secretary of State, it was noted that: "... Germany was compelled to resort, in February 1915, to reprisals in order to fight her opponents' measures, which were absolutely contrary to international law. She chose for this purpose a new weapon the use of which had not yet been regulated by international law and, in doing so, could and did not violate any existing rules, but only took into account the peculiarity of this new weapon, the submarine boat." cited in Hackworth, op. cit., Vol. VI, p. 478. It is also true that in 1916 the German Naval Staff concluded that the sub-
would appear more accurate to state that, apart from reprisals, Germany’s principal argument on behalf of her conduct of submarine warfare was based upon the contention that the novel circumstances in which that conflict was being waged justified a policy of attacking enemy merchant vessels on sight and without warning. One of the principal circumstances upon which Germany came to rely was the vulnerability of the submarine in relation to armed British merchant vessels instructed to use their armament against any attempt at seizure by an enemy submarine.30

The central question raised by the arming of belligerent merchant vessels concerned the effect this measure could be considered to have upon the immunity from attack normally granted the latter.31 The position consistently taken by Great Britain has been that the right of merchant vessels to carry armament to be used for defensive purposes only is one clearly recognized by customary law, and that so long as merchant vessels restrict the use of such armament to measures of self-defense they may not be deprived—simply for the reason that they are so armed—either of their non-combatant status or of their normal exemption from attack.32 In marine, being a novel weapon, must provide “its own lines of conduct.” Nevertheless, despite these and other isolated expressions to the contrary, Germany’s official position was not based upon the argument that new weapons must thereby create new rules. Nor—for that matter—was it based upon the closely related argument that “old rules” cannot automatically bind “new weapons” (i.e., the submarine).

30 In the latter stages of World War I, and during World War II, armed merchant vessels were instructed to use their armament upon sighting an enemy submarine, the assumption being that unlawful attack by the submarine would—in any event—be forthcoming.

31 This, at least, is the central question raised as between belligerents. A quite different question concerns the effect the arming of merchant vessels may have in determining the treatment to be accorded them in the ports and territorial waters of neutral states (see pp. 247-51).

32 See Higgins and Colombos (op. cit., pp. 363-9) for a statement of the British position. Substantially the same position was taken in both World Wars by France, and Article 2 of the French Naval Instructions of 1934 provided that enemy merchant vessels were not to be attacked for the sole reason (“le seul motif”) that they bore defensive armament. During World War I the position finally taken by the United States, while still neutral, was in support of the British attitude. Earlier, however, the United States had advocated that in return for a pledge that submarines would adhere strictly to the customary rules in carrying out search and seizure, merchant vessels of belligerent nationality should be prohibited from carrying any armament. In the 1939-41 period of neutrality this country refrained from raising any question as to the belligerent arming of merchant vessels. Finally, as a belligerent in both wars the United States resorted to the practice of arming its merchant vessels and of manning such armament with naval gun crews. See, generally, Hackworth, op. cit., Vol. VI, pp. 489-503.

It may also be noted that frequently the discussion of the effect of arming merchant vessels suffers from the endeavor to establish that the carrying of armament does not thereby serve to confer upon a merchant vessel the status of a warship. In principle, this argument may be considered to be correct. Defensively armed merchant vessels have no competence to exercise belligerent rights at sea, and if found doing so the officers and crew may be treated—in strict law—as war criminals. However, this fact does not of itself prove that armed merchant vessels, if refraining from the exercise of belligerent rights at sea, must thereby be accorded exemption from attack without prior warning. There are two quite different questions involved here, as Hyde (op. cit., p. 1997) correctly observes in stating that the fact that “an
practice, this position would require a warship to follow the procedure normally prescribed by the traditional law in attempting to seize an armed enemy merchant vessel; in the absence of other reasons providing an independent justification for attack force may be resorted to—according to this view—only if the merchant vessel first makes use of its armament in order to resist.

The German view, on the other hand, has been one of refusing to accept the claim that the arming of belligerent merchant vessels does not result in rendering such vessels liable to attack on sight. Indeed, the initial German reaction to the arming of British merchant vessels was to consider the act a violation of international law on the part of Great Britain, and to threaten to treat the personnel of vessels making use of their armament—even for allegedly defensive purposes—as war criminals. But the more consistent, and more moderate, position has been to consider the carrying of armament simply as depriving enemy merchant vessels of immunity from attack without warning and without taking prior precautions for the safety of the crew.

armed merchantman may retain its status as a private ship is not decisive of the treatment to which it may be subjected. The difficulty involved is due to the frequent use of the term "legal status" in two different senses. It may refer to the conditions necessary for the conversion of a merchant vessel into a warship. But it may refer to the fact that a merchant vessel is subject to the same liabilities as a warship although, by retaining its non-combatant character, it does not possess the competence to exercise belligerent rights at sea.

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The controversy thus occasioned during the first World War over the arming of belligerent merchant vessels continued into the inter-war period and can scarcely be considered as wholly resolved even today. When judged by the customary law the British position appears, on first consideration, as unexceptionable. The difficulty of this position, however, is that despite its apparent conformity with the customary law it was applied during World War I (and during World War II) in both a manner as well as in circumstances that bore little relation to the circumstances and manner of employment characteristic of the preceding period.

It has always appeared rather paradoxical that although enemy merchant vessels were at liberty to resist attempted seizure, and could even carry armament for this purpose, warships were normally obliged to refrain from attacking merchant vessels until the latter had first actually resorted to measures of resistance. If an enemy merchant vessel carried armament whose sole purpose was evidently to provide means of resistance against attempted seizure, then it would seem only reasonable to allow a warship—particularly if inferior in defensive power—to attack such armed vessels on sight. In part, the explanation of this seeming paradox may be attributed to the carrying over of a practice formed under quite different historical circumstances. During an earlier period the danger of attack from privateers, or from pirates, served to justify the carrying of arms not only in time of war but in time of peace as well. As the nineteenth century progressed this earlier justification for arming belligerent merchant vessels largely disappeared. At the same time, the rule exempting the merchant vessels of an enemy from attack gained ground. Indeed, it was only during

while arming of merchant vessels does not serve to transform the latter into warships, it does justify treating such vessels as liable to attack without warning. The German Prize Law Code of September 1939 was silent on this matter but on September 30, 1939, the Deutsches Nachrichten Büro stated that henceforth armed enemy merchant vessels would be treated like warships and sunk without warning. It was further declared: "Armed resistance to the regular measures of prize law is not permissible. Arming a merchant ship alone does not make of the latter a warship, but does justify the adversary in treating the merchant ship as a warship to the same extent that it is equipped for the use of armed force." cited in Hackworth, op. cit., Vol. VI, p. 499. In substance, this has also been the position taken by perhaps the majority of German writers. Indeed, the view that the presence of armament on board an enemy merchant vessel served to justify attacking such vessel without warning was urged even prior to World War I. See, for example, the opinions expressed by Professor Heinrich Triepel before the Institute of International Law in 1913 (Annuaire de l'Institut de Droit International, 26 (1913), pp. 516 ff.). And for the inter-war period see, in particular, P. A. Martini, Reformvorschläge zum Seekriegsrecht (1933) and the detailed argument given by Werner Plaga, Das bewaffnete Handelsschiff (1939). The latter writer argued that the British position was devoid of any-legal foundation even in the pre-1914 law, and that, in any event, the specific measures taken by the British in arming their merchant vessels after 1914 served to deprive the latter of immunity from attack.—And for a recent view, see Professor Verdross, op. cit., p. 389. Though declaring that the carriage of armament for "mere defense" is admissible, in that it does not serve to turn enemy merchant vessels into illegitimate combatants, Professor Verdross is not altogether clear as to whether such carriage may deprive enemy merchant vessels of immunity from attack without warning.
the course of this past century that the distinction between the treatment of combatants and non-combatants in warfare at sea became firmly established. The continued retention, on the one hand, of the ancient rule allowing belligerent merchant vessels to arm in self-defense and, on the other hand, the growing immunity granted to merchant vessels if they refrained from measures of resistance, is to be explained, however, largely by the disparity in power that existed between warship and merchant vessel.

In retrospect, it is clear that one of the principal reasons for the increased measure of immunity granted enemy merchant vessels during the nineteenth century was this very disparity, and that the degree to which this immunity was observed was roughly proportionate to the difference in power between warship and merchant vessel. In fact, during the century preceding the outbreak of war in 1914 the practice of arming merchant vessels was abandoned almost entirely, only to be revived by the announcement of the British Government in 1913 that in the event of war it would supply its merchant vessels with defensive armament. Although the initial purpose of this measure was to provide merchant vessels with the means to defend themselves against seizure by converted enemy warships it soon became readily apparent that the principal employment of such armament was to be directed against enemy submarines (and, during World War II, against enemy aircraft as well). But in the case of submarines this former disparity in power between warship and merchant vessel became negligible, provided that the merchant vessel was armed and the submarine required to attempt seizure before resorting to force. Under these circumstances the submarine—and any other type of warship not clearly superior in power to the armed merchant vessel—was almost certain to encounter active resistance if it attempted to conform with the traditional law. And the instructions furnished British armed merchantmen in both World Wars, stipulating that enemy submarines should be attacked on sight, made it difficult—and in many cases impossible—to draw a clear line between defensive and offensive action. In any event, it is not easy to see why belligerent merchant vessels may be armed for the sole purpose of attacking enemy submarines on sight,

35 It is upon this consideration that many writers have placed greatest emphasis. Thus Hyde (op. cit., p. 1997), in concluding that the carrying of armament by a merchant vessel serves to deprive the vessel so armed of the right to claim immunity from attack without warning, states that the “immunity of merchant vessels from attack at sight grew out of their impotency to endanger the safety of public armed vessels of an enemy, .... maritime states have never acquiesced in a principle that a merchant vessel so armed as to be capable of destroying a vessel of war of any kind should enjoy immunity from attack at sight, at least when encountering an enemy cruiser of inferior defensive strength.” Also, to the same general effect, G. G. Wilson, “Armed Merchant Vessels and Submarines,” A. J. I. L., 24 (1930), pp. 337–8; Edwin Borchard, “Armed Merchantmen,” A. J. I. L., 34 (1940), p. 110; and J. L. Kunz, Kriegsrecht und Neutralitätsrecht, pp. 118–35.
but enemy submarines considered as without a similar right to take ‘‘defensive’’ measures by attacking armed merchant vessels on sight.  

Perhaps even more important was the manner in which merchant vessels were armed and directed to use their armament. The traditional law assumed that the owner of a private vessel would decide for himself whether or not to carry arms, would arm—if at all—at his own expense, and would determine under what conditions he would choose to make use of such arms. In short, the fact that a merchant vessel was armed did not mean that it was in any way incorporated into the military effort of a belligerent, or that it was acting under the direct control of the state. In World War I, as in World War II, the manner in which merchant vessels were armed and were directed to use their armament no longer met these assumptions. The state decided upon the arming of merchant vessels, providing both guns and personnel to operate the guns, and directed merchant vessels as to the manner in which they were to employ their armament.  

On balance, then, the lengthy dispute relating to the position of armed merchant vessels, particularly with respect to submarines, appears inconclusive. The real strength of the British position is not to be found in the claim that the arming of merchant vessels was sanctioned by the customary law. Instead, it must be found in the contention that the effective use of the submarine was, in the vast majority of cases, incompatible with the observance of the rules distinguishing between combatants and non-combatants, that Germany had not observed these rules in conducting submarine warfare, and that the arming of merchant vessels was the only possible means to be taken against the unlawful use of submarines. Yet the fact remains that the initial British decision to arm merchant vessels was taken prior to World War I. More important were the circumstances in which merchant vessels were armed and directed to use their arms, circumstances which hardly allowed the assumption that these vessels retained a peaceful and strictly non-combatant status. It is difficult to avoid the conclusion that the immunity granted merchant vessels by the traditional law can be observed only under the conditions that merchant

36 In a memorandum of March 25, 1916, prepared by the Department of State for the President, it was observed that: “A merchantman entitled to exercise the right of self-protection may do so when certain of attack by an enemy warship, otherwise the exercise of the right would be so restricted as to render it ineffectual. There is a distinct difference, however, between the exercise of the right of self-protection and the act of cruising the seas in an armed vessel for the purpose of attacking enemy naval vessels.” The German Government in commenting upon this memorandum observed: “It admits . . . the merchant vessel’s right to resort to self-defense as soon as it is certain of attack by an enemy warship, as otherwise the exercise of the right would be so restricted as to be made ineffectual; exactly the same grounds support the position that a warship that is entitled to exercise the right of capture may use force when certain of attack by an armed enemy merchant vessel.” cited in Hackworth, op. cit., Vol. VI, pp. 497-8.

vessels do not present—in terms of their armament—a serious threat to enemy warships and that they are in no way integrated into the military effort of a belligerent. If either, or both, of these conditions do not obtain, and they were not satisfied even in World War I, warships—whether submarines or surface vessels—cannot be expected to refrain from attacking enemy merchant vessels.

In the period following the first World War the continued validity of the traditional rules regulating the attack and destruction of enemy vessels was reaffirmed on a number of occasions, and in 1930 these rules were given conventional expression at the London Naval Conference in the Treaty on the Limitation and Reduction of Armament. Article 22 of the London Naval Treaty of 1930 declared:

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 and 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 ships' 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.

According to the terms of the 1930 London Naval Treaty, Article 22 was to remain in force "without limit of time." Upon the expiration of the remainder of the Treaty in December 1936 this provision therefore remained

38 It should be observed that Article 22, insofar as it attempted merely to restate in conventional form the traditional law, ought not to be interpreted as permitting attack only under those circumstances to which reference is expressly made. Any such interpretation clearly would not be in accord with the pre-existing law, which allowed a belligerent warship to attack enemy merchant vessels for acts in addition to refusal to stop on being duly summoned or active resistance to visit and search. The committee of jurists responsible for the formulation of Article 22 of the London Naval Treaty stated in its report on this article: "The committee wish to place on record that the expression 'merchant vessel', where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of merchant vessels." Proceedings, London Naval Conference, (1930), p. 189. No reference is made to the treatment to be accorded armed merchant vessels. In fact, the Treaty left this all important question where it found it. And see U. S. Naval War College, International Law Situations, 1930, pp. 1–65, for a general review of the 1930 London Naval Treaty in its bearing upon the conduct of submarine warfare.
binding upon the contracting Parties. However, in November of the same year (1936) Article 2.2. of the London Naval Treaty was incorporated _verbatim_ in the form of a Protocol, the purpose of this being to increase the number of states accepting the obligations contained therein. At the time of the outbreak of war in 1939 some forty odd states, including all the major naval powers, had either ratified, or had expressly acceded to, the 1936 London Protocol, and the provisions of the Protocol were given prominent place in the naval instructions issued by many governments to their naval forces. Nor was there any serious question over the applicability of these rules to military aircraft when used in operations against enemy merchant shipping.

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

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39 See paragraph 50 of the 1941 Tentative Instructions For the Navy of the United States Governing Maritime and Aerial Warfare (cited throughout as 1941 Instructions). The earlier 1917 Instructions For the Navy of the United States Governing Maritime Warfare (cited throughout as 1917 Instructions) did not contain a parallel provision, paragraph 45 providing for the resort to forcible measures against enemy merchant vessels if the latter resisted or took to flight after once being summoned. Article 22 of the London Naval Treaty also formed a part of the German Prize Law Code of 1939 (Article 74).

40 Distinguish between the diversion of merchant vessels by aircraft and the attack of merchant vessels by aircraft. Although there was a good deal of dispute over the former question during the inter-war period there was no dispute over the applicability to aircraft of the rule—already applicable to surface warships and submarines—forbidding the attack and destruction of enemy merchant vessels without having first placed passengers and crew in a place of safety.

41 S. W. Roskill summarizes the German resort to unrestricted submarine warfare in the following passage:

"On the 23rd of September, Hitler, on the recommendation of Admiral Raeder, approved that 'all merchant ships making use of their wireless on being stopped by U-boats should be sunk or taken in prize.' As the immediate despatch of a wireless signal in such circumstances was included in the Admiralty's instructions to merchant ships and was essential—if for no other reason—to the rescue of their crews, this German order marked a considerable step towards unrestricted warfare. . . . On the 30th of September observance of the Prize Regulations in the North Sea was withdrawn; and on the 2nd of October complete freedom was given to attack darkened ships encountered off the British and French coasts. Two days later the Prize Regulations were cancelled in waters extending as far as 15° West, and on the 17th of October the German Naval Staff gave U-boats permission 'to attack without warning all ships identified as hostile.' The zone where darkened ships could be attacked with complete freedom was extended to 20° West on the 19th of October. Practically the only restrictions now placed on U-boats concerned attacks on liners and, on the 17th of November, they too were allowed to be attacked without warning if 'clearly identifiable as hostile.' Although the enemy this time carefully avoided the expression 'unrestricted U-boat warfare,' it can therefore be said that, against British and French shipping, it was, in fact, adopted by the middle of November 1939."
circumstances in which hostilities at sea were being conducted. The obligations laid down in the 1936 London Protocol were not denied. Emphasis was placed rather upon the argument that the methods of warfare employed by Great Britain, and particularly the measures taken to integrate British merchant shipping into Britain’s military effort at sea, prevented German compliance with the provisions of the 1936 London Protocol. 42

Great Britain refrained during the initial stages of the conflict from resorting to measures of a similar nature. The British reprisals order of November 27, 1939, taken in response to alleged unlawful German mine and submarine warfare, sought instead to cut off all German exports whether carried in enemy or in neutral bottoms. 43 Indeed, for a substantial period of time British aircraft were forbidden to attack any enemy ships other than warships, troopships, and “auxiliaries in direct attendance on the enemy fleet.” 44 As the war progressed certain areas were declared to be “danger-

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43 On September 19, 1939, the Commander in Chief of the German Navy, Grand Admiral Raeder, declared: “Germany is conducting submarine warfare in accordance with the Prize Laws issued on August 28, 1939. These are strictly in accordance with the acknowledged rules of maritime war. The provisions of the London Submarine Protocol are taken over in full in them. The submarines have strict orders to comply with these provisions. In harmony with the rules of the Submarine Protocol they are however justified in breaking armed resistance with all means. It is obvious that ships which participate in warlike measures or travel in convoy of enemy warships place themselves in danger and cannot complain when in the course of belligerent actions they are damaged or destroyed.” cited in Hackworth, op. cit., Vol. VI, p. 484. Also the passage from the judgment of the Nuremberg Tribunal summarizing the testimony of Doenitz: “Doenitz insists that at all times the Navy remained within the confines of international law and of the Protocol. He testified that when the war began, the guide to submarine warfare was the German prize ordinance taken almost literally from the Protocol, that pursuant to the German view, he ordered submarines to attack all merchant ships in convoy, and all that refused to stop or used their radio upon sighting a submarine. When his reports indicated that British merchant ships were being used to give information by wireless, were being armed, and were attacking submarines on sight, he ordered his submarines on 17 October 1939, to attack all enemy merchant ships without warning on the ground that resistance was to be expected.” U. S. Naval War College, International Law Documents, 1946-47, p. 298.

44 See p. 312.

45 Roskill states that by this policy “only warships, troopships or ‘auxiliaries in direct attendance on the enemy fleet’ could be attacked, and then only if identified beyond doubt. Even if an enemy merchant ship opened fire with her defensive armament our craft were forbidden to retaliate . . . It will readily be understood how far this policy made air action ineffective against all types of enemy merchant ships, including, for example, disguised merchant raiders. During the whole of 1940 only sixteen enemy merchant ships, totalling 22,472 tons, were sunk by air attack and seventeen were damaged.” op. cit., p. 144. In March 1940
ous to shipping” and within some of them enemy vessels were liable to be attacked and sunk on sight. In the final stages of the conflict the measures taken by Great Britain against enemy shipping wherever encountered were only barely distinguishable from a policy of unrestricted warfare.\(^45\)

In the Pacific no attempt was made by either of the major naval belligerents to observe the obligations laid down by the 1936 London Protocol. Immediately upon the outbreak of war the United States initiated a policy of unrestricted aerial and submarine warfare against Japanese merchant vessels, and consistently pursued this policy throughout the course of hostilities.\(^46\) Japan, in turn, furnished no evidence of a willingness to abide by the provisions of the Protocol, and—in fact—Japanese submarines attacked without warning and destroyed an American merchant vessel within a few hours following the attack upon Pearl Harbor.\(^47\)

In these latter stages the British practice was to assimilate enemy merchant vessels to the status of supply or auxiliary vessels. According to custom such vessels are considered as liable to attack without prior warning. — It is feared that the above summary does less than justice to the British record at sea, particularly in the first year or so of the conflict. It should be emphasized that during this period Great Britain clearly manifested a desire not to be drawn into unrestricted warfare against enemy shipping and, in the end, did so only reluctantly.\(^48\)

The U.S. Navy Department despatch of December 7, 1941 to naval forces in the Pacific read: "Execute unrestricted air and submarine warfare against Japan."

In an official survey made following World War II it was estimated that United States forces sunk 2,117 Japanese merchant vessels. Of this number 1,113 were sunk by submarines. See Japanese Naval and Merchant Shipping Losses During World War II by All Causes (Prepared by the Joint Army-Navy Assessment Committee, NAVEXOS P-468) (1947), pp. 6-7.

No apparent attempt was ever made officially by the United States to base the policy of unrestricted warfare against Japanese merchant vessels either upon the right of reprisal or upon the quasi-military character of Japanese merchant shipping. On February 2, 1946 a curious statement occurred in a Navy Department Press Release entitled United States Submarine Contributions to Victory in the Pacific. Referring to the despatch of December 8, 1941 to execute unrestricted air and submarine warfare the statement noted:

"It is true that Germany had for years been waging unrestricted submarine warfare in the Atlantic. It is true that Japanese submarines sank a merchant ship in the Pacific within a few hours after the attack on Pearl Harbor. It was also true that the conditions under which Japan employed her so-called merchant shipping was such that it would be impossible to distinguish between 'merchant ships' and Japanese Army and Navy auxiliaries and these conditions would sooner or later have forced us to adopt the position which we boldly assumed at the outset. However, the existing 'Instructions for the Navy of the United States Governing Maritime and Aerial Warfare' were so restrictive as to practically preclude a submarine attack on anything but an unmistakable man of war . . . "

In point of fact, neither the 1936 London Protocol—on which the 1941 Instructions were
3. The Present Situation.

In its judgment on Admiral Doenitz for charges of violations of the laws of war the International Military Tribunal at Nuremberg declared that it was "not prepared to hold Doenitz guilty for his conduct of submarine warfare against British armed merchant ships." In reaching this decision the Tribunal did not thereby imply that the rules laid down in the 1936 London Protocol were to be considered as no longer binding upon belligerent warships in their behavior toward enemy merchant vessels. There was no indication that, in the Tribunal's opinion, the ineffectiveness of the Protocol in regulating belligerent conduct had served to deprive it of its character as law. Indeed, the most reasonable interpretation of this particular aspect of the judgment rendered by the Nuremberg Tribunal is that the latter clearly assumed the continued validity of the 1936 London Protocol as it relates to inter-belligerent measures.

The significance of the Tribunal's judgment must instead be found in the reasons given for its refusal to hold Doenitz guilty for his conduct of submarine warfare against British armed merchant ships. These reasons are summarized as follows:

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

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based—nor the traditional law were as restrictive as the above quoted press release appears to assume. It is probable that the resort to unrestricted submarine warfare could have been justified in this instance either as a reprisal against similar action by the enemy or as a consequence of the nature of employment of Japanese merchant vessels.

In this connection it is also of interest to note that in testimony submitted to the International Military Tribunal at Nuremberg, Fleet Admiral Chester W. Nimitz declared that: "The unrestricted submarine and air warfare ordered by the Chief of Naval Operations on 7 December 1941 was justified by the Japanese attacks on that date on U.S. bases, and on both armed and unarmed ships and nationals, without warning or declaration of war." Trials of The Major War Criminals (1947-49), Vol. XL, p. 111.

48 Though it is true that a number of writers have so interpreted the Tribunal's judgment. However, for reasons noted in the text above it is believed that this interpretation has little, if any, support. It is, of course, quite another matter to ask how relevant may be the affirmation of the continued validity of the rules laid down in the 1936 London Protocol, in view of recent belligerent practices. To this latter question it is hardly possible to reply other than by stating that given those conditions characterizing the belligerent conduct of naval hostilities in World War II the traditional rules according enemy merchant vessels immunity from attack without warning, and without safeguarding the lives of passengers and crew, can have but limited relevance.

In this brief passage the Nuremberg Tribunal took cognizance of practices that have transformed the character of naval warfare during the past half century and that have made increasingly difficult the application of the rules distinguishing between the treatment of combatant and non-combatant vessels. Although varying in both form and degree, the near universal tendency in recent maritime warfare has been for merchant vessels to become a part of the belligerents’ military effort at sea.\(^\text{50}\)

In consequence, the principal assumption on which the traditional law was based no longer obtains—or, at least, did not obtain during World War II. This assumption was that a reasonably clear distinction could be drawn between the naval forces of a belligerent and merchant vessels having no relation to the belligerent’s military operations.\(^\text{51}\) It is necessary only to recall that even under the traditional law the immunity granted merchant vessels from attack depended upon a strict abstention from all active participation in hostilities, upon refraining from rendering any kind of direct assistance at sea to the military operations of a belligerent, and upon a refusal to accept the protection of a belligerent’s naval forces (e.g., in the form of a convoy). Failure to place sufficient emphasis upon these requirements of the traditional law may easily lead to the mistaken belief that the recent claims of belligerents to possess the right to attack enemy merchant vessels are invariably rooted in the theory that novel circumstances must

\(^{50}\) It was this common tendency of belligerents during World War II that reduced the importance of earlier controversy over the effect of arming belligerent merchant vessels. Whether with or without armament merchant vessels were nearly always under instructions to report the position of enemy warships immediately upon sighting the latter. In effect, this practice amounted to incorporating merchant vessels into the belligerent’s intelligence system, and the danger that could thereby arise for submarines attempting seizure might easily prove as great as the danger arising from the carriage of armament. In either case, seizure in accordance with the traditional methods was normally incompatible with the safety of the warship and—indeed—was no longer demanded of the latter. A number of writers—e.g., Guggenheim (op. cit., pp. 400-1) and Castren (op. cit., pp. 282-90)—in continuing to insist upon the validity of the traditional rules governing the attack and destruction of enemy merchant vessels, and justifiably so, nevertheless fail to place sufficient emphasis upon the significance of these recent developments, and their effect in depriving merchant vessels of that immunity formerly enjoyed.

\(^{51}\) It may be noted that the immunity from attack normally granted merchant vessels need not, and probably should not, be made wholly dependent upon their public or private character. It is of course true that the distinction drawn by the traditional law between combatant and non-combatant vessels was heavily influenced by, and largely developed from, nineteenth century liberalism, with its clear separation between public and private economic activities. It is also clear that a state which exercises public ownership over all merchant vessels will most probably integrate these vessels in time of war into its military effort. Nevertheless, it is at least conceivable that a state might refrain from associating its publicly owned vessels engaged in trade with its military operations. Under these circumstances—highly improbable though they may be—there would seem to be no apparent justification for attacking such vessels on sight simply by virtue of their public ownership. To argue otherwise is to identify the combatant-non-combatant distinction with an economic system rather than with the nature of the acts performed, an identification which is considered erroneous. See Law of Naval Warfare, section 500b.
serve to create new rules. These novel circumstances are generally considered to be the effectiveness of the submarine and aircraft as commerce destroyers and the central importance of the economic objective in modern war; circumstances which, when taken together, are held to justify the practice that he who cannot seize (in accordance with the traditional law) may nonetheless sink. 52 The rejection of this theory, however justified, ought not to lead to a similar rejection of the quite different contention that novel circumstances may be considered as permitting the application of measures which, in an earlier period, found only the most infrequent use. 53 These novel circumstances are—from the present point of view—neither the submarine (and aircraft) nor the central importance of what has...
come to be known as economic warfare, but rather the insistence of belligerents upon the resort to measures which have as their direct consequence the integration of merchant shipping into the military effort at sea. 54

4. Obligations of Belligerents When Attacking Enemy Vessels.

In view of the present status of the law relating to the liability of enemy vessels to attack it would appear especially important to place the strongest possible emphasis upon those few specific rules a belligerent is obligated to comply with in the course of attacking enemy vessels and personnel. In the standard treatise on naval warfare it is not uncommon to find only the briefest reference to these rules. It is probable that most writers have deemed it superfluous to lay emphasis upon what have heretofore been regarded as almost self-evident prohibitions, as—for example—the prohibition against firing on unarmed and defenseless survivors. It is also probable that this relative inattention has been due in the past to the assumption that only in the most unusual circumstances would enemy vessels other than warships be made the object of direct attack. Unfortunately, however, the circumstances in which enemy merchant vessels are now held subject to attack are no longer unusual and the excesses committed by belligerents during World War II no longer allow the sanguine assumption that some prohibitions are too self-evident (and too deeply ingrained) to require laboring over.

ance of essentially defensive character . . . is not likely to command general assent.” Oppenheim-Lauterpacht, op. cit., pp. 491-2. On the one hand, then, the belligerent claim to discard the fundamental distinction between combatants and non-combatants is very nearly acquiesced in, and the "necessities" imposed by total war conceded. On the other hand, the belligerent claim to attack enemy merchant vessels without warning, if the latter have been integrated into the belligerent’s military effort, is largely denied, so long as this integration is justified as having a "defensive character." It should be apparent that the position taken in the text above is such as to deny the validity of the former claim while at the same time arguing for the legitimacy of the latter claim.

54 Law of Naval Warfare, Article 503b (3), reads as follows:

"Destruction of enemy merchant vessels prior to capture. Enemy merchant vessels may be attacked and destroyed, either with or without prior warning, in any of the following circumstances:

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

It is believed that this provision does not substantially depart from the requirements of the traditional law, although it does focus attention upon those recent practices of belligerents which serve, and have always served, to deprive belligerent merchant vessels of immunity from attack.
Article 23, paragraphs c and d, of the Regulations annexed to Hague Convention IV (1907) declare that it is especially forbidden to “kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion” or to “declare that no quarter will be given.” These rules are applicable to hostilities wherever conducted. Hence, in warfare at sea, it is forbidden to refuse quarter either to an enemy vessel that clearly indicates a desire to surrender in good faith or to fire upon the unarmed and defenseless survivors of sunken enemy vessels. A belligerent is required to use only that degree of force necessary in order to compel submission of the enemy, force in excess of this requirement being strictly prohibited. In addition, a belligerent is required, following every engagement at sea, to take all possible measures to search for and to rescue the shipwrecked and wounded survivors of an enemy and to protect the latter, as well as the dead, against pillage and ill-treatment.

The rules outlined above have long been considered applicable to warships in their conduct toward the naval forces of an enemy. The same rules must be considered to be especially applicable to warships in their conduct toward enemy merchant vessels which are—in principle—liable to attack. Indeed, it is only reasonable to demand that in the case of enemy merchant vessels a special effort be made by the attacking warship to cease the attack once active resistance has come to an end and to exert the utmost endeavor to search for and rescue shipwrecked survivors.

55 See Law of Naval Warfare, Article 51 and c. The customary prohibition against the unnecessary use of force has already been discussed (see pp. 46–50). On the duty of giving quarter to enemy vessels, see note 36 to Chapter 5, Law of Naval Warfare. The prohibition against firing on unarmed and defenseless survivors of sunken enemy vessels forms a part of the customary law. The obligation to rescue enemy shipwrecked and wounded survivors may also be considered a rule of customary law though it has received expression first in Article 16 of Hague X (1907) and more recently in Article 18 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. In both conventions the belligerent obligation to rescue shipwrecked and wounded survivors is qualified. Article 16 of Hague X uses the phrase “so far as military interests permit” whereas Article 18 of the 1949 Geneva Convention states that: “After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.”

56 These remarks are considered to apply with even greater force in the case of attacks upon merchant vessels by surface warships. In the Trial of Helmuth von Ruchteschell, (Law Reports . . . 9 (1949), pp. 82–90) the accused, a commander of a German armed raider, was charged with committing the following acts against enemy merchant vessels: continuing to fire after the enemy had indicated surrender; failure to make any provision for the safety of survivors; and firing at survivors in liferafts. The British Military Court trying the accused found him guilty of committing the first and second acts, though not the third. In the notes to this case the following statement occurs:

“Three propositions seem to emerge, either from the utterances of the Judge Advocate or from the findings of the Court: (i) no war crime is committed if an unwarned attack is made upon a merchantman who by reason of arms and wireless communication is part of the war
The position of the submarine (and, even more, of the aircraft) with respect to the fulfillment of this latter obligation is admittedly a difficult one. In normal circumstances the submarine has been unable to take on any appreciable number of survivors. In fact, even the partial attempt to fulfill the obligation to search for and rescue survivors may result in subjecting the submarine to serious danger from enemy warships and aircraft. A submarine (or aircraft) commits no violation of the law of war, however, if after attacking an enemy vessel it is required by reasons of operational necessity immediately to leave the scene of the attack. The obligation to search for and rescue survivors is not an absolute one. A belligerent is required only to take all possible measures to rescue survivors consistent with his own security. On the other hand, the prohibition against firing on the defenseless survivors of sunken vessels is not similarly qualified and, it is believed, cannot be justified by pleading reasons of operational necessity.

The foregoing considerations were involved in those war crimes trials conducted after World War II which dealt with charges arising under, or as a result of, the so-called "Laconia Order." This order, issued September 17, 1942, originated from the German U-boat command and was directed to all German submarine commanders. It ran as follows:

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

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

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

effort of the opposing belligerent; (2) the impunity of attack without warning on a merchantman in these circumstances forms an exception to the general rules of sea warfare and imposes upon the attacking warship the duty to use only adequate force and not to kill or wound a greater number of the crew than is reasonably necessary to secure the defeat of the attacked vessel; (3) as soon as the attacked merchantman is effectively stopped and silenced, all possible steps must be taken by the raider to rescue the crew" (p. 87-8). It was further observed that: "(1) if the raider is aware of survivors who have taken to their lifeboats, he must make reasonable efforts to rescue them; (2) it is no defense that the survivors did not draw attention to their boats if they had reasonable grounds to believe that no quarter was being given" (p. 88).

According to S. W. Roskill, with the one exception noted above, the captains of German armed merchant raiders "generally behaved with reasonable humanity towards the crews of intercepted ships, tried to avoid causing unnecessary loss of life and treated their prisoners tolerably" op. cit., p. 279. Attacks upon merchant vessels by German raiders were very frequently the result of the merchant vessel’s resort to the use of its defensive armament or to an insistence upon making use of its wireless in order to report the raider’s presence and position. Under either of these circumstances attack upon the merchant vessel could be considered justified.

It is assumed, of course, that the attack upon the enemy vessel is justified.
(4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities. The International Military Tribunal at Nuremberg found the Laconia Order ambiguous, and therefore refused to hold the originator of the order—Admiral Doenitz—guilty of deliberately ordering the killing of shipwrecked survivors. The ambiguity of the order apparently was considered to stem from an uncertainty as to whether its intent was only to forbid submarine commanders from making any attempt to rescue survivors or was intended to enjoin them deliberately to kill survivors. The International Military Tribunal seemed to have been of the opinion that if the former interpretation was intended the order was a lawful one. But even this opinion is doubtful, since the rule in question allows only for circumstances of operational necessity. The most favorable interpretation of the Laconia Order was that it laid down a policy of no rescue, not solely—or perhaps not even primarily—for reasons of operational necessity, but because rescue was deemed to run “counter to the rudimentary demands of war for the destruction of enemy ships and crews.” On this basis alone the unlawful character of the order would seem to be readily apparent. In any event, in two reported trials held before the British Military Court at Hamburg it was amply shown that in the course of interpreting and applying the Laconia Order its supposed ambiguity was resolved in favor of the killing of survivors. As such, the illegality of the order should be placed beyond question.  

58 The order was given orally, never in writing. In the Peleus Trial (Law Reports . . . 1 (1947), p. 5) and the Trial of Karl-Heinz Moehle (Law Reports . . . 9 (1949), p. 75) the accused confirmed the contents of the order, reproduced above.  

59 On this point the Tribunal’s judgment declared: “The Tribunal is of the opinion that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.” U. S. Naval War College, International Law Documents, 1946-47, p. 300.  

60 In the Trial of Karl-Heinz Moehle the accused, a senior officer of the 5th U-boat Flotilla, was charged with giving orders “to commanding officers of U-boats who were due to leave on war patrols that they were to destroy ships and their crews.” Law Reports . . . 9 (1949), p. 75. The orders were given in the form of briefings and were based upon the Laconia Order. From the sample briefings furnished as evidence at the trial it appeared clear that the Laconia Order was interpreted in practice as an order to kill survivors. The British Military Court found the accused guilty of ordering the commission of acts contrary to the law of war. In the notes on this case it is observed that: “If a submarine commander can, without danger to his boat, save or succour survivors, he is no doubt under a duty to do so. If, however, by so doing he would endanger his boat he cannot be held responsible if he does not save any such survivors since it is recognized that the safety of his own boat and its crew must be his primary consideration. It is clearly recognised, on the other hand, that the killing of defenceless survivors of a torpedoed ship is a war crime” (p. 80).  

In the Peleus Trial the commanding officer of a German submarine was charged with having given orders to fire on the survivors of the steamship Peleus. In presenting his defense the accused quoted the Laconia Order, though he did not plead superior orders. The principal defense plea was that the order to fire on the rafts containing survivors was an operational necessity, and by destroying all evidence of the sinking pursuit of the submarine was made less
D. THE SEIZURE OF ENEMY VESSELS AND GOODS

Unless specially protected by a rule of customary or conventional international law all vessels and goods encountered at sea in time of war are liable to seizure and to subsequent condemnation if impressed with an enemy character. In this respect the conduct of naval warfare is to be distinguished from the methods characterizing land warfare, where the private property of the enemy population may not—as a general rule—be seized and confiscated. There is no need to deal here with the arguments both for and against this belligerent right in warfare at sea to seize the private property of an enemy. It is sufficient merely to note that despite a substantial opposition during the late nineteenth and early twentieth centuries to the retention of this right, an opposition led very largely by the United States, there has been no general disposition on the part of naval powers to relinquish a practice as old as naval warfare itself.  

61 A useful summary of earlier arguments for and against the retention of the belligerent right to seize and condemn the private property of enemy subjects may be found in U. S. Naval War College, International Law Topics, 1905, pp. 9-20. Hyde (op. cit., pp. 2059-63) contains a brief review of the traditional American position, citing the proposal urged by the American delegation at the 1907 Hague Peace Conference, which declared that: "The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war shall be exempt from capture or seizure on the sea by the armed vessels or by the military forces of any of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers." And in a recent review of the inactivity since the Spanish-American War of American courts sitting in prize it has been stated that: "The history of the matter shows that the policy of the United States has tended to avoid resort to capture and prize, and to substitute for the form, if not always the whole substance of the doctrine, gentler legal devices, such as requisition for use or title upon promise or payment of just compensation .... Thus our country has maintained its position of endeavoring to lead the world towards a general law or rule of immunity from capture or destruction of peaceful merchantmen and cargoes not contraband." A. W. Knauth, "Prize Law Reconsidered," Columbia Law Review, 46 (1946), p. 86. It may be relevant to observe, however, that the conditions attending American participation in the two World Wars are not so easily interpreted as a reluctance "to abandon the great reform." The device of requisition for use or title upon promise or payment of just compensation was used almost exclusively with respect to enemy merchant vessels caught in American ports at the outbreak of hostilities—and it may still be contended that such vessels ought to be given special consideration (see pp. 86-90). With respect to enemy merchant vessels encountered at sea, any conclusions drawn must be extremely tentative. In both World Wars
anything, recent belligerent practice has moved in the contrary direction of restricting—and, in certain instances, invalidating entirely—the application of the few rules formerly granting certain enemy vessels and goods exemption from seizure. However this may be, the liability of vessels and goods to seizure in naval warfare depends, in the first instance, merely upon the fact that such vessels and goods possess an enemy character. This being so, the determination of enemy character in relation to vessels and cargoes may be taken as the starting point of an inquiry into the nature and scope of the belligerent right to seize enemy property at sea.62

German merchant shipping was—by the time America became a belligerent—almost nonexistent in any event. And during World War II the methods pursued in the Pacific hardly pointed toward any practice save that of unrestricted submarine and aerial warfare against Japanese merchant shipping (see pp. 66-7). It may also be noted that in both World Wars neutral shipping no longer remained a major problem by the time America entered as a belligerent. These, and other, circumstances surely render hazardous any interpretation of the possible lines of action this country might pursue in the future if involved in hostilities at sea against a major maritime Power—and given the task of controlling substantial neutral trade.

In a broader sense, of course, the belligerent right of seizure in naval warfare also extends to vessels and cargoes bearing a neutral character. Normally, however, neutral commerce is exempt from belligerent interference, and liability to seizure arises only from the performance of acts—contraband carriage, blockade breach, unneutral service—belligerents have a right to prevent according to international law. In the case of enemy vessels and goods, liability to seizure and confiscation follows simply from the character of the property, and requires no further justification (except, perhaps, to establish that the property does not come within a category given special protection from seizure). The law of prize therefore encompasses the totality of the rules governing the belligerent right to seize and to condemn privately owned vessels and cargoes, whether of enemy or of neutral subjects.

Attention may once again be called to a point earlier made in the Foreword, that a detailed examination of prize law does not form one of the purposes of the present study. In the immediate section (D) of this Chapter, as well as in Chapters IX through XII, the attempt is made to indicate only in broad outline those rules which determine both the substantive grounds for capture and what are generally considered the procedural rules regulating the conduct of visit, search and seizure. No endeavor is made, however, to examine the nature and organization of belligerent prize courts, or the procedural rules applied by these courts—save perhaps where these rules have had, as in the case of contraband (see pp. 270-6), a marked impact in extending the belligerent's control over neutral trade. It will also be apparent that emphasis has been placed primarily upon British Prize Law since 1914—or rather the interpretation given the law of prize by the British prize courts during the two World Wars. The justification for this emphasis may be based not only upon the fact that the British decisions have been the most numerous and by far the most influential but also upon the conjecture that if the United States should in the future resort to prize proceedings—admittedly an unlikely contingency—American prize courts would in all probability lean heavily upon these decisions.

I. Enemy Character.

a. Vessels.

Normally, the enemy or neutral character of a vessel is determined by the flag which she has the right to fly. A vessel entitled to fly the flag of an enemy state and therefore having an enemy nationality may be regarded in every instance as bearing enemy character. But although the owners of a vessel are always bound by the flag they have chosen to adopt, belligerents are not so bound in determining the neutral or enemy character of a vessel. For the practice of states is clear that even though entitled to fly a neutral flag—and thus possessing a neutral nationality—a vessel may nevertheless be considered as impressed with an enemy character. The neutral flag cannot serve as a device to protect vessels from seizure whose actual status indicates either continued ownership or control by individuals who themselves possess enemy character.

An invaluable summary of the more significant World War II prize cases may be found in the *Annual Digest and Reports of Public International Law Cases* (ed. by H. Lauterpacht), 1938-48. Finally, among general treatises on the law of war special mention should be made of the stimulating and thoroughly up to date analysis given in Stone, *op. cit.*, pp. 457 ff.

63 It is therefore important that a clear distinction be drawn between the neutral or enemy nationality and the neutral or enemy character of vessels. The former—nationality—is determined by the flag a vessel has the right to fly, and the conditions of this right are directly determined by the municipal law of each maritime state. But the latter—character—is a matter solely within the province of international law, and international law may or may not make the character of a vessel coincide with its nationality. In point of fact, international law does not identify the two.

In this connection the relevant provisions of the 1909 Declaration of London deserve passing mention. Article 57 of that unratified instrument declared:

"Subject to the provisions respecting the transfer of flag, the neutral or enemy character of a vessel is determined by the flag which she has the right to fly.

"The case in which a neutral vessel is engaged in a trade which is reserved in time of peace, remains outside the scope of, and is in nowise affected by, this rule."

Article 57 thereby made the nationality of a vessel the principal test for determining its character. Three exceptions were provided for, however. The first concerned the fraudulent transfer of flag, dealt with in Articles 55 and 56. The second, mentioned in paragraph 2 of Article 57, refers to the so called "Rule of 1756," which holds that neutral merchant vessels acquire enemy character if in time of war they engage in a trade the enemy state exclusively reserves in time of peace to merchant vessels flying its own flag. According to the practice of several states the neutral vessel accepting this privilege from a belligerent thereby becomes so closely identified with the belligerent as to lose its neutral character. Finally, and not mentioned in Article 57, neutral vessels performing certain types of unneutral services for a belligerent thereby became impressed with enemy character—according to Article 46—and liable to the same treatment as enemy merchantmen.

64 See *Law of Naval Warfare*, Article 501, which abandons entirely the "right to fly" formula, it now being clear that flying the enemy flag is conclusive evidence of enemy character regardless of whether or not a vessel has the right to do so. Of course, the principal defect of Article 57 of the Declaration of London—at least from the belligerents' viewpoint—was the exclusion of ownership as a criterion for the determination of enemy character. During World War I a number of neutral states, including the United States, nevertheless persisted in considering Article 57 as accurately reflecting the law governing enemy character of vessels. But the prac-
In addition, a merchant vessel though entitled to fly a neutral flag may nevertheless forfeit its neutral character by undertaking to perform any one of several services on behalf of a belligerent. In a later chapter these acts—generally considered under the heading of "unneutral service"—are examined in some detail. Here it is sufficient to observe that the more serious forms of unneutral service may so identify merchant vessels of neutral nationality with the armed forces of an enemy as to expose such vessels to the same treatment as is meted out to enemy warships. Thus merchant vessels of neutral nationality which take a direct part in hostilities on the side of an enemy or act in any capacity as a naval or military auxiliary to an enemy's armed forces not only acquire enemy character but are liable to the same treatment as enemy warships. Further, neutral merchant vessels may acquire enemy character and be made liable to the same treatment as enemy merchant vessels if found operating directly under enemy orders, employment, or direction. Finally, it is customary to

The criteria for determining the enemy character of the owners of a vessel are considered in connection with the discussion of the criteria for determining the enemy character of goods generally (see pp. 8s–4).

The attitudes of the British Prize Court was best set forth in the following passage:

"It is a settled rule of prize law, based on the principles upon which Courts of Prize act, that they will penetrate through and beyond forms and technicalities to the facts and realities. This rule, when applied to questions of the ownership of vessels, means that the Court is not bound to determine the neutral or enemy character of a vessel according to the flag she is flying, or may be entitled to fly, at the time of capture. The owners are bound by the flag which they have chosen to adopt; but the captors as against them are not so bound." The Hamborn [1918], 7 Lloyds Prize Cases, p. 62.

Now it may be contended—and with a certain merit—that the differences required by the traditional law in the treatment of vessels bearing an enemy character (see pp. 102–8) and the treatment of vessels retaining a neutral character (see pp. 347–53) are no longer very considerable. It is true that the treatment of cargo carried on board a seized vessel differed according to whether the status of the vessel was enemy or neutral, though this difference is no longer very significant. Even further, although the destruction of neutral prizes following seizure is a far more serious measure than is the destruction of enemy vessels, the former may admittedly be destroyed
consider a merchant vessel of neutral nationality as acquiring enemy character if it resists the exercise of the legitimate belligerent right of visit and search.68

(i) Transfer of Flag

The imminence of hostilities or the actual outbreak of war is generally productive of attempts on the part of the owners of vessels possessing enemy character to avoid the risk of seizure and confiscation by transferring such vessels to a neutral flag. It is universally acknowledged that although the transfer of a vessel from an enemy to a neutral flag may take place in accordance with the municipal law of the neutral state international law may nevertheless regard the transfer as fraudulent and not serving to divest the vessel of its enemy character. The general principle involved is clear: the fraudulent transfer of vessels, a matter determined by international law, cannot serve to defeat the rights of a belligerent. But the detailed application of this principle is quite another matter, and states have long disagreed upon the specific conditions that must be satisfied before vessels can be regarded as properly divested of enemy character.

It has been observed that the traditional view maintained in this matter by the United States is that "a neutral national may lawfully purchase a private ship under a belligerent flag and thereby acquire a title to be respected by the enemy of the State of the vendor, provided the transaction is a bona fide one, by the terms of which no right to purchase or recover the vessel is reserved to the seller, and the price paid gives evidence of a reasonable sacrifice by the purchaser. Other considerations, such as the motives impelling a sale have not been deemed to be decisive of the validity of the transaction." 69 A substantially similar view, emphasing the bona fide

in circumstances of exceptional necessity. Hence, the differences in this latter respect, while not to be lightly brushed aside, should not be exaggerated.

However, the significant and rather unexpected point is that in view of the increasing liability of enemy merchant vessels to attack (see pp. 67-70), the importance of clearly distinguishing between neutral merchant vessels acquiring and neutral vessels not acquiring enemy character becomes even more imperative than previously. For if the law may now be considered as permitting—under certain circumstances—the sinking without warning of enemy merchant vessels, special caution must be exercised in making clear precisely those vessels either possessing enemy character or acquiring such character by the performance of certain acts. The consequences of even a partial abandonment of the heretofore valid rule requiring warships (whether surface or submarine) to refrain from sinking any merchant vessels without having first placed passengers and crew in a place of safety are sufficiently grave to warrant a very careful discrimination between enemy vessels, including neutral vessels acquiring enemy character, to which this partial abandonment applies, and neutral vessels, which may perform prohibited acts (e.g., contraband carriage) but which do not acquire by these actions enemy character.

68 Strictly speaking, the act of resisting visit and search does not fall within the category of unneutral service, though it nevertheless results in a neutral vessel acquiring enemy character.

69 Hyde, op. cit., pp. 2078-9, and sources cited therein. Paragraph 58 of the 1917 Instructions issued to the U. S. Navy declared:

"The transfer of a private vessel of a belligerent to a neutral flag during war is valid if in accordance with the laws of the State of the vendor and of the vendee, provided that it is made
and absolute character of the transfer of a vessel from enemy to neutral ownership, has long been endorsed by Great Britain.\textsuperscript{70}

On the other hand, the traditional practice of certain of the continental European states, and notably France, has been to refuse to recognize the validity of any transfer made from an enemy to a neutral flag in time of war, though treating such transfers as were made prior to the outbreak of hostilities as valid merely if carried out in accordance with the laws of the state of the vendor and vendee.

In retrospect, it is clear that the provisions of the 1909 Declaration of London relating to the transfer of flag did not successfully meet the difficulties posed by these divergent practices. The relevant articles of that instrument provided for a distinction to be drawn between the transfer of an enemy vessel to a neutral flag when effected shortly before the opening of hostilities and transfer when effected after the outbreak of war. In both

in good faith and is accompanied by a payment sufficient in amount to leave no doubt of good faith; that it is absolute and unconditional, with a complete divestiture of title by the vendor, with no continued interest, direct or indirect, of the vendor, and with no right of repurchase by him; and that the ship does not remain in her old employment."

This provision was substantially repeated in paragraph 64 of the 1941 Instructions. There is no reason to believe that the above quoted provision does not still remain the position of this country, the United States having never endorsed the principles discussed below—concerning transfer of flag provided for in the Declaration of London. As regards the transfer to a neutral flag before hostilities, both the 1917 and 1941 Instructions merely declared such transfer to be valid provided it was made in accordance with the laws of the state of the vendor and the state of the vendee. But this provision must be considered along with this country’s endorsement—as reflected in earlier manuals—of Article 57 of the Declaration of London. Simply stated, this led to the position that so long as a belligerent vessel was transferred to a neutral flag prior to the outbreak of war, and in accordance with the municipal law of the neutral state, such vessel enjoyed a neutral character once war broke out. Thus the requirements demanded of transfer made prior to hostilities were different from, and exceedingly more liberal, than the requirements made for transfer during war. The present validity of this distinction must be doubted, however, if only for the reason that Article 57 of the Declaration of London can no longer be regarded as valid. If anything, it would appear that the test heretofore established in American practice for determining the validity of transfers made during war is equally applicable to transfers made immediately prior to the commencement of hostilities.

On October 3, 1939 the Panama meeting of the Foreign Ministers of the American Republics resolved that the latter: "Shall consider as lawful the transfer of the flag of a merchant vessel to that of any American Republic provided such transfer is made in good faith, without agreement for resale to the vendor, and that it takes place in the waters of an American Republic." \textit{A. J. I. L.}, 34 (1940), Supp., p. 11. Also see Hackworth, \textit{op. cit.}, Vol. VI, pp. 524-41.

\textsuperscript{70} "From the British point of view, transfers of vessels during the war are not \textit{per se} invalid, but the belligerent is entitled to inquire into the transaction in order to determine whether it was made in fraud of his rights and whether there has been an effective divestment of enemy title and an effective vesting in the neutral owner." Colombos, \textit{op. cit.}, p. 105. In practice, this has been interpreted to mean that the seller must not retain any interest in the vessel, or any right to repurchase or recover the vessel following the termination of the war. Still further, British practice forbids transfer while in a blockaded port or while the vessel is \textit{in transitu} (though once having reached port and taken possession of by a neutral owner the voyage has been regarded as terminated).
instances transfer from an enemy to a neutral flag was to be considered void if made "in order to evade the consequences which the enemy character of the vessel would involve." However, for transfers made immediately prior to hostilities the burden of proving such a purpose was placed upon the captors, whereas for transfers made during the period of war the claimant was obliged to displace the presumption that transfer was made in order to avoid seizure. This principal test was further supplemented by a number of related presumptions.\textsuperscript{71}

These provisions constituted an obvious attempt to compromise differences in state practice already noted. However, the manner in which they were formulated was such as to allow a considerable latitude in interpretation, and during World War I belligerents—or at least those belligerents professing to follow the Declaration of London—did not hesitate to resort to that interpretation most nearly in accord with their traditional practice.\textsuperscript{72}

\textsuperscript{71} Thus according to Article 55 of the Declaration, an absolute presumption of a valid transfer was to be made if the transfer was effected more than thirty days before hostilities and was absolute, complete, conformed to the laws of the countries concerned, and the former owners were divested both of control and of earnings. But a rebuttable presumption that the transfer was void resulted if the bill of sale was not found on board a vessel that lost her belligerent nationality less than sixty days before the opening of hostilities.

According to Article 56 an absolute presumption that transfer—in time of war—was void followed if the transfer was made during a voyage or in a blockaded port, if the vendor retained a right of redemption or of revision, or if the requirements for a valid transfer laid down by the municipal law of the flag state were not observed.

\textsuperscript{72} A rigorous interpretation of the stipulation that transfer was void if made in order to "evade the consequences which the enemy character of the vessel would involve" easily served to render wartime transfers practically impossible. Thus the position of France and Germany was that this injunction applied to the intentions of both the seller and the purchaser. Since the motives of the former are necessarily suspect it is at best an extremely difficult task for a claimant to establish that the transferor's motives were not to "evade the consequences" of enemy character, particularly when the acts held to constitute an evasion of the consequences of enemy character were never clarified or made the object of common agreement. The well-known case of The Dacia, decided by the French Prize Council in August 1915, indicated the French interpretation of Article 56 of the Declaration of London. The Dacia, a German merchant vessel purchased by an American citizen, and transferred to American registry while lying in an American port, was seized by a French cruiser on a voyage from Port Arthur, Texas, to Rotterdam. The cargo carried was destined for Bremen. Earlier, the French Government had notified the American Government that it would not recognize the validity of any transfer of German vessels lying in American ports to American registry. In condemning the Dacia, the French Prize Council asserted that the American owner had failed to establish—as required by Article 56—that the German transferor had not sold the vessel in order to "evade the consequences" of enemy character. Even further, the Prize Council declared that a transfer could be regarded as valid "only if there was reason to believe that it would have been effected just the same had the war not occurred . . . ." For translation of The Dacia; see A. J. I. L., 9 (1915), pp. 1015–26. The French Council of State, on appeal, upheld the decision of the Prize Council and in doing so made the same point. In effect, then, this interpretation—also made by Germany—placed an impossible burden upon claimants. In the case of The Dacia, however, the Prize Council did lay emphasis upon the additional circumstance that the vessel was engaged in a trade "for which it had been chartered when it was under the German flag, and in view

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At present, then, the disparate rules governing the transfer of vessels from an enemy to a neutral flag remain roughly what they had been prior to the Declaration of London. So far as Anglo-American practice is concerned this would appear to mean that transfers effected either immediately prior to or following the outbreak of war will be—in principle—recognized as valid if made in good faith by the purchaser and if resulting in the complete divestiture of enemy ownership and control. However, it remains to be emphasized that the very circumstances normally attending the transfer of vessels in time of war are such that belligerents and belligerent prize courts will subject such transfers to the most careful investigation. It also seems clear that in this process the burden of proving that the divestiture of enemy ownership in and control over a vessel has been complete and genuine rests largely upon the claimant.\footnote{It should be apparent that the task of ascertaining whether or not a transfer does satisfy the requirements demanded by Anglo-American practice is one suited to a court of prize and not to belligerent commanders undertaking visit and search. Save in exceptional circumstances the latter may treat the fact of transfer from an enemy to a neutral flag as sufficient cause for seizure, leaving the ultimate determination of the vessel’s status to the prize court.}

b. Goods (Cargoes)

Whereas in the case of vessels the fact of ownership serves as a supplementary criterion for determining neutral or enemy character, in the case of cargoes ownership becomes the principal test. But although it is recognized that the neutral or enemy character of goods is dependent upon the neutral or enemy character of the owners, states have differed in the tests they have established for determining the enemy character of individuals. The 1909 Declaration of London failed to resolve the traditional disparities in state practice, being limited to an endorsement of the customary rule that all goods found on board enemy merchant vessels are presumed to have an enemy character unless proof of neutral character is furnished by the owners. With respect to the central question, however, the Declaration merely provided that the enemy character of goods is determined by the enemy character of the owners, thereby selecting neither the “territorial” test, adhered to by the United States and Great Britain, of which it had been transferred to a neutral flag; such transfer to a neutral flag with the object of carrying on enemy trade and protecting the ship from capture cannot be valid against belligerents.” This latter point does appear to offer a clear basis for the voidance of transfer and to provide sufficient indication that transfer was not made in “good faith.”—For the diplomatic correspondence on the Dacia, see U. S. Naval War College, International Law Situations, 1934, pp. 7–17.

In contrast to France and Germany, Great Britain applied a liberal interpretation to Article 56 and one that accorded with her previous practice. Thus in The Edna, [1919]—(9 Lloyds Prize Cases, p. 70) the Judicial Committee of the Privy Council declared that Article 56 was intended to prevent colorable or fictitious transfers and that the only change made by this Article was to place the burden of proving a bona fide transfer upon the purchaser. But the latter is under no obligation to establish the motives—innocent or otherwise—of the seller.

\footnote{It should be apparent that the task of ascertaining whether or not a transfer does satisfy the requirements demanded by Anglo-American practice is one suited to a court of prize and not to belligerent commanders undertaking visit and search. Save in exceptional circumstances the latter may treat the fact of transfer from an enemy to a neutral flag as sufficient cause for seizure, leaving the ultimate determination of the vessel’s status to the prize court.}
nor the "nationality" test, followed by France and other continental powers. 74

It has frequently been observed that the true purpose of the belligerent right to seize enemy goods at sea is to prevent an opponent from retaining a control over any trade that will serve to augment his economy and thus enable him the more effectively to conduct war. From this point of view it is neither the possession of enemy nationality nor the subjective attachment to the cause of an enemy state that—in itself—provides sufficient reason for the confiscation of an individual's goods on the ground that they are impressed with an enemy character. Instead, it is the existence of an objective relationship between the trade of an individual—whatever his nationality or allegiance—and the territory belonging to or occupied by the enemy; a relationship the result of which is to subject the property of an individual to the control of the enemy, thereby increasing the latter's potential for waging war.

This is, at any rate, the rationale upon which Anglo-American practice may be said to have developed. The test for determining the neutral or enemy character of an individual, at least so far as the determination of the character of goods is concerned, is made dependent upon what is commonly termed the individual's "commercial (trade) domicile." 75 Even though of non-enemy nationality, an individual is regarded as having a hostile commercial domicile if he resides in territory belonging to or occupied by an enemy. In consequence, all goods belonging to the subjects of neutral states who reside and carry on trade in enemy territory bear an enemy character; and the same holds true for the goods belonging to the subjects of a belligerent, or of the belligerent's allies, resident in the territory of an enemy and remaining there following the outbreak of war. Conversely, through residence in a neutral state (or in the territory of the belligerent or of an ally) an individual of enemy nationality may so remove himself and his commercial activities from enemy territory and control as to obtain a neutral (or friendly) commercial domicile and to no longer warrant treating his property as impressed with an enemy character.

Furthermore, it may be that a neutral subject, though residing in neutral territory, has an interest in a house of trade that is established and doing business in or from an enemy state. In this event the goods he owns as a result of such commercial enterprises in the enemy country are impressed with an enemy character, the neutral owner being considered as acquiring an enemy commercial domicile with respect to—though only with respect to—his assets in the enemy house of trade. The enemy character that is imputed to goods in this instance follows from the connection held to obtain between the latter and enemy territory; a relationship that is considered

74 And, by implication, thereby sanctioning both tests.
75 See Article 633a, Law of Naval Warfare—which follows a parallel provision found in both the 1917 and 1941 Instructions.
to increase the enemy's resources. It is this relationship rather than the actual residence of the neutral owner that is held to be decisive here. On the other hand, the converse situation does not hold true, for the doctrine of commercial domicile does not exempt from enemy character the goods of individuals permanently resident in an enemy country though having a house of trade in a neutral state. Last of all, mention should be made of the special rule relating to articles which form part of the produce of enemy soil. According to American and British practice goods which are the products of the soil of an enemy country and which are shipped therefrom after

The above remarks constitute no more than the barest summary of the principal lines of development that the territorial test has taken in its application to cargoes owned by individual traders. To these remarks some additional observations may be appended in this note.—In British prize law a distinction is drawn between the acquisition of a neutral or friendly commercial domicile and of a hostile commercial domicile. With respect to the former, residence is an essential element, and although it is not possible to lay down a general rule covering all cases it is at least clear that the residence required must be of a fairly permanent character. But a hostile commercial domicile may be acquired either by residing and trading in an enemy state or simply by having an interest in a business established in hostile country. Thus in the Anglo-Mexican [1918], Lord Parker declared on behalf of the Judicial Committee of the Privy Council that "a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business. He acquires by virtue of the business a commercial domicile in the country in or from which the business is carried on, and this commercial domicile, though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character." Lloyds Prize Cases, pp. 113-14. However, in the case of a hostile commercial domicile acquired by residing and trading in hostile country, enemy character is imputed to an individual's goods wherever situate (i.e., whether in hostile, neutral or friendly territory). Nor have individuals acquiring a hostile commercial domicile through residing in enemy territory been allowed a period of grace, upon the outbreak of hostilities, in which to abandon their acquired domicile (though such abandonment may be taken by an unequivocal act, following which the goods of neutral individuals will not be considered as any longer impressed with enemy character and liable to capture). But in the case of neutral subjects resident in neutral territory and partners in an enemy house of trade it is only the assets owned as a result of the interest in the enemy house of trade that have been considered impressed with enemy character. Furthermore, in this instance practice has been to allow neutral subjects a reasonable period of time in which to break off their enemy interests. Indeed, it is only by a kind of projection of the concept of commercial domicile that it is used to cover the case of being a partner in an enemy house of trade though without being actually resident in hostile country.

Where the ownership of cargoes (and vessels) is vested in a corporate entity rather than in an individual the application of the territorial test must of necessity undergo certain modifications, and here again it is British practice that has pointed the way. It is clear, to begin with, that a corporation will be impressed with an enemy character, and its property rendered liable to seizure, if its place of incorporation is within hostile country. Nor will the imputation of enemy character to a corporation thus having an enemy nationality be affected by the fact that those who own or control the enterprise are made up largely of neutral nationals residing in neutral territory. In addition, a corporation, even though its place of incorporation is within neutral territory, may be considered as possessing an enemy character if it is substantially owned and controlled by individuals who themselves bear enemy character—this at least according to the British view.
the outbreak of war are impressed with an enemy character even though the owner of the goods may be domiciled or resident in a neutral country.

In contrast with the territorial test is the test traditionally applied by France and other continental states which emphasizes the nationality of the owner of goods as the decisive criterion for determining the neutral or enemy character of cargoes. In applying the nationality test goods belonging to the subjects of an enemy state are impressed with an enemy character, despite the fact that the owners may be permanently resident in neutral territory; and if found on board enemy merchantmen such goods are always considered liable to capture. Conversely, goods owned by the subjects of a neutral state normally do not bear enemy character—again according to the nationality test—despite the fact that the owners may be residing in enemy territory.  

It is now generally recognized, however, that the experience of the two World Wars has demonstrated that the traditional divergence between the territorial and the nationality test has lost a substantial measure of its former significance. In practice, many of the belligerents refrained from a rigid adherence to either test, but sought to effect a combination of both. Nor can it be said that a belligerent acts in violation of international law by applying both tests, should the particular circumstances attending a war render such behavior expedient. See, for example, Hyde, op. cit., pp. 1090-1. At the same time, the importance that may be attached to belligerent practice in this respect during the two World Wars is difficult to assess, since much of the "evidence" that belligerents are in fact abandoning an exclusive adherence to either the territorial or the nationality tests has been found in belligerent "trading with the enemy" acts. At the outbreak of war every belligerent is at liberty to prevent its subjects, as well as other individuals residing within its territory, from carrying on any intercourse—commercial or otherwise—with the enemy. Such prohibition may extend not merely to all persons residing in the enemy state but to enemy nationals residing abroad in neutral states and even to individuals—regardless of nationality and residence—found to have an association with the enemy. During World War I Great Britain's Trading With the Enemy Act authorized the Government to forbid trade not only with all persons residing in an enemy state but also with any person not resident in enemy territory whenever such prohibition appeared expedient "by reason of the enemy nationality or enemy association of such persons." In accordance with this Act so-called "black-lists" were made up containing the names of individuals, many of them residing in neutral states, with whom trading was deemed unlawful. As a neutral the United States protested against the British black-lists, though upon becoming a belligerent it resorted to similar measures. France, on the other hand, in addition to forbidding trade with enemy subjects wherever resident also prohibited trade with non-enemy subjects residing in enemy territory.—In World War II the belligerents once again resorted to similar measures in their trading with the enemy legislation. For the text of Great Britain's Trading With the Enemy Act, 1939, see A. J. I. L., 36 (1942), Supp., pp. 3-12. The United States' Trading with the Enemy Act, 1917, is given in A. J. I. L., 12 (1918), Supp., pp. 274 ff., and the World War II amendments in A. J. I. L., 36 (1945), Supp., pp. 56-8. In effect, then, these states adopted both the territorial and the nationality tests for determining enemy character in their trading with the enemy legislation. Nevertheless, such legislation is mainly a matter of municipal law rather than of international law; it places restraints upon the subjects of the belligerent and all other persons residing within its territory and provides appropriate penalties in the event these restrictions are broken. There is nothing to prevent a belligerent from taking such measures. Nor does there appear any solid basis in international law for neutral protests against these measures simply for the reason that the belligerent has forbidden its subjects.
(i) Transfer of Goods at Sea

Although the character of goods seized at sea is normally dependent upon the character of the owners, difficulties may frequently arise in determining who are the true owners at the time of seizure. It is generally acknowledged that with respect to goods sold prior to, and without anticipation of, hostilities, the question whether or not ownership in the goods has passed from seller to buyer at the time of seizure is one that may be determined either in accordance with the municipal law of the parties involved in the transaction or in accordance with the municipal law of the captor.

Quite different considerations govern the transfer of goods when made after the outbreak of war or in contemplation of hostilities. Were the municipal law governing the passing of property to remain applicable to these latter cases of transfer, and to determine the neutral or enemy character of goods, risk of confiscation would be rendered negligible so long as ownership in goods being shipped from neutral to enemy or from enemy to neutral could remain vested in neutral hands. In the case of goods being

from trading with individuals, residing in neutral territory, known to be either of enemy nationality or to have enemy associations. To this extent American protests against the British "black-lists" during World War I appear misplaced. Even further, Great Britain was well within her lawful rights as a belligerent in taking other discriminatory measures against the vessels belonging to individuals residing in neutral territory though placed on the statutory lists, e. g., in refusing to allow such vessels to be insured by British companies or in denying to them the facilities of British controlled ports. But it should be emphasized that the "enemy character" imputed to individuals in trading with the enemy legislation has been relevant only for those purposes already noted, not for the purpose of determining whether the goods of such individuals are impressed with an enemy character and therefore liable to seizure as lawful prize. In this latter sense Great Britain and the United States have yet to depart from the territorial test, though it is true that the scope of this test has been limited by virtue of other belligerent measures.

And it is ownership in the goods at the time of seizure that is decisive in determining their neutral or enemy character. The right of belligerents to confiscate cargoes (and vessels) thus owned by individuals or corporations endowed with enemy character is not affected by any special rights that may be attached to the seized enemy property, and recognized by municipal law, e. g., mortgages, liens, etc. On this point the practice of prize courts is uniform, it being recognized that to allow such special claims by neutrals would doubtless render the belligerent right to seize enemy property at sea of very little value.

The captor may therefore determine the question of ownership by the law of sale applicable in his own state. Generally speaking, the delivery of goods on board a vessel is normally considered as equivalent to their delivery to the consignee, the latter thereby accepting the risk and the right to dispose of the goods. But this need not be the case, and the decisions of prize courts—particularly the British, which apply the English law governing the sale of goods—are clear that ownership can be determined only by an inquiry into the intentions of the parties and the terms governing each particular contract for the sale of goods. For an enlightening commentary on some of the recent problems arising in English practice, see Stone, op. cit., pp. 469-70, 475-7.

80 Here again it is British prize decisions that provide the substantial basis for the remarks to follow, though this practice is shared in varying degrees by other states and particularly the United States.
transferred from a neutral to an enemy this result is prevented by the established practice of considering such goods as impressed with enemy character during the entire period of transit. Nor does it matter that according to the strict terms of the sale the property is not to pass into enemy hands until the time delivery has been made and actual possession of the goods has been taken.\(^81\) In addition, there is the principle governing converse cases involving transfer of property from enemy to neutral, and according to which a belligerent may seize such goods while in transit—although title to the goods has already passed to the neutral—if the transfer is deemed to be fraudulent, i. e., entered into for the purpose of defeating the rights of the captor.\(^82\) This is almost always considered to be the case if transfer of title to enemy goods is carried out once the goods are already at sea.\(^83\) But quite apart from this special case the transfer of title to goods in transit from enemy to neutral, however clear, cannot operate against the captor if fraudulently made. And while it may be open to the neutral claimant to disprove any presumption of fraud against the captor the practical effect of the foregoing rule, as well as the rule governing the transfer of goods from neutral to enemy, is to regard all goods in transit—whether from neutral to enemy or from enemy to neutral—as enemy property.\(^84\)

It should be made clear, in conclusion, that the preceding rules are always relevant to the transfer of title in goods found on enemy vessels. The extent to which they will prove applicable to the transfer of goods on neutral vessels must depend, of course, upon whether or not the rule of "free ships, free goods" is being observed by belligerents.\(^85\)

2. Enemy Property Exempt From Seizure

a. Enemy Vessels at the Outbreak of War

During the course of the nineteenth century the practice gradually took root of granting belligerent merchant vessels caught in enemy ports at the

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\(^81\) Of course, if title to goods has already passed to the enemy owners then obviously no problem arises with respect to their character.\(^82\) Again it may be noted that no difficulty arises with respect to the passing of property from enemy to neutral if the title to the property remains in the vendor at the time of seizure—the goods evidently retain their enemy character. It is only when a neutral title has been perfected that any problem arises and when the principle that transfers of property cannot be made in order to defeat the rights of the captor becomes applicable.\(^83\) Law of Naval Warfare, Article 633b. Article 60 of the Declaration of London, the only provision concerning the transfer of goods upon which the drafters were able to agree, provided that the "enemy character of goods on board an enemy vessel continues until they reach their destination, notwithstanding an intervening transfer after the opening of hostilities while the goods are being forwarded."

\(^84\) But once the neutral buyer has taken actual possession of the goods through their delivery, the transit is complete and the belligerent cannot seize them—at least not on the basis of the rules presently considered—unless it can be shown that the enemy seller has nevertheless retained an interest in or control over the property.

\(^85\) As to the present status of the latter rule, see pp. 99–102.
outbreak of war a period of grace in which to depart unmolested. Exemption from seizure also was frequently accorded to belligerent merchant vessels which left their last port of departure before the outbreak of war and when encountered on the high seas were unaware that hostilities had broken out. Hague Convention VI (1907), Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities sought to codify this practice, and Article I of that Convention provided that in the event a merchant ship belonging to one belligerent is at the commencement of war in an enemy port "it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated." A similar rule was provided for a belligerent merchant ship which, having left its last port of departure before the outbreak of war, entered a port belonging to the enemy in ignorance of the fact that hostilities had broken out. Merchant ships unable to leave an enemy port within the allotted period of grace, owing to circumstances of force majeure, were not to be confiscated, but could either be detained, without payment of compensation though subject to restoration at the conclusion of hostilities, or requisitioned, on payment of compensation. Belligerent merchant vessels met at sea and ignorant of the outbreak of war, having left their last port of departure before war's outbreak, could be seized by an enemy and either detained or requisitioned in the same manner as vessels unable to leave an enemy port. Confiscation was, in any event, forbidden. Finally, the Convention expressly excluded from the benefit of its provisions those merchant ships whose build indicated that they were intended for conversion into warships.

A large number of states, including the United States, failed to ratify

86 A review of nineteenth century opinion and practice with respect to the status of enemy merchant vessels at the outbreak of war is given in U. S. Naval War College, International Law Topics, 1906, pp. 46-65, where it is concluded that the exemption granted enemy vessels should be conditioned upon a strict reciprocity of treatment, that it should be subject to the protection of a belligerent's military interests, and that it should not extend to private vessels suitable for warlike use.—It should be observed that prior to the middle of the last century the practice of belligerents had been to seize and confiscate enemy vessels caught in belligerent ports at the outbreak of hostilities. And there were a number of instances of states placing an embargo upon the vessels of a foreign state in anticipation of war with the latter.

87 Such vessels, if destined for an enemy port, were usually allowed to enter such port, discharge their cargo, and depart. On the other hand, if seized they were generally not subject to confiscation but instead to detention or to requisition upon compensation.

88 The foregoing is a brief summary of Articles 1, 2, 3 and 5 of Hague VI. Article 4 provided that in all instances enemy cargo was likewise liable to detention, subject to restoration after the termination of war without compensation, or to requisition, on payment of compensation. It should be observed that the exclusion of "potential auxiliary cruisers" from the protection of the Convention seriously limited its applicability from the very start. Even then, the only strict obligation laid down by the Convention was that which forbade confiscation.
the Convention, however. In addition, among those states ratifying Hague VI several did so only after attaching certain reservations. During World War I observance of the Convention by the contracting parties was far from uniform and in consequence of this failure to secure "either uniformity or liberality of treatment" Great Britain denounced Hague VI in 1925. Following the outbreak of hostilities in 1939 neither Great Britain nor France granted any days of grace to enemy merchant vessels caught in their ports. Instead, such vessels as were found in Allied ports—or encountered upon the high seas—were held liable to seizure and subsequent confiscation.

At the present time, it must be considered very doubtful that in the absence of specific obligations imposed by treaty a belligerent is required by customary international law to accord any favorable treatment—in the form of exemption from seizure and confiscation—to enemy merchant vessels found in its ports at the commencement of hostilities. Despite the

89 The failure of the United States to ratify the Convention was not due to a lack of support for its purposes. On the contrary, one of the chief complaints made by this country was that the Convention did not provide sufficient guarantee that enemy vessels would be permitted to depart from the ports of the other belligerent upon the outbreak of war.

90 A review of World War I practice is given by A. P. Higgins, "Enemy Ships in Port at the Outbreak of War," B. Y. I. L., 3 (1923-24), pp. 55-78. Of the British denunciation of Hague VI, Colombos (op. cit., p. 138) writes that: "This development in the law is to be regretted. The provisions contained in the Hague Convention appear substantially just and equitable and deserve to be followed on their own merits." The British decision to denounce Hague VI was very largely a result of the decision rendered by the Judicial Committee of the Privy Council in The Blonde and Other Vessels, [1921]-(10 Lloyds Prize Cases, pp. 248 ff.), where Lord Sumner held that during the war of 1914-18 Great Britain had acted on the basis that Hague Convention VI was in effect. This being so, Article 2 of the Convention—forbidding confiscation—was regarded as obligatory even though Article 1—concerning the granting of days of grace—was considered as only optional. ("Ships which find themselves at the outbreak of war in an enemy port shall in no case be condemned if they are not allowed to leave, or if they unavoidably overstay their days of grace, but it would be better that they always be allowed to leave, with or without days of grace.") Thus the argument that the prohibition in Hague VI against confiscation was dependent upon a prior reciprocal agreement between belligerents on the days of grace to be granted enemy merchant vessels in which to depart from belligerent ports was expressly rejected. Such an agreement had not been reached between Great Britain and Germany in 1914 and consequently each state detained the merchant vessels of the other. The effect of the decision in The Blonde was to require the British Government either to restore the detained German vessels to their owners or to requisition the vessels on payment of compensation.

91 France denounced Hague VI in 1939. Other allied states, e. g., Canada, followed the same pattern and seized all German ships either found in their ports or encountered upon the high seas without granting any period of grace. Nor did these states refrain from confiscating the seized vessels. However, it is true that a number of belligerents retained the provisions of Hague Convention VI in their prize codes. Thus Article 18 of the German Prize Law Code of 1939 declared that the provisions of the Convention "remain unaffected." But Article 18 was interpreted as being conditioned only upon reciprocal treatment by Germany's enemies. Italy also retained the provisions of Hague VI in her prize code of 1938 and offered to apply these provisions upon becoming a belligerent in 1940, though nothing came of the offer.
fairly widespread practice of belligerents in the years prior to World War I of granting either a period of grace or, in any event, exemption from confiscation, it is difficult to accept the occasional assertion that this practice had hardened into a rule of customary law by 1914.\(^{92}\) A belligerent is, of course, at liberty to refrain from resorting to its customary right to confiscate enemy vessels found in its ports at the commencement of hostilities, and to date the United States has chosen to follow the policy of requisitioning such vessels on payment of compensation.\(^{93}\)

\(^{92}\) This was also the opinion of the British Prize Court in *The Pomona* [1942], where Lord Merriman held that in the absence of reciprocal agreement there was no rule of international law which exempts from condemnation an enemy ship found in a belligerent’s port at the outbreak of war. See *Annual Digest and Reports of Public International Law Cases, 1941–42*, Case No. 159, pp. 509–14. The judgment in *The Pomona* rejected the contention put forward by the claimants that the provisions of Hague VI were merely declaratory of established customary rules of international law. This contention, shared by a number of writers, has been considered as receiving some support from the preamble to Hague VI which stated that the protection of operations undertaken in good faith and in process of being carried out before the outbreak of hostilities was “in accordance with modern practice.” Hyde (op. cit., pp. 2045–53), in a review of the subject declares that while there is no obligation to grant a period of grace, in the absence of treaty, “Provision for the detention or requisition on compensation, of enemy vessels in port, in lieu of confiscation, is a mark of respect for private property which should enjoy universal approval.” Judicial opinion in the United States, although in general accord with this view, has nevertheless refrained from declaring that seizure and confiscation would be contrary to customary international law. In *Littlejohn v. United States*, (1926), 270 U. S. 215, p. 225, the Supreme Court stated that: “In the absence of convention every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs.”

With respect to enemy merchant vessels which left their last port of departure before the outbreak of war, and are encountered at sea, there seems little question but that they are liable to seizure and confiscation. Even Hague Convention VI exempted them from confiscation only if “still ignorant that hostilities had broken out.” Developments in communications render such ignorance highly unlikely today.

\(^{93}\) The United States upon becoming a belligerent in 1917 did not grant to enemy merchant vessels any period of grace in which to depart freely from American ports. Nevertheless, this country acted in substantial accord with the injunction contained in Article 2. of Hague Convention VI by refraining from confiscation and by applying instead the principle of requisition. On May 12, 1917, Congress authorized the President to take “immediate possession and title of” any enemy vessel within ports under American jurisdiction, and “through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or otherwise.” A decade later Congressional provision was made, through the Settlement of War Claims Act, for compensating the owners of the requisitioned enemy merchant ships. See Hackworth, op. cit., Vol. VI, pp. 572–6. Also Edwin Borchard, “The German Ship Claims,” *A. J. I. L.*, 25 (1931), pp. 101–7.

During World War II a quite different situation arose owing to the fact that foreign merchant vessels—both belligerent and neutral—lying idle in American ports were forcibly acquired prior to the entrance of the United States in the hostilities. The Idle Foreign Vessels Act, signed by the President on June 6, 1941, authorized the President—until June 30, 1942—to purchase, requisition, charter, requisition the use of, or take over the title to, or the possession of, any foreign merchant vessels lying idle within the jurisdiction of the
less, a policy either of requisition or of detention, while within the discretion of each state, is not demanded by customary international law. Even clearer is the absence of any rules granting either a period of grace or exemption from confiscation to belligerent civil aircraft found in the territory of an enemy upon the outbreak of hostilities.\(^94\)

b. Postal Correspondence

Prior to the conclusion of Hague Convention XI (1907) no general rule existed granting postal correspondence special exemption from seizure. It is true, however, that during the nineteenth century a number of treaties were concluded which provided that in the event of war between the contracting parties the mail boats as well as the postal correspondence of the belligerents were to be regarded as immune from seizure. With respect to the postal correspondence carried on board neutral vessels, there are a number of impressive precedents that can be drawn from nineteenth century practice indicating a widespread disposition toward the granting of special treatment to mails. Not infrequently belligerents exempted neutral mail bags from search; and even when neutral vessels were seized for carriage of contraband the mail on board such vessels was often forwarded unopened.\(^95\)

At the second Hague Conference in 1907 the problem of postal corres-

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\(^94\) Spaight (op. cit., pp. 397-8) is of this opinion, which appears correct.

\(^95\) For a brief review of nineteenth century practice, U. S. Naval War College, International Law Topics, 1906, pp. 88–96. A more extensive review, carried through World War I, is given in U. S. Naval War College, International Law Situations, 1928, pp. 40–72. The case for exempting postal correspondence found on board neutral vessels is obviously a much stronger one—as seen from nineteenth century practice—that is the case for according special treatment to mail found on board enemy vessels. Even so, the opinion that customary law accorded no special exemption to postal correspondence, but instead regarded it in the same manner as other merchandise, is believed to be correct.
Correspondence was subjected to conventional regulation, Articles 1 and 2 of Hague Convention XI providing as follows:

Article 1. The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port.

Article 2. The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.

From a formal point of view it must probably be concluded that these provisions remain binding today upon the parties to Hague Convention XI. On the other hand, it is difficult to avoid the conclusion that the events of the two World Wars have reduced the significance of these provisions almost to a vanishing point. As between belligerents the Convention presupposes that enemy vessels will be seized and not sunk without warning. In both World Wars the destruction of the postal correspondence of belligerents formed only one of the incidental effects of a policy of unrestricted warfare waged against enemy merchant vessels.

As between belligerent and neutral it soon became apparent during the 1914-18 War that the varying interpretations placed upon Article 1 of Hague XI were—for all practical purposes—irreconcilable. In principle,
agreement proved wanting both as to the meaning of "postal correspondence," considered as inviolable, and the construction to be given the phrase "found on the high seas." The initial neutral position, as might be expected, was to insist that postal correspondence be understood to refer to all sealed envelopes, regardless of contents. In turn, the injunction of inviolability was interpreted as forbidding the opening of sealed mails for any reason, an interpretation that would evidently exclude application of the principle of contraband to the mails. Still further, the neutrals contended that the scope of Article I of Hague XI extended inviolability to postal correspondence on board neutral vessels, even after such vessels had been seized and conducted into belligerent ports (and particularly if merely diverted into belligerent ports for the purpose of searching the cargo). In opposition to the foregoing, belligerents insisted that "postal correspondence" did not include contraband materials, and refused to regard letters containing such materials as "genuine" correspondence entitled to receive special protection. Thus bonds, stocks, securities, checks and money orders were considered, among other articles, as constituting contraband merchandise which, if destined to neutral territory, a belligerent had the right to seize even though contained in sealed correspondence. This claim to apply the principle of contraband to the mails was accompanied by the further assertion of the right to search neutral mail bags and the contents contained therein, whether at sea or following diversion to a neutral port.

99 It has always been understood that the inviolability granted to postal correspondence in Hague XI does not extend to parcels or packages sent by parcel post.

The correspondence occasioned between neutral and belligerent—and particularly between the United States and Great Britain—over interference with mails is reviewed in Hackworth, op. cit., Vol. VI, pp. 608-22. As judged by both the actual wording of Article I of Hague XI, and the known intention of the drafters, it is difficult to deny the force of the initial neutral position. Quite briefly, the inviolability of postal correspondence guaranteed in Article I meant that sealed envelopes could neither be opened nor their contents seized nor censored in any way by belligerents. It may of course be asked why prospective belligerents were prepared to grant such a substantial concession for future conflicts. In part, the answer is to be found in the fact that the attention of the drafters was concentrated largely upon the effect that new means of communication would have upon the continued importance of the mails in transmitting intelligence of value to an enemy. It was thought that the importance of mails as a means for conveying intelligence would have upon the continued importance of the mails in transmitting intelligence of value to an enemy. It was thought that the importance of mails as a means for conveying contraband merchandise of value to an enemy. But despite these assumptions, which later proved to be largely misplaced, Article I must be seen as part of the compromise between the conflicting interests of neutral and belligerent—and the devitalization of Article I of Hague XI must therefore be seen as only one rather limited development in the much larger process whereby belligerents have severely restricted, if not invalidated entirely, traditional neutral rights. Thus it is, at best, misleading to argue, as did the Inter-American Neutrality Committee in its recommendation of May 31, 1940 on the inviolability of postal correspondence (A. J. I. L., 34 (1940), Supp., pp. 135-9), that by Article I of Hague XI the recognition of the inviolability of postal correspondence "was made necessary in order to give the greatest possible scope to the right of immunity and privacy of postal communications, even in time of war, and in view of the grave injuries resulting from the examination of corre-
Whatever the respective merits of these opposed positions, both World Wars provide abundant evidence that belligerents are not prepared—in any event—to exempt mails from the application of the principle of contraband. Nor, for that matter, have neutrals been either united or consistent in adhering to their initial position that the inviolability of mails must be interpreted as forbidding the opening of sealed envelopes whatever the contents of the latter. But once it is admitted that the principle of contraband applies to postal correspondence it is obviously incongruous to deny belligerents the right to open and scrutinize mail whose ultimate destination may be to enemy territory; for without this right there can be no meaningful application of the principle of contraband to the mails. No less incongruous is the recognition of the belligerent right to divert neutral merchant vessels into port in order to conduct search for contraband among the cargo and the denial of the same right of diversion for the purpose of screening postal correspondence.

2 As a neutral the United States conceded in 1916 that the principle of contraband was applicable to the mails by declaring that letters containing articles of merchandise—understood to include stocks, bonds, coupons and similar securities, money orders, checks, drafts, notes and other negotiable instruments—were liable to seizure by belligerents.

3 In reply to an American protest of December 22, 1939, that British authorities had removed from American and other neutral ships American mails addressed to neutral countries, and had opened and censored sealed letter mail sent from this country, particularly after having compelled neutral vessels to call at designated British control bases, the British Government declared (January 16, 1940) that “in the case of merchandise, His Majesty’s Government are entitled to ascertain if it is contraband intended for the enemy or whether it possesses an innocent character, and it is impossible to decide whether a sealed letter does or does not contain such merchandise without opening it and ascertaining what the contents are.” cited in Hackworth, op. cit., Vol. VI, pp. 620-1. In commenting upon this exchange Clyde Eagleton has noted that: “If . . . the principle of contraband is to be applied to the mails, it makes little difference whether they are searched upon the high seas or in port. It is not the fact that they have come into port, willingly or unwillingly, and therefore under British jurisdiction, which gives to the British Government the claim to search mails; it is the admission that mails may have a contraband character which gives the authority to search, whether upon the high seas or in port, and to seize contraband contained found therein . . . At this point, the debate ceases to be one of inviolability of mails; it now becomes part of the controversy over visit, search, and seizure of contraband goods.” “Interference With American Mails,” A. J. I. L., 34 (1940), pp. 317-9. Eagleton’s conclusions are reflected in Hyde’s (op. cit., p. 1979) comment that the “real basis” of the American complaint “was the British action that caused mails on board of neutral ships, and having an immediate or direct neutral destination, to be carried
Nor has the belligerent’s position been limited only to the assertion of a right to prevent contraband merchandise from being sent to an enemy through the mails. The much broader claim has been made of a right to screen all postal correspondence carried on board neutral vessels entering belligerent ports—whether voluntarily or involuntarily—with a view to the removal of any materials or information which is judged as providing some assistance to an enemy in the conduct of war. Goods of enemy origin as well as of enemy destination have been seized. Information destined to an enemy and instructions sent out by the latter to its agents abroad have been censored. In these circumstances, it need hardly be pointed out that the “inviolability” of postal correspondence, even though still proclaimed by belligerents, no longer retains its former meaning. In effect, postal correspondence has been made subject— at least when judged into belligerent ports and there be subjected to a rigid censorship. It was the abuse of a belligerent privilege revealed in the method by which it was applied which was the chief ground for objection. On this view, the issue is no longer the “inviolability” of mails but the methods—e. g., diversion into port—a belligerent uses in preventing “letter mail that might by reason of its contents or character be fairly assimilated to contraband from reaching the enemy.”

On diversion of neutral vessels generally, together with related problems, see pp. 338-44. Thus in the “long distance” blockades imposed against Germany in both World Wars (see pp. 305 ff.) Great Britain and her Allies made liable to detention (and later to seizure) all goods of enemy origin. In practice, the control exercised over enemy exports was employed as a means for screening outgoing postal correspondence. During World War I the “blockade” system—whose legal basis rested upon the right of reprisal—finally required all neutral merchant vessels sailing to or from neutral ports providing access to enemy territory to call at British or Allied ports. Failure to do so resulted in a liability to seizure. Once in British ports the mail carried on board was subject to censorship. During World War II, the Order in Council of July 31, 1940 (see pp. 313-5) resulted in an even tighter control over postal correspondence carried to or from neutral ports providing access to the enemy. In consequence, many neutral vessels ceased carrying any mails, and for those vessels that continued to do so “mailcerts” were introduced as a part of the navicert system.

It should be noted that the term “censorship,” frequently used in diplomatic interchanges as well as in academic discussions over belligerent interference with mails, has partially confused the relevant issues due to its ambiguous use. More often than not it has been used as a general term to indicate any form of belligerent interference with mails regardless of the specific objective. But belligerent censorship of mails in order to prevent the import to, or export from, an enemy of merchandise is a quite different matter than the exercise of censorship in order to prevent the enemy transmission of information of a political or military nature. In practice, belligerents have sought to prevent the latter as well as the former, and in the British reply of January 16, 1940 to the American note of December 22, 1939, regarding interference with mails on neutral ships, it was observed: “Quite apart from transmission of contraband, the possibility must be taken into account of the use of the letter post by Germany to transmit military intelligence, to promote sabotage and to carry on other hostile acts. It is in accordance with international law for belligerents to prevent intelligence reaching the enemy which might assist them in hostile operations.” Cited in Hackworth, op. cit., Vol. VI, p. 621. As judged by Article 1 of Hague XI this last contention has an even more doubtful basis than the claim to apply the principle of contraband to the mails. For while the drafters of Hague XI perhaps paid insufficient attention to the possibilities of using the mails for contraband carriage, a good deal of attention was devoted to the possibility of using the ordinary mails for conveying
by recent practice—to practically the same restrictions that belligerents have imposed upon neutral commerce generally in time of war.6

c. Coastal Fishing Boats and Small Boats Engaged in Local Coastal Trade

Article 3 of Hague XI provides that:

Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.

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

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

The exemption from seizure accorded to coastal fishing boats is founded upon the conviction that considerations of humanity warrant the absence of belligerent interference with a class of men normally felt to be both inoffensive and of no material importance to the military effort of an enemy. Their immunity from seizure, though provided for by conventional rule, has been considered by many states—including the United States7—as resting upon well established custom. Whether or not a vessel falls within this exempted category depends primarily upon the use to which it is put rather than to its size or mode of propulsion. Thus it is clear that immunity from seizure does not extend to vessels engaged in deep sea fishing or to vessels which do not bring fish fresh to the market.

military intelligence. Despite this consideration it was decided to exempt mails from seizure, even though containing military intelligence. The British claim, therefore, cannot possibly find support in the “international law” of Hague XI. Instead, it is an open disavowal of the continued validity, in this respect, of the clear intent of Hague XI. Nevertheless, Great Britain (as well as other belligerents) sought to, and did, exercise this right of censorship over mails on neutral vessels that entered (whether voluntarily or involuntarily) British territorial waters and ports.

6 In this general connection brief attention may be directed to another form of neutral intercourse with a belligerent—i.e., intercourse through submarine telegraph cables. The comparison frequently drawn between neutral mail boats and cables is, as Higgins and Colombos (op. cit., p. 380) point out, hardly sound. The only conventional rule on the subject is that contained in Article 54 of the Regulations attached to Hague IV (1907), which reads: “Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.” It will be readily apparent that the severance of an enemy’s communications forms an essential object in the conduct of hostilities, and belligerent practice is clear that cables connecting two points in enemy territory, or connecting the territory of two enemies, may be severed. So also the cables connecting enemy and neutral territory, though only in case of necessity. On the other hand, cables connecting two points in neutral territory must be held inviolable. See Law of Naval Warfare, Article 52b.

7 The Supreme Court in the Paquete Habana (1900), 175 U. S. 677, considered the immunity of coastal fishing boats as based upon custom—though it was made clear that the rule applied only to coastal fishing vessels and not to those engaged in deep sea fishing.
The test is that the fishing should serve a purely local need, and that it must not be deep sea fishing. On the other hand, there is no indication that coastal fishing boats must remain strictly within territorial waters or that they must refrain from fishing off the coasts of third states (the latter so permitting).

Similarly, in the case of boats engaged in coastal navigation it is local trade only that is permitted by Hague XI. Steamers engaged in general coastal trade, i.e., cabotage, are not accorded immunity from seizure. Furthermore, with respect to this latter category of boats it is not only the character of the trade that is restricted but the size of the boats as well. The Convention does not accord protection to large boats even though engaged only in local trade.

The special protection granted to coastal fishing boats and small boats engaged in local coastal trade has always been dependent upon an abstention from any kind of participation in the conduct of hostilities. In addition, it is only reasonable that belligerent naval forces operating in the vicinity of these craft should be able to insure their security by requiring such vessels and boats to conform to the regulations of the belligerent naval commander operating in the area.8 The movements of such vessels and boats may be restricted as military operations require, and immediate identification must be provided upon demand. The necessity for emphasizing these latter points is due to the ubiquity of radio-telephonic apparatus in even the smallest of boats and the ease with which coastal craft may be integrated into the intelligence network of an enemy. Indeed, recent experience points to the increasing use by belligerents of coastal craft for intelligence purposes. It should be clear that this development can only result in an increased liability to seizure or destruction of vessels and boats formerly exempt from such treatment.

d. Vessels Engaged in Missions of a Religious, Scientific or Philanthropic Character

Article 4 of Hague XI states that exemption from capture is to be accorded "vessels charged with religious, scientific, or philanthropic missions."9 The value of this provision has been found to be extremely limited in practice. During World War I the question arose on several occasions as to the definition of a "philanthropic mission," the conduct of which would exempt an enemy vessel from seizure.10 In the absence of special

8 See Law of Naval Warfare, Article 503c (6).
9 See Law of Naval Warfare, Article 503c (3).
10 So far as vessels charged with religious or scientific missions are concerned the present significance of these exemptions is practically negligible. It is difficult to conceive of a "scientific" mission belligerents would now be prepared to accept and grant immunity to—except on the basis of a specific agreement. Earlier scientific missions generally were voyages of discovery, and on several occasions such missions were granted special protection. Thus Article 13 of the U. S. Naval War Code of 1900 exempted from capture public vessels of the enemy engaged in "scientific pursuits, in voyages of discovery . . ." In the Naval War
agreement on specific voyages, and the consequent issuance of safe conduct passes, belligerents indicated that they were prepared to allow only the most narrow of interpretations. This has meant, however, that the basis for the immunity granted enemy vessels performing humanitarian functions has not depended primarily upon the general rule contained in Article 4 of Hague XI but—in almost every instance—upon the express agreement of the belligerents.

c. Hospital Ships, Medical Transports and Medical Aircraft

The 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces At Sea provides that belligerent hospital ships, medical transports and medical aircraft are, when properly marked and duly notified to the other belligerents, immune from either attack or seizure. A more detailed analysis of the provisions of this recently concluded Convention, which replaces for the Contracting Parties Hague Convention X (1907), is presented in later pages.

f. Cartel Ships

Ordinarily the term cartel is used to indicate an agreement concluded between belligerents for the purpose of regulating the exchange of prisoners

College commentary to Article 13 of the Code the opinion is expressed that private vessels engaged in religious, scientific or philanthropic missions are liable to capture: "The difficulty of responsible control is so great that these (private) vessels should be exempt only by grace of the commander in the immediate region, not by general rule." U. S. Naval War College, International Law Discussions, 1903, pp. 51-2. But Article 4 of Hague XI does not require that vessels so exempted be of a public character, and it is the general opinion that the immunity provided for extends either to public or to private vessels.

Thus the transport of women and children refugees by an enemy vessel has not been construed as a philanthropic mission which, in the absence of a safe conduct pass, may result in exemption from seizure. Nor has the carrying of supplies for the purpose of succoring starving women and children. See Hackworth, op. cit., Vol. VI, pp. 543-6.

Of course, the source of the special agreement may be a convention to which the belligerents are contracting parties. Thus the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides in Article 59 that an occupying power shall agree to relief schemes on behalf of the population of an occupied territory that is inadequately supplied, and shall facilitate such schemes by all the means at its disposal. Accordingly, the Contracting Parties to the Convention are obligated to permit the free passage of consignments of foodstuffs, medical supplies and clothing to occupied territory and to guarantee their protection. Article 59 further declares that a state "granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy populations and are not to be used for the benefit of the Occupying Powers." It will be apparent that although the Convention on the Protection of Civilian Persons establishes a general obligation for the Contracting Parties to grant exemption to vessels carrying those supplies noted above, and for the relief of occupied populations, the immunity granted to specific voyages must rest upon prior and express agreement between the belligerents (and—in all probability—upon the issuance of safe conduct passes).

See pp. 123-34. The practice of belligerents during World War II, while still governed by Hague X (1907), is also discussed in these later pages.
of war. In a broader sense, however, the term has been used to refer to agreements permitting various kinds of non-hostile relations between belligerents, e. g., the exchange of official communications.\(^{14}\) Vessels (and aircraft) engaged in carrying out the terms of such agreements, and particularly when engaged in the carriage of prisoners of war, must be regarded as inviolable.\(^{15}\) But this inviolability is to be guaranteed only so long as cartel vessels (and aircraft) confine themselves strictly to those services for which they have been engaged. According to custom they must not carry any cargo—unless such carriage has been expressly permitted. Nor can they carry ammunition or other instruments of war. It is also customary to furnish cartel vessels with documents testifying to their character and to the missions upon which they are engaged.

In addition to cartel vessels (and aircraft) belligerents may agree to extend safe conduct passes to enemy vessels (and aircraft) in order that the latter may perform any of various services bearing a humanitarian character. Here, as elsewhere, exemption from either attack or seizure is guaranteed only so long as the vessel (or aircraft) strictly confines itself to the performance of those functions for which it has been engaged.\(^{16}\)

\(^{14}\) "In its narrower sense a cartel is an agreement entered into by belligerents for the exchange of prisoners of war. In its broader sense it is any convention concluded between belligerents for the purpose of arranging or regulating certain kinds of non-hostile intercourse otherwise prohibited by reason of the existence of the war. Both parties to a cartel are in honor bound to observe its provisions with the most scrupulous care, but it is voidable by either party upon definite proof that it has been intentionally violated in an important particular by the other party." U. S. Army Rules of Land Warfare, paragraph 469.

\(^{15}\) And this inviolability extends to return voyages or flights as well as to voyages or flights to ports or airfields in which the duties of a cartel vessel or aircraft are to be taken up.

\(^{16}\) Law of Naval Warfare, Article 503c distinguishes among the following categories of enemy vessels and aircraft exempt from destruction or capture:

1. Cartel vessels and aircraft, i. e. vessels and aircraft designated for and engaged in the exchange of prisoners.

4. Vessels and aircraft granted safe conduct by prior arrangement between the belligerents.

5. Vessels and aircraft exempt by proclamation, operation plan, order, or other directive."

Whereas the first two categories enumerated (1 and 4) depend upon the prior agreement of the belligerents, the third category (5) does not. A belligerent is, of course, at liberty to grant any exemptions he may desire to vessels or aircraft otherwise subject to either attack or seizure.—The distinction normally drawn between cartel vessels and vessels granted safe conduct passes is not entirely free from obscurity. In either case the immunity of the vessel has as its basis an agreement concluded by the belligerents. It is also true that both categories of vessels are usually provided with special documents testifying to their character and innocent employment. It would appear that the distinction has its basis partly in the fact that cartel vessels are engaged in the performance of particular kinds of missions, and especially in the carriage of exchanged prisoners of war, that they are especially commissioned as cartel ships, and that the services performed generally extend over the period of hostilities and not merely a voyage. On the other hand, vessels may be granted—by prior arrangement—safe conduct passes in order to perform any type of humanitarian service. The period during which the pass is valid may cover only one voyage and return or a number of voyages.

During World War II the incident involving the sinking of the *Awo Maru* illustrated some of the problems involved in the satisfactory execution of agreements, concluded between bellig-
g. Enemy Goods Under a Neutral Flag

At the outbreak of hostilities in 1914 the principle that free ships make free goods had been accepted by the overwhelming majority of states for well over a half a century. Article 2 of the Declaration of Paris of 1856 had provided that “the neutral flag covers enemy goods, with the exception of contraband of war.” The rule constituted the most important exceptions, providing for the safe conduct of enemy vessels. By prior agreement the Japanese vessel Awa Maru had been designated to carry relief supplies to Allied nationals held in Japanese custody and for this purpose had been granted Allied safe conduct. On the evening of April 1, 1945, the Awa Maru was torpedoed and sunk by an American submarine while returning from a voyage to Hong Kong, Singapore and other ports, on which relief supplies furnished by the Allied Governments had been carried as part of the cargo. At the time of the sinking the Awa Maru was carrying a large number of Japanese nationals evacuated from danger zones, and although the United States questioned the propriety of utilizing the ship for this purpose the point was not pressed since Japan had earlier notified this country that the Awa Maru could not be used for the sole purpose of carrying relief supplies. Japan charged that the sinking represented a deliberate violation of the agreement and demanded that the United States apologize to the Japanese Government for the sinking, punish those responsible, and indemnify the Japanese Government for the loss incurred. In reply, this Government categorically denied that the sinking had been either willful or deliberate, though it acknowledged—following an investigation—responsibility for the sinking and expressed its “deep regret.” Disciplinary action was promised against the commanding officer of the submarine, and a promise of indemnification was deferred until the termination of hostilities. Later, however, the United States offered to replace the Awa Maru, not as indemnification but in order that there might be no impediment placed in the way of shipping and distributing relief supplies to Allied nationals. For the diplomatic correspondence on the Awa Maru sinking, see U. S. Naval War College, International Law Documents, 1941-45, pp. 125-38. The incident of the Awa Maru is indicative of the responsibility a belligerent must accept in guaranteeing safe conduct to enemy vessels. Although the Awa Maru had deviated slightly from her prescribed course and the visibility was low (though later investigation indicated she was showing the prescribed lights), it was clearly the burden of the commander of the American submarine to establish the identity of the vessel prior to attacking it. The failure to have done so placed responsibility for the incident squarely upon the United States. It may also be observed, however, that the sinking of the Awa Maru is suggestive of the possible consequences following upon the waging of unrestricted submarine (or aerial) warfare.

The other provisions of the Declaration of Paris are dealt with elsewhere. Article 1, abolishing privateering, is considered in connection with the naval forces of belligerents, see pp. 40-3. Article 3, declaring that neutral goods—contraband excepted—are not liable to capture under the enemy’s flag is referred to in earlier pages (85-6) of this chapter. Article 4, requiring that blockades must be effective in order to be binding, is discussed in Chapter X, pp. 288-9. Prior to the Declaration of Paris the principle that free ships make free goods had not enjoyed general acceptance. Great Britain, in particular, had never accepted it, maintaining instead the position that enemy goods were liable to seizure if found under a neutral flag. France, on the other hand, followed the practice of condemning neutral goods if found under an enemy flag. During the Crimean War both states abandoned their previous practices, though intending this only for the hostilities then being carried out. However, in the years immediately following the Crimean War the pressure of neutral interests became very strong and led to the Declaration of Paris. In effect, the Declaration represented a far reaching concession to neutrals, and British writers never tire in pointing out that from the viewpoint of British interests the Declaration represented a bad bargain. In surrendering the right as a belligerent to seize enemy goods even though under a neutral flag Great Britain received
tion to the principle that a belligerent may seize and condemn enemy goods found at sea. Indeed, the significance once attached in many quarters to this acceptance of the principle of "free ships, free goods" was such that it was used in support of the argument that the belligerent right to seize and confiscate enemy property at sea ought to be generally abolished, the expectation being that a belligerent could—in any event—transfer his trade to neutral vessels and thereby secure immunity from seizure. Given these circumstances the advantage enjoyed by belligerents in retaining the right to seize enemy property at sea was considered to be substantially diminished.

This expectation has never materialized, however. In both World Wars the Declaration of Paris, though remaining formally binding upon the belligerents, was nevertheless rendered ineffective—largely through the resort to reprisal measures. But even apart from reprisals belligerents sought to reduce the possible scope of application of the principle that free ships make free goods. Thus belligerent prize courts have interpreted Article 2 of the Declaration of Paris as failing to provide protection to enemy goods when found under the flag of the captor state or of his allies. Further, immunity from seizure has been extended to enemy goods only while on board the neutral vessel; once unloaded, whether afloat or on shore, liability to seizure applies. Nor have goods transhipped from an enemy to a neutral vessel been regarded as entitled to the protection afforded by the Declaration of Paris.

Still more important inroads upon Article 2 have followed from the nothing comparable in return. Article 1 of the Declaration did provide for the abolition of privateering—a practice from which Great Britain had seriously suffered during the Napoleonic Wars—but by 1856 privateering was already on its way out. Even then, the small advantage accruing to Great Britain was further reduced by Hague Convention VII (1907), allowing as it did the conversion of merchant vessels into warships though failing clearly to forbid such conversion on the high seas. The United States refused formally to adhere to the Declaration of Paris—for reasons now no longer relevant—though in practice this country followed the provisions of that instrument, and in 1914 considered them binding upon all belligerents.—See H. W. Malkin, "The Inner History of the Declaration of Paris," B. Y. I. L., 8 (1927), pp. 1-44; and for a brief summary of the American attitude both prior to and following the Declaration, see Hyde, op. cit., pp. 2041-5.

18 Of relatively minor significance is the practice, generally regarded as forming a part of customary law, of restoring to master and crew of seized enemy vessels their personal effects.

19 Thus in 1905 the Naval War College concluded: "The Declaration of Paris of 1856 . . . has made possible the transfer of a large portion of the enemy sea commerce to neutral flag in time of war. The absence of risk under neutral flag will also make possible cheaper rates under neutral flags. Under ordinary economic laws commerce would thus go to neutrals in time of war." U. S. Naval War College, International Law Topics, 1905, p. 18. This conclusion was offered in support of the recommendation that "innocent enemy goods and ships"—i. e., goods not constituting contraband of war and ships not engaged either in contraband carriage or blockade breach—be made immune from capture.

20 See pp. 256 ff., for a review of these reprisal measures and their effect upon Article 2 of the Declaration of Paris.
changes that have since occurred in the law of contraband. Article 2 specifically deprives enemy goods of the protection otherwise afforded by the neutral flag if such goods have the character of contraband of war. Aside from certain peripheral questions arising in the interpretation of this exception the main intent was simply to provide that the "neutral flag covers enemy's goods, with the exception of such as would, if neutral, be contraband of war." 21 In practice, the importance of this exception must be found to be proportionate to the degree to which belligerents have expanded the list of goods regarded as susceptible of use in war as well as the destination required of goods in order to justify their seizure and condemnation as contraband. Modern developments in the law of contraband are dealt with elsewhere; 22 here it is sufficient to note that these developments have operated drastically to reduce the significance formerly attributed to Article 2 of the Declaration of Paris. 23

Formally, the Declaration of Paris may be regarded as retaining its validity even today. In neither the decisions of belligerent prize courts nor the policies expressed by belligerent governments is there to be found evidence of a formal abandonment of that instrument. 24 In practice, how-

21 U. S. Naval War College, International Law Topics, 1905, p. 118. This is, in fact, the only plausible interpretation since, as Stone (op. cit., p. 467) points out: "Strictly, the doctrine of contraband is inapplicable to enemy goods found at sea, since these are in any case confiscable as enemy goods. Presumably then the term refers to goods which, if owned by a neutral or allied trader would be contraband." The same writer further points out (p. 468) that although Article 2 expressly excepts only contraband from the immunity otherwise granted enemy goods covered by a neutral flag, "it is difficult to see why blockade-running goods should be immune when contraband is not; and the contrary seems to be generally assumed."—Belligerent prize courts have also applied the so-called doctrine of infection (see p. 276 (n)) to enemy goods carried in neutral bottoms. Thus goods otherwise immune from seizure have been held liable to condemnation if belonging to the same enemy owner of contraband goods and carried on the same neutral vessel along with the contraband cargo.

22 See, generally, Chapter IX.

23 At least so far as the import of goods to an enemy state under a neutral flag is affected. With respect to enemy exports under neutral flags, belligerents have sought to rely primarily upon reprisal measures (see pp. 296 ff.).—Still other questions have arisen in the interpretation of Article 2, which deserve some attention. Although it is clear that the neutral shipowner as well as the private enemy owner of goods were intended to benefit from Article 2, it is not at all clear whether this benefit is to extend to goods owned by the enemy state. The Declaration itself speaks only of enemy goods (la marchandise ennemie) without further qualification as to private or public ownership. Nevertheless, the purpose of the provision—and of the Declaration as a whole—was to apply to the private property of an enemy and to private transactions. It has therefore been contended that goods owned either in whole or in part by the enemy state need not be given the protection of the Declaration. See H. A. Smith, "The Declaration of Paris in Modern War," Law Quarterly Review, 55 (1939), pp. 237-49. In principle, this position appears sound, though the practice of states affords no sufficient indication of the attitude taken on this point. Nor is there likely to be any further development in this respect, given the other belligerent measures which have practically done away with the protection granted by Article 2.

24 None of the prize codes issued by belligerents in the 1939-45 war denied this continued formal validity. And see Article 633c, Law of Naval Warfare.
ever, Article 2 of the Declaration has been deprived of material effect upon
the conduct of hostilities by the interpretation given it by the belligerents,
by the changes wrought in the law of contraband, and by its subordination
to belligerent reprisal measures. It may of course be argued that these
latter measures provide no sufficient reason for questioning the continued
significance of Article 2; that, on the contrary, the fact that belligerents
felt compelled to resort to reprisals in order to override the rule that free
ships make free goods itself testifies to its continued validity—and signifi­
cance. As already observed, the merit of this particular argument—while
not to be dismissed—ought not to be overestimated. It would, in fact, be
much nearer the mark to state that in departing from Article 2 of the
Declaration of Paris through the device of “reprisal measures” taken
against allegedly unlawful behavior of an opponent belligerents found a
ready instrument for preventing what they were in any event determined
to prevent—if need be by the formal denunciation of the Declaration. In
a word, the present significance of the Declaration of Paris in general, and
Article 2 of that instrument in particular, must be further assessed in the
light of the common belligerent determination to destroy the whole of an
enemy’s seaborne trade, whether carried in enemy or neutral bottoms.25

3. The Conduct of Seizure

The seizure—or capture 26—of enemy merchant vessels as prize, being a
hostile operation exercisable only during the existence of a state of war,27

25 For further reflections on this point, see pp. 2.84-7, 315-7.
26 For further observations on the use of the terms “capture” and “seizure,” see p. 105 (n).
27 It remains the prevailing consensus of states, prize courts and writers on the law of war
that the seizure of enemy vessels and goods as lawful prize (and, of course, the right of seizure
as exercised against neutral vessels and cargoes, see pp. 332 ff.) can only be exercised during a
formal state of war and not during a period of armed conflict in which the parties involved do
not admit—either explicitly or implicitly—that war as such exists. To this extent the law of
naval warfare—at least so far as the right of prize is concerned—must be excempted from the
more recent trend, noted in an earlier chapter (see pp. 2.3-5), of applying the law of war to
situations of armed conflict held—for varying reasons—not to constitute a state of war.
(Though it may be noted that during the period of hostility (1947-48) between certain Arab
states and Israel, Egypt exercised the right of seizure and established a prize court to pass upon
the validity of maritime captures. At the time Israel was not considered as constituting a
state in the sense of international law.)

Even so, there is some question as to the period in which the right of prize is applicable.
Its starting point may be taken as from the time a state declares war. But a declaration of
war may be—and occasionally has been—made retroactive, though such retroactive declara­
tions may prove to be only a device whereby a state resorts to an “anticipatory embargo,”
in substance if not in form. Still further, it is in all cases true that in the absence of express
treaty provision to the contrary the seizure of enemy property after the conclusion of peace
is forbidden (though the decisions of prize courts upon vessels and goods seized prior to this
time are valid). Some difficulty, and uncertainty, does arise, however, with respect to
the effect of a general armistice upon the right of prize. In principle, the conclusion of an
armistice seems to have the effect of suspending the right of prize unless the armistice agree-
is forbidden within neutral jurisdiction. But apart from the inviolability of neutral jurisdiction—enemy property may—if not accorded special protection—be seized anywhere upon the high seas, within the territorial waters, harbors and ports of either the captor or the enemy state, and even upon rivers, inland seas or lakes. The subjects of the right of seizure are normally the units which comprise the naval forces (i.e., warships and military aircraft) of belligerents, although exceptionally the seizure of enemy vessels and cargoes may be undertaken by the civil authorities of a belligerent and even by private individuals.

The act of seizure itself consists essentially in the taking of effective control over an enemy vessel; from the time such effective control is exercised the vessel is regarded as seized. In the past, the effective control required was normally accomplished through the sending of a prize crew on board the captured enemy vessel following visit and search. In the circumstances presently characterizing the conduct of warfare at sea this procedure must frequently prove impracticable, however, and there is nothing to prevent the captor from seizing and maintaining effective control through other methods. There is no legal requirement that the act of seizure be preceded by the visit and search of the enemy merchant

ment itself provides to the contrary. During World War I the armistice of November 11, 1918 declared that the so-called "blockade" of Germany continued in force and that German merchant vessels met at sea remained liable to seizure. See Garner, op. cit., pp. 204-6. Thus the law of prize—both in its application to enemy as well as to neutral vessels—remained in effect as far as the Allies were concerned. Germany, on the other hand, was required not only to renounce the right of seizure but to release all neutral vessels already seized. World War II practice, in this respect quite varied, is reviewed by S. W. D. Rowson, op. cit., pp. 172-4.

28 See pp. 219-23, 259-60 for a discussion of the nature and scope of the prohibition against resorting to seizure—or to visit and search—within neutral jurisdiction.

29 "The persons effecting a capture may in fact belong to the military, naval or other public service, or they may be private citizens. They may even be occupants of the ship that is seized. Thus the crew of a captured vessel, in charge of a prize crew of inferior strength, may rescue the ship from those asserting control over it, and so capture it. The work of capture, save when such action takes the form of rescue by occupants of a captured ship, or is the consequence of resistance to capture, should be confined to the public, and preferably the naval forces of a belligerent." Hyde, op. cit., p. 2023.

30 As to what constitutes capture the most frequently cited statement is that given in the judgment of the Judicial Committee of the Privy Council in The Pellworm: "In principle it would seem that capture consists in compelling the vessel captured to conform to the captor's will. When that is done deditio is complete, even though there may be on the part of the prize an intention to seize an opportunity of escape, should it present itself. Submission must be judged by action or by abstention from action; it cannot depend on mere intention, though proof of actual intention to evade capture may be evidence that acts in themselves presenting an appearance of submission were ambiguous and did not result in a completed capture. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary." The Pellworm and Other Ships [1920], 9 Lloyds Prize Cases, p. 175. In this instance it was decided that hauling down the flag did not result in capture unless the enemy merchant vessel actually submitted to the captor's will. 103
vessel, although the contrary opinion still finds frequent expression. Nor is it necessary to send a prize crew on board. Instead, enemy vessels may simply be ordered to proceed under escort of a belligerent warship, or belligerent military aircraft, to one of the belligerent’s ports or to the port of an ally.

a. Destruction of Enemy Prizes

In a general sense the act of seizure in naval warfare, and hence the effects of seizure, may be considered in relation to all the vessels and goods of an enemy, whether public or private in character. Although the warships of an enemy are always liable to attack and destruction, they may in-

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31 The statements made in the text above raise several points which deserve additional comment. The traditional procedure for effecting seizure had been the same for both enemy and neutral vessels. Visit and search preceded seizure, and the latter was normally effected through sending a prize crew on board the vessel. In the case of enemy vessels armed resistance might well be offered, but in this circumstance the vessel had to accept the consequences of its action. It will be apparent that this traditional procedure can no longer be regarded as wholly compatible with naval warfare as presently conducted, given the dangers presented by armed enemy merchant vessels, submarines and aircraft. (Of course, in the improbable case of belligerent military aircraft attempting seizure of enemy vessels it is normally absurd even to contemplate visit and search at sea, let alone to provide prize crews.)—It is entirely doubtful, though, whether this traditional procedure was ever strictly required. The purpose of visit and search has always been—in principle—to determine whether sufficient cause for seizure exists. In the case of enemy vessels such cause will always exist unless the vessel falls in one of the categories granted special protection. In the case of neutral vessels the matter is admittedly different since the latter are liable to seizure only if engaged in certain acts (contraband carriage and blockade breach); and the seizure of neutral vessels without sufficient cause gives rise to a liability of the captor for losses incurred by the owners of the vessel as a result of wrongful seizure. But certainly the seizure of an enemy vessel or of a neutral vessel for sufficient cause has never been questioned by prize courts simply because not preceded by visit and search. Nor have neutrals complained if seizure was not preceded by visit and search, so long as legitimate cause for the seizure of a neutral vessel could later be established in a court of prize. Besides, if belligerents wish to take the risk of illegal seizure they may clearly do so. See, generally, U.S. Naval War College, International Law Situations, 1930, pp. 25 ff.—From a rather abstract point of view, therefore, it may be said that visit and search forms no part of the act of seizing enemy merchant vessels, such vessels always being liable to seizure. From a practical point of view, visit and search may of course prove necessary if positive identification of enemy character cannot be made by other methods. See Law of Naval Warfare, Article 502a. In the main, however, visit and search may properly be regarded as a procedure relevant to the seizure of neutral merchant vessels and as such is considered in a later chapter (Chapter XII).

32 In the case of enemy merchantmen, readily identified as such, the scope of action permitted to belligerent military aircraft is certainly no less than that granted to belligerent warships. The right of the latter to seize enemy vessels without prior visit and search must be accorded equally to belligerent military aircraft. On the quite different question of the diversion of neutral merchant vessels by belligerent military aircraft, see pp. 342–3.

33 Still further, the belligerent may compel the enemy prize—if need be by measures of force—to accede to such orders as are given her. In the event a prize crew is sent on board the prize the master and crew may be requested to assist the captor, although they cannot be compelled to do so. The act of seizure is signified by ordering the captured enemy vessel to lower her flag, the captor’s flag being flown at the usual place (peak or staff) over the enemy flag.—On the ultimate disposition of the officers and crews of captured enemy merchant vessels, see pp. 311–6.
stead be captured. Where enemy warships are captured title to such vessels immediately vests entirely in the captor state by virtue of the fact of capture.\textsuperscript{34} In this respect, however, the consequences following upon the taking of effective control over an enemy warship differ from the consequences following upon the seizure of privately owned enemy merchant vessels. Title to the latter does not finally vest in the captor state until the vessel has been brought before a prize court and duly condemned as lawful prize.\textsuperscript{35} In the case of cargo carried on board seized enemy merchant vessels the need for adjudication is clearer still, since part of the cargo may well be owned by neutrals.\textsuperscript{36} For these reasons, among others, it

\textsuperscript{34} Law of Naval Warfare, Article 503a (2).

\textsuperscript{35} Simply stated, the function of a prize court is to pass upon or to confirm the validity of all maritime captures, and title to the privately owned vessels or goods of an enemy (or of a neutral) seized in prize does not finally pass to the captor until adjudication by a court of prize. Hence, even if an enemy vessel has been destroyed following capture, adjudication remains necessary. Occasionally, however, it has been contended that as between the belligerents title to privately owned enemy vessels normally vests in the captor state by virtue of the fact of capture. Thus Hyde (op. cit., p. 2383) observes that: "As long as the law of maritime war permits a belligerent to appropriate generally enemy ships and enemy property thereon, both private and public, the State of the captor would seem to be justified in claiming that the fact of capture vests title in itself as against the enemy." (And see Law of Naval Warfare, Chapter 5, note 19.) At the same time Hyde goes on to declare that to establish "an indefeasible title to an enemy prize as against the legitimate claims of neutral States or persons, condemnation is regarded as necessary. This circumstance together with other practical considerations render it highly expedient that enemy prizes should always be made the subject of adjudication with a view to condemnation." This view is clearly a minority one, though, since the prevailing opinion—shared by the great majority of writers and frequently endorsed by prize courts—is that every enemy prize ought to be judged, that a valid title cannot arise simply from the military act of seizure, and that title passes only with the condemning judgment of a court of prize.

\textsuperscript{36} This for the reason that neutral goods—contraband excepted—on enemy ships ordinarily are not liable to condemnation, at least if the neutral owner can clearly establish their innocent character.—Although the distinction drawn above in the text is an old one, and in itself raises no novel questions, there is a certain difficulty—or at least an ambiguity—involving the terminology used to describe acts of varying legal significance and involving different legal consequences. Thus H. A. Smith (The Law and Custom of the Sea, p. 100) criticizes the "indiscriminate" use of the terms "capture" and "seizure," suggesting instead that capture be used "to indicate those cases in which the act of taking control immediately transfers the full legal ownership of that which is taken" (e. g., warships, enemy vessels in the public service and state owned property) and seizure to indicate "these cases in which the act of taking control does not by itself change the ownership, but is merely provisional, the final change of ownership being conditioned on what is called 'condemnation' by a court of prize" (e. g., privately owned enemy vessels and goods, neutral vessels seized for unneutral service, blockade breach and contraband carriage). It must be observed, however, that general usage has been, and will probably continue to be, to use the terms interchangeably. Nor is there any real harm in this so long as it is understood that there is a distinction to be drawn between the appropriation of state owned property—which falls to the captor as legitimate booty of war—and the appropriation of privately owned enemy property—which comes under the right of prize and is therefore governed by the law of prize, including the necessity for adjudication.—In this connection one further point should be noted. The traditional law is clearly based on the assumption that
is considered desirable that—circumstances permitting—enemy merchant vessels once seized should either be sent or conducted into port for adjudication. 37 Occasions frequently arise, however, when the sending of an enemy prize into port proves either impossible or highly inconvenient. The condition of the prize may be such as to prevent her further navigation. The captor may be unable to spare a prize crew and unwilling to conduct the enemy prize into port if such action would thereby interfere with the military operations upon which he is engaged at the time of seizure. Rather than release the prize the practice of belligerents in these—as well as in still other—circumstances has been to resort to the destruction of the vessel and cargo; and—in principle—the belligerent license to destroy enemy prizes in certain circumstances is firmly established in law, despite continued controversy as to the precise nature of the circumstances in which belligerents may resort to destruction. Although the assertion is still made by some writers that the destruction of enemy prizes is permitted only where circumstances render any other course impossible, it now appears reasonably clear that this

warships apart (and certain other limited categories of vessels in the enemy's public service) the vessels and goods of an enemy will be privately owned. But what of publicly owned vessels engaged solely in commercial activities? Is their seizure, as well as the seizure of state owned cargoes, to be regarded as the taking of legitimate booty of war, and therefore outside the law of prize? Or is their seizure to be assimilated to the act of seizing privately owned enemy vessels and goods? Belligerent practice to date hardly furnishes a clear answer in this regard, though on principle the former alternative would appear correct. See, for example, Rowson, op. cit., pp. 175-7. Even so, a clear distinction would still be warranted between the liability of state owned vessels—engaged in commercial activities—to seizure as booty of war and their liability to attack in a manner similar to warships. As already pointed out (see p. 68 (n)), there appears to be no justification for making such vessels liable to attack simply by virtue of their public ownership.—As to the quite different question of the applicability of prize law to neutral state owned vessels and cargoes, see pp. 213-4, 335-6. 37 State practice is equally clear, however, that a belligerent may convert captured enemy merchant vessels to his immediate public use should circumstances so require. In American law the procedure to be observed when sending in enemy and neutral prizes for adjudication is set forth in the text of the Prize Statutes, U. S. Code, Title 34, Chapter 2.0, Secs. 1131-67. Prior to World War II the requirement had been that in order for a Federal District Court to obtain jurisdiction to entertain prize proceedings a seized vessel had to be brought to the United States. During World War II amendments to the prize law were made in order to allow such jurisdiction to Federal Courts if a prize "was brought into the territorial waters of a co-belligerent (the latter so consenting) or into a locality in the temporary or permanent possession or occupation of the armed forces of the United States." In addition, the World War II amendments extended prize law to aircraft. Finally, the procedure for making immediate use of captured vessels, and avoiding the necessity for applying to the Prize Court for requisition of the prize, was broadened. See, generally, the publication Instructions For Prize Masters and Special Prize Commissioners (NAVEXOS P-825), Office of the Judge Advocate General, Department of the Navy, (1949). Also, Law of Naval Warfare, Article 502(b) (8) and notes thereto. See also Chapter XII, pp. 344-8, for further discussion of these and related points as they apply to neutral prizes. And on the taking of prizes—whether enemy or neutral—into neutral ports, see pp. 245-7.
formula is much too restrictive. Instead, it would seem that the widespread practice followed by belligerents is indicative of the conviction that the destruction of enemy prizes is permitted whenever military necessity—a term which, in this context, must have broad application—so requires.38

Before resorting to the destruction of enemy prizes the captor is obliged to remove the passengers and crew, as well as the ship's papers, to a place of safety.39 And despite the practices pursued by many of the belligerents during the two World Wars there is as yet insufficient warrant for denying the continued validity of obligations established by custom and subsequently reaffirmed by convention. No doubt it is true that in the past submarines (and aircraft) have been—in nearly every instance—in capable of

38 Distinguish, though, between the destruction of enemy prizes and the destruction of neutral prizes. The conditions permitting the destruction of neutral prizes are considerably more restrictive and are examined in a later chapter (see pp. 349–53). (It should be made clear, however, that in referring to the destruction of enemy prizes, neutral vessels acquiring enemy character are included.) See Article 503b (2) Law of Naval Warfare. The formula of "military necessity" given in the initial sentence of Article 503b (2) follows earlier Instructions and represents the traditional policy of this country. British practice has been interpreted as permitting destruction of enemy prizes in two cases "... first, when the prize is in such a condition as prevents her from being sent to any port of adjudication; and, secondly, when the capturing vessel is unable to spare a prize crew to navigate the prize into such a port." Oppenheim-Lauterpacht, op. cit., pp. 487–8. In effect, however, British practice has allowed destruction in other cases of "military necessity." Thus Higgins and Colombos (op. cit., pp. 607–8) point out that the British Prize Court has permitted destruction of enemy prizes when "the capturing British warship was engaged in pursuing the enemy fleet and could not stop for the purpose of taking the vessel into port." Article 72. of the 1939 German Prize Law Code declared that captured enemy vessels may be destroyed "if it appears to be inexpedient or unsafe to bring them into port." In both wars German surface warships, even when first seizing enemy vessels—and not resorting to sinking without warning—nearly always resorted to destruction. It remains disputed whether or not the captor state is obliged to render compensation to the neutral owners of goods on board an enemy vessel that has been lawfully destroyed. The opinions of writers are sharply divided on this point, and the practice of states is none too clear. German prize courts during World War I denied neutral owners any right of compensation. Before the British Prize Court the matter was never clearly adjudicated upon, though nineteenth century decisions can be cited on behalf of a right of compensation. Nor is there any clear indication as to what the position of the United States may be on the matter. Hyde (op. cit., p. 2259) contends that there ought to be no right of compensation to neutral owners, that neutral cargo on board enemy vessels ought not to become a shield to protect such vessels from the lawful act (i.e., destruction) of the captors. This may well be, but it is equally true that if this opinion is accepted Article 3 of the Declaration of Paris is rendered practically worthless. For the latitude now given belligerents in destroying enemy prizes would amount to granting belligerents an equal latitude in destroying innocent neutral goods when carried on board. Nevertheless, it must be conceded that the view holding that no compensation need be accorded the neutral owners of cargo is much more in accord with the over-all recent trends of belligerent practices.

39 An obligation which is not fulfilled merely by allowing passengers and crew to take to the ship's boats unless the safety of the latter 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.
satisfactorily fulfilling these obligations. But the fact that the captor may be unable to provide for the safety of passengers and crews of enemy merchant vessels cannot be regarded as a justification for non-compliance with the law.\textsuperscript{40} Indeed, to argue otherwise must logically involve the further assertion that he who cannot seize may nonetheless sink. It has been previously urged that the law of naval warfare has still to condone the latter doctrine.\textsuperscript{41} There is no more reason to believe that this law as presently constituted has accepted the doctrine that he who cannot provide for the safety of passengers and crew following seizure may nonetheless destroy.

\textbf{E. THE SEIZURE AND DESTRUCTION OF ENEMY AIRCRAFT}

It remains uncertain to what extent the rules regulating the seizure and destruction of enemy merchant vessels are applicable—by analogy—to enemy civil aircraft.\textsuperscript{42} Quite apart from the fact that the rules governing the treatment of enemy merchant vessels are themselves in an unsettled state, the attempt to adopt rules operative in naval warfare to the seizure and destruction of aircraft presents obvious difficulties. At the same time, it is clear that in many respects belligerent practice in conducting aerial warfare is so slight at present as to provide no real guidance to that behavior belligerents may consider as both obligatory and right. Nor is it very useful—in the absence of such practice—to continue to place undue emphasis upon the 1923 Rules of Aerial Warfare, drafted by the Commission of Jurists at The Hague. Though undoubtedly a significant contribution at the time, these draft rules provide today little more than a landmark to

\textsuperscript{40} Though in the circumstances presently characterizing the conduct of naval warfare it has been argued that the equities of passengers and crew may be affected by the nature and conduct of their own ship. Thus, Hyde (op. cit., p. 2026) declares that in the case of an armed merchant vessel "which in consequence of resistance or otherwise has become unseaworthy, the duty to offer safe accommodation to persons on board would appear to be dependent upon the military requirements of the captors." Strictly speaking, though, there is no apparent basis for this opinion in the traditional law. Undoubtedly acts of resistance render enemy merchant vessels liable to attack and possible destruction. But once the vessel had been seized, and the captor had asserted his effective control, no discrimination was made toward crews for having offered resistance prior to capture. It may well be claimed, however, that it is no longer reasonable that captors be expected scrupulously to fulfill the obligation of ensuring the safety of crews of enemy merchant vessels when such vessels are—for all practical purposes—integrated into the enemy's military effort at sea and have offered acts of resistance prior to capture; and in these circumstances a captor unable to take officers and crews on board before resorting to the destruction of enemy prizes nevertheless fulfills his duty by permitting the latter to take to the ship's boats. Certainly, there is much force to this argument, even though it is still unrecognized in law.

\textsuperscript{41} See pp. 67–70.

\textsuperscript{42} On the classification of enemy aircraft, see Law of Naval Warfare, Section 500. The term "civil aircraft," as used in the text above, is intended to include the same aircraft as are included in Section 500a.
one phase in the historic development of juristic thought on the regulation of aerial warfare.\textsuperscript{43}

On one central issue state practice does appear to be reasonably well settled. The liability to capture and confiscation of enemy civil aircraft, and of enemy goods on board, now enjoys general support, and it is not likely that this adaptation of the practice operative in warfare at sea rather than the practice governing seizure of property on land will be reversed.\textsuperscript{44}

\textsuperscript{43} For a general discussion and analysis of the problems dealt with in this section, see Spaight, \textit{op. cit.}, pp. 394-418. The attempt to apply maritime practices to aerial warfare formed the basis of much earlier speculation, and the influence of the maritime analogy was apparent in the work of the Commission of Jurists. For the text of the 1923 Rules of Aerial Warfare, together with the general report of the Commission of Jurists, see \textit{U.S. Naval War College, International Law Documents}, 1924, pp. 108-54. With respect to the seizure and destruction of enemy civil aircraft it is difficult to estimate the effect of the 1923 Rules upon later belligerent practice, if only for the reason that this later practice has been so slight. If the deference shown to the provisions of the 1923 Rules dealing with aerial bombardment are to be regarded as generally indicative of the degree to which belligerents may be expected to follow the other prescriptions of this draft code, then the 1923 Rules hardly retain more than an historic interest. However, the fate suffered by the 1923 Rules of Aerial Warfare does not justify their characterization as "examples of a high-water mark in legal fantasy" (C. P. Phillips, \textit{"Air Warfare and Law: An Analysis of the Legal Doctrines, Practices and Policies," George Washington Law Review}, 21 (1953), p. 326), unless the excesses of modern—and total—war are to be regarded as an entirely normal state of affairs. The mistake—though hardly a fantasy—of the Commission of Jurists was in assuming that belligerents would not look upon the practices of World War I as a desirable standard for the conduct of future wars. On this assumption—however sanguine it may now appear with the advantage of hindsight—the 1923 Rules were quite realistic.

In the absence either of conventional regulation or of belligerent practice constitutive of customary rules it has been contended that the general principles of the law of war place restrictions upon the seizure and destruction of enemy aircraft, and that "whenever a departure from these principles is alleged to be necessary, its cogency must be proved by reference either to express agreement or to the peculiar conditions of aerial warfare." Oppenheim-Lauterpacht, \textit{op. cit.}, p. 520. No doubt this opinion may be considered as justified—in theory at least. Yet it would serve little purpose to ignore the obstacles encountered in applying the general principles of the law of war to aerial warfare. In the case of aerial bombardment these difficulties have long been painfully apparent (see pp. 146–9). If they are less apparent with respect to seizure and destruction of enemy aircraft this may be attributed largely to the peripheral importance of this problem alongside the momentous issues posed by aerial bombardment. The dearth of actual practice relating to seizure and destruction of enemy civil aircraft is a further reason for continued speculation that may prove to have little relevance to actual practice. The unfortunate truth is that in the absence of customary or conventional rules effectively regulating the conduct of aerial warfare in some detail, the invocation of general principles has a distinctly limited utility, particularly when these general principles are themselves subject to varying interpretations (see pp. 46–50).

\textsuperscript{44} Article 52 of the 1923 draft Rules, in following maritime practice, provided that enemy private aircraft "are liable to capture in all circumstances." Article 55 declared that the capture of aircraft or goods on board "shall be made the subject of prize proceedings, in order that any neutral claim may be duly heard and determined."—During World War II a number of belligerents—including Great Britain and the United States—amended their prize legislation so as to include aircraft and goods carried on board. (See S. W. D. Rowson, \textit{op. cit.}, pp. 209–13 and A. W. Knauth, \textit{op. cit.}, pp. 76–7.) The American Prize Act of June 24, 1941 (55 Stat. 261; 34 U.S. Code Sec. 1131) does not specify where aircraft may be captured, though the capturing
But belligerent practice has not yet given rise to any definite procedure governing the conduct of seizure in the case of enemy civil aircraft. 45

No particular problem would appear to arise with respect to the destruction of enemy aircraft once seizure has been made and the captor has been able to remove passengers and crew to a place of safety. In these circumstances the capturing belligerent must be regarded as having at least the same discretion as he already possesses in destroying enemy merchant vessels. Of critical importance, however—and as yet far from resolved—is the question of the occasions in which enemy civil aircraft may be fired upon while still in flight. In principle, the rule granting non-combatants immunity from direct attack must be regarded as applicable to hostilities wherever conducted. There is no apparent reason why aerial warfare should be thought of as an exception, and—in fact—belligerents have never contended that in the air they may discard a distinction long operative in hostilities on land and at sea. At the same time, it has frequently been contended that given the special circumstances attending aerial hostilities the scope of the immunity from direct attack granted non-combatants necessarily must prove more restricted than elsewhere. 46

In earlier pages attention has been directed to those acts which when performed by enemy merchant vessels serve to deprive the latter of immunity

agency appears to have been limited to the Navy. The British Prize Act of 1939, in extending prize law to aircraft, is quite clear that the capture of aircraft may occur even though the aircraft is over land.—Presumably, the rules governing the enemy character of vessels will apply by analogy to aircraft. On the question of belligerent aircraft in enemy territory at the outbreak of war, see p. 90. On the rules governing the use of medical aircraft and transports under the 1949 Convention on the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, see pp. 129-31. And, finally, on the application of prize law to neutral aircraft, see pp. 354-6.

45 No doubt it is true that as in the case of enemy vessels so in the case of enemy aircraft the act of seizure must consist in the assertion of effective control over the aircraft. Assuming that the place of encounter is over the high seas a belligerent may use any convenient method to signal to the enemy civil aircraft and to order her to proceed to one of the belligerent's landing fields (on the rarest of occasions landing at sea may even prove feasible). Failure to carry out such orders will constitute sufficient reason for employing forcible measures. But what course of action is permitted to a belligerent aircraft (or, for that matter, to a belligerent warship) against enemy civil aircraft that lack the fuel to carry out the belligerent's directions? The problem has no parallel in naval warfare. For suggestions on the conduct of visit, search and seizure of aircraft see U.S. Naval War College, International Law Situations, 1938, pp. 15-25.

46 The nature of these circumstances are sufficiently apparent and need not be examined once again in these pages. Spaight (op. cit., pp. 398-9) points out that although the attack of civil aircraft results in a more serious danger to the individual occupants than does similar action when directed against merchant vessels, nevertheless, “the military necessity for warlike action that may involve loss of innocent life is greater in the former case, for the speed of an aircraft, its ability to elude seizure, and its capacity for damaging action (either by bomb-dropping or by observing important movements), render it a more dangerous potential enemy than a sea vessel; and there is always the possibility that an apparently non-military aircraft may be a combatant one disguised.”
from attack. There is little question but that the same acts if performed by enemy civil aircraft may result in a liability to attack. Thus any attempt by enemy civil aircraft to resist the orders given by belligerent aircraft, or to flee upon being duly summoned by a belligerent, will justify the use of force. Similarly, civil aircraft found flying under escort of enemy military aircraft may be fired upon. Liability to attack may also result from the carriage of armament. Finally, if the civil aircraft of a belligerent are integrated in any way into the military effort of the state they need not be accorded immunity from attack on sight.

F. THE TREATMENT OF ENEMY SUBJECTS

1. Prisoners of War

It has always been clear that the combatant personnel of belligerent warships, whether vessels of the line or auxiliaries, who fall into the hands of an enemy during the course of naval hostilities are to be accorded the status of prisoners of war. The same status has been held to attach to the non-combatant members of a belligerent's naval forces, unless granted special exemption, as well as to those persons who officially accompany the naval

47 See pp. 56 ff.

48 Quite apart from military consideration, which would clearly dictate attacking any enemy aircraft found to be bearing armament, there is no practice to which belligerents can turn to justify the “defensive” arming of civil aircraft. Any attempt to apply here the practices of naval warfare would not bear serious scrutiny, and belligerents have never suggested otherwise.

49 In the circumstances enumerated above the liability of enemy civil aircraft to attack does not succeed in raising serious question. In warfare at sea it has always been true that the immunity from attack granted belligerent merchant vessels is dependent upon the abstention from all acts of force against a captor as well as upon the absence of any relationship to the military operations of a belligerent. The fulfillment of the same general conditions must be regarded as even more mandatory in the case of aerial warfare. It is beyond this point, however, that uncertainty persists. To what extent does the nature of aerial warfare, and the potential danger posed by enemy aircraft, permit the resort to measures that are yet to be accepted in naval warfare? (Of course, if the position is accepted that belligerents are now at liberty to attack enemy merchant vessels without warning, and to destroy them without first insuring the safety of passengers and crew, then no problem arises in the case of aerial warfare. What is permitted against merchant vessels is equally permitted—from this point of view—against civil aircraft.) In this respect, Spaight (op. cit., pp. 400-2) suggests that belligerents may close limited aerial zones over the high seas to both enemy and neutral aircraft, and attack any aircraft thereafter entering these aerial enclosures. Nevertheless, he insists that the belligerent in establishing such a zone must be able to show “concrete grounds for his action, e.g., to operations actually in progress on the spot, or important concentrations therein for pending operations, to the constant patrolling of the zone by his aircraft in the search for enemy submarines, to the regular passing of transports over a line of communications, or to some other form of military activity which differentiates the area in question from the ordinary high sea.” There can be little question but that as against belligerent civil aircraft the closure of such restricted aerial zones over the high seas—and their rigid enforcement—does not raise any substantial question. As to the operation of these zones with respect to neutral aircraft, see pp. 300-2.

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forces without actually being members thereof. In an even broader sense, the status of prisoners of war has been customarily conferred upon the personnel of all the public vessels of a belligerent.

With respect to the officers and crew of a captured private enemy merchant ship, the traditional practice of belligerents prior to this century had generally been to make them prisoners of war. But a quite different procedure was provided for in Hague Convention XI (1907). In the event of capturing an enemy merchant ship the parties to that Convention were obliged not to make prisoners of war those members of the crew who were nationals of a neutral state. The same rule applied in the case of the captain and officers, likewise nationals of a neutral state, if they promised formally in writing not to serve in an enemy ship for the duration of the war. Nor were the captain, officers, and members of the crew who were nationals of the enemy state to be made prisoners of war, if they undertook, on the faith of a formal written promise, not to engage, while the hostilities lasted, in any service connected with the operations of the war. In each instance a pledge was given, the captor was to notify the other belligerent, and the latter was forbidden knowingly to employ the said persons. The preceding provisions were qualified, however, by the stipulation that they did not apply to ships "taking part in the hostilities," a phrase which was given from the very start the broadest possible interpretation.

In the light of belligerent practice during the two World Wars it is hardly useful to continue to accord any significance to these provisions of Hague XI, at least to the extent that they concern the status of enemy subjects

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50 See Law of Naval Warfare, Article 511a, which reflects the customary international law applicable to hostilities whether conducted on land, at sea or in the air. As between the parties to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, the categories of individuals entitled to that status are enumerated in Article 4. The other 1949 Geneva Conventions For the Protection of War Victims are: The Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, the Convention For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, and the Convention Relative to the Protection of Civilian Persons in Time of War. For a detailed treatment of the Convention governing treatment of wounded, sick and shipwrecked at sea, see pp. 117-38. The United States ratified the four 1949 Geneva Conventions in August 1955.

51 Even though not forming a part of the naval or military forces of a belligerent—e. g., customs and police vessels. Exemption must of course be made for the personnel attached to those public vessels granted special immunity from either attack or seizure.

52 Article 11 of the U. S. Naval War Code of 1900 provided that: "The personnel of a merchant vessel of an enemy captured as a prize can be held, at the discretion of the captor, as witnesses, or as prisoners of war when by training or enrollment they are immediately available for the naval service of the enemy, or they may be released from detention or confined."
making up the crews of enemy merchant ships captured by a belligerent. They clearly were not intended to apply to the personnel of publicly owned and controlled belligerent merchant vessels. It seems equally clear that they were never designed to apply to the officers and crews of enemy merchant vessels which, though privately owned, operate under the instructions of the state and—for all practical purposes—are integrated into the military effort at sea. Certainly they ought not to apply, and in fact have not been so interpreted as applying, to enemy merchant ships offering—or intending to offer—forcible resistance to capture. Such intent to offer forcible resistance, and thus to “take part in the hostilities,” may not improperly be imputed to any enemy merchant ship bearing “defensive” armament.

Hence, the present character of naval hostilities hardly permits the expectation that belligerents will give any greater effect in the future to these provisions of Hague XI than they have in the past. Instead, the expectation must be that enemy nationals making up the crews of belligerent merchantmen will be detained by the captor as prisoners of war, and as between the parties to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War this is a status which—if detained—they are now entitled to receive. Similarly, the officers and crews of enemy merchantmen who are nationals of a neutral state may also be detained as

57 “... the provision that members of the crew who were enemy subjects might only be made prisoners if they refused to give parole was ipso facto modified by the practice followed during the First World War, according to which all enemy civilians of military age could be prevented from returning home, and could be interned. Accordingly, all the belligerents interned the enemy crews of captured enemy merchant-vessels.” Oppenheim-Lauterpacht, op. cit., p. 267. A similar practice obtained throughout the 1939 war, though the detention of enemy crew members of captured belligerent merchant vessels frequently resulted in their receiving the status of prisoners of war rather than that of interned enemy aliens. In the past the problem of the status to be accorded detained enemy merchant seamen has frequently been complicated by the fact that in some states the merchant marine may be taken over by the state, and the personnel may even be included within the armed forces. In this latter case the status of the individuals when captured is clear—i.e., they are entitled to the protection accorded prisoners of war. But in those states where the personnel of the merchant marine remained civilians the captor has been free to treat them simply as interned enemy aliens. Even further, the civilian personnel of the merchant marine have been frequently deprived of the protection accorded by Hague Convention X (1907) to the sick, wounded and shipwrecked at sea. As will presently be noted, the 1949 Geneva Conventions have altered this situation.

58 None of the observations made in the text above are immediately apparent from the actual wording of Articles 5–8 of Hague XI, for these articles speak only of “enemy merchantships” and of the deprivation of the benefits contained therein when “taking part in the hostilities.” Yet it seems clear that the Convention was to apply only to privately owned merchant ships of the enemy. Furthermore, belligerents have interpreted—and not unreasonably—any of the acts indicated above as indicative of taking part in the hostilities. See also, in this connection, pp. 57–70.

59 Article 4A (5) of that Convention provides that among the categories of individuals entitled to receive the status of prisoners of war are: “Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of
prisoners of war if the vessel on which they are serving has taken any part in the hostilities prior to capture. But if the enemy merchantman has abstained from any participation in the hostilities prior to capture, and in particular has not attempted to offer any resistance to the captor, the officers and crew who are nationals of a neutral state normally are not to be made prisoners of war.\footnote{60}

The civilian passengers carried on board enemy merchant vessels may be composed of nationals of the enemy state as well as of neutral states. If they are nationals of the enemy state, and have refrained from any participation in the hostilities prior to the capture of the vessel, they are normally not to be made prisoners of war. However, as enemy nationals they are subject to detention by the belligerent into whose hands they fall; and under exceptional circumstances they may even be treated as prisoners of war.\footnote{61} On the other hand, the nationals of a neutral state on board cap-

international law.'—The "other provisions of international law" is a reference to Articles 5-8 of Hague XI. In view of the doubtful validity today of the latter articles, at least as they apply to enemy nationals, it may be assumed that the status of prisoners of war will prevail with respect to enemy nationals making up the personnel of enemy merchant ships. It should also be pointed out that Article 4A (5) of the 1949 Convention on prisoners of war deals with the personnel of enemy civil aircraft in the same manner as with the crew of enemy merchant ships. Unless entitled to more favorable treatment under any other provisions of international law the crew of enemy civil aircraft are to be made prisoners of war. In this instance, however, the "other provisions of international law" are non-existent. For this reason it may be contended that, in principle, the rules governing the status and treatment of individuals taken from enemy merchant vessels apply, mutatis mutandis, to the personnel taken from the civil aircraft of an enemy (see Law of Naval Warfare, Article 512). At the same time, it may be noted that the 1923 Rules of Aerial Warfare (Article 36) would have granted belligerents substantially greater power over the crew and passengers of enemy civil aircraft than had theretofore been accorded in the case of enemy merchant vessels. Not only would these draft rules have permitted making prisoners of war of all enemy nationals composing the crew, but neutral nationals making up the crew of enemy civil aircraft would also be liable to detention as prisoners of war unless signing a written undertaking not to serve in any enemy aircraft while hostilities lasted. Passengers found to be of enemy nationality and fit for military service could be made prisoners of war. In addition, passengers found to be in the "service of the enemy" could be made prisoners of war, regardless of nationality. Finally, a belligerent could hold as prisoner of war any member of the crew of an enemy civil aircraft or any passenger whose service in a flight had been of special and active assistance to the enemy (and see generally, Spaight, op. cit., pp. 411-4).

\footnote{60} In practice, belligerents have not detained—either as prisoners of war or as "civil prisoners"—nationals of neutral states serving as crew members on board enemy merchantmen, if not found to have participated in acts of hostilities against the captor. But it is fairly well established that release is dependent upon the abstention from committing hostile acts or from participating in such acts. On the other hand, it follows from Article 4A (5) of the 1949 Convention on prisoners of war that if the nationals of neutral states serving on board belligerent merchantmen are detained they are to receive the status of prisoners of war.

\footnote{61} E. g., if officials of the enemy state.—As between the parties to the 1949 Convention Relative to the Protection of Civilian Persons it would appear that such enemy nationals as are found on board captured enemy merchant vessels as private passengers are entitled to the status of "protected persons." The first paragraph of Article 4 of the Convention on civilian

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tured enemy merchant vessels as passengers are not to be made prisoners of war unless they have previously participated in acts of hostility against the captor. Nor are they to be detained by the captor any longer than proves necessary, the captor being under the obligation to release such nationals of neutral states as expeditiously as is possible. 62

It has already been observed that neutral merchant vessels may acquire enemy character by undertaking to perform any one of several services on behalf of a belligerent. In the more serious forms of unneutral service, where the neutral vessel takes a direct part in the hostilities or acts in any manner as a naval auxiliary to an enemy's forces, it may be assimilated to an enemy warship and rendered liable to attack on sight. There can be little question that if the personnel of such vessels fall into the hands of the other belligerent they are subject to detention as prisoners of war. 63

persons states: "Persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The same article goes on to declare that persons protected by the prisoners of war Convention or the Convention relating to the wounded, sick and shipwrecked at sea "shall not be considered as protected persons within the meaning of the present Convention." 62

Law of Naval Warfare, Article 512. In addition to participation in acts of hostility committed against the captor prior to seizure, it seems reasonably clear that nationals of a neutral state on board a captured enemy merchant vessel as passengers may be made prisoners of war if found to be in the service of the enemy.

63 It has occasionally been urged that the crews of neutral vessels taking a direct part in the hostilities may even be liable to punishment as war criminals. But this opinion would seem justified only where such vessels undertake offensive operations directly aimed against the warships or merchantmen of an enemy—and this will prove exceedingly rare. Hyde (op. cit., p. 2066) distinguishes between neutral vessels "primarily devoted to the military service of a belligerent" and those neutral vessels taking part in hostilities but "not given over to a belligerent service." Whereas the crews of the former may be treated as prisoners of war Hyde would permit the crews of the latter to be dealt with "summarily"—presumably meaning as war criminals. The distinction is not easy to follow, since a vessel of neutral registry that takes part in the hostilities is always acting—in a broad sense—in the "military service of a belligerent"—unless, of course, it is undertaking purely private acts of depredation in the manner of a pirate vessel. In any event, a distinction should be carefully drawn between neutral merchant vessels acquiring enemy character through acts of unneutral service, and whose crew members are liable to treatment as prisoners of war, and neutral vessels acquiring enemy character—whether by committing acts of unneutral service or other acts—but whose crew members are not subject to detention as prisoners of war. The acquisition of enemy character on the part of a neutral merchant vessel does not necessarily mean that the captor has a right to treat members of the crew bearing neutral nationality as prisoners of war. Indeed, it is only exceptionally that such treatment may prove warranted, i.e., when the neutral vessel has by its actions identified itself with the armed forces of a belligerent. Acts of unneutral service which do not result in such identification may nevertheless result in the neutral vessel acquiring enemy character and rendering it liable to capture. But a neutral vessel acting under belligerent orders or direction does not, for that reason alone, give the belligerent capturing it the right to make prisoners of war those members of the crew as are nationals of a neutral state. In short, the imputation of enemy character to neutral merchant vessels is not to be taken as an indication that the officers and crews of such vessels, when captured, may therefore be made prisoners of war.
There is surprisingly little guidance of a specific character for the treatment of prisoners of war while detained on board a belligerent warship. The customary rule that they must be treated in a humane manner fails to indicate with any precision the specific duties and rights of the captor. For those states that are parties to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War it is apparent that the general obligations laid down for the protection of prisoners of war in Articles 12 through 16 must be complied with, at least to the degree that these obligations are relevant to the circumstances attending internment on board belligerent warships. But these latter provisions are of a very general character and consequently leave unanswered many questions that may well arise in the course of operations at sea. Doubtless a belligerent must refrain either from imposing unnecessary hardships upon prisoners of war interned on board his warship or from subjecting prisoners to unnecessary danger. Nevertheless, the fulfillment of these obligations, given the facilities of warships and the circumstances characterizing naval operations, may present numerous difficulties. Of course, once prisoners of war are landed they immediately become subject to the detailed provisions relating to prisoners of war as are set out in the relevant Geneva Convention of 1949.

64 In general these Articles provide that prisoners of war are in the hands of the enemy power though not of the individuals or military units who have captured them, that they must be humanely treated, that no act must be taken against them which would cause death or seriously endanger their health, that they must not be made the object of measures of reprisal, that they are entitled to respect for their persons, honour, and sex, that they must be accorded proper maintenance and medical attention, and that they must be granted equality of treatment without any adverse distinction based on race, nationality, religious belief or political opinions.

65 These difficulties are hardly met by the observation that "the propriety of exposing prisoners taken at sea to great personal danger or hardship would depend upon whether, under the particular circumstances, the captor had the right to deprive them of the safeguards of their own craft without substituting others of substantial value, a question of which the solution might hang upon the propriety of the measures by which capture was effected." Hyde, _op. cit._, p. 2067. In the case of enemy warships that have been destroyed there is no question of the right of a belligerent to deprive enemy personnel "of the safeguards of their own craft without substituting others of substantial value." The question does arise, however, with respect to enemy merchant vessels. In a strict sense the obligation of the captor to place the crews of such vessels in a "place of safety" prior to destroying enemy prizes may be interpreted as forbidding destruction when the warship itself does not constitute a place of safety—due either to the operations upon which it is engaged or to the nature of the warship itself. Even so, this is surely a counsel of perfection and one which belligerents can hardly be expected to follow, even under far more ideal conditions than those presently characterizing naval warfare.—It is, in fact, hard to avoid the conclusion that what is "unnecessary" (hence forbidden) in the hardships or dangers imposed upon prisoners of war carried on board warships must largely be judged by the facilities of the particular warship and the military operations it may be required to complete prior to landing the prisoners of war. In a way, this is only to say that at sea the military necessities of the belligerent may take priority over the comfort and safety of prisoners of war. These remarks are themselves far too broad for the kind of guidance that may be considered useful, though more pointed observations on the duties of the captor at sea do not appear possible.

Prior to the conclusion in 1949 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea the rules relating to the protection of the sick and wounded at sea were contained in Hague Conventions III (1899) and X (1907). On the whole, it was the latter Convention that was recognized by the belligerents as applicable in the two World Wars. However, dissatisfaction with a number of the provisions of Hague X, and an awareness of the necessity for its revision and expansion to account more satisfactorily for changing conditions, had been expressed even before the close of the 1914 war. During the second World War this need for revising and expanding the provisions of Hague X became even more clearly apparent, despite the efforts already made by the belligerents to interpret and adapt the Convention to some of the novel circumstances characterizing modern naval warfare.

As between the states that are parties to the 1949 Convention, the latter replaces Hague Convention X. Although a number of the provisions of the 1949 Convention closely adhere to the rules laid down in the preceding convention, many significant modifications have been made and entirely new provisions added which reflect recent experience. An analysis of the present legal regime governing the protection of the sick, wounded and shipwrecked at sea must properly concentrate upon these changes. At the same time, it would appear only reasonable—and realistic—to avoid treating the 1949 Convention quite apart from the experience of the two World

66 The 1899 Convention represented the first successful adaptation to naval warfare of the principles of the 1864 Geneva Convention for the Relief of the Wounded and Sick of Armies in The Field. In 1906 the Convention of 1864, applicable to land warfare, was revised and, as a consequence, in the following year (1907) the 1899 Convention dealing with sea warfare was also revised to bring it again into accord with the more recent Convention on the sick and wounded in the field. As between the parties to the tenth Hague Convention of 1907, the latter served to replace the earlier convention concluded in 1899. But some states—e. g., Great Britain—remained formally bound by the earlier convention, though in practice it was accepted that the 1907 Convention was authoritative for the belligerents.

67 In 1929 the 1906 Geneva Convention on the wounded and sick in the field was revised, but the revision of the 1907 Convention dealing with naval warfare never got beyond the stage of draft proposals by the time World War II broke out.

Wars, and the extent to which belligerents have indicated that they are willing to subordinate possible military advantage to a humanitarian cause.\(^6\)

\textit{a. The Wounded, Sick and Shipwrecked}

One of the principal assumptions upon which Hague Convention X (1907) had been based was that only those combatants sick or wounded as a result of hostilities at sea need be protected.\(^7\) On this assumption the chief function of hospital ships was to accompany the warships of belligerent fleets and to provide assistance at the scene of action to rescue survivors and to treat the wounded. In modern naval warfare this function—while not yet obsolescent—has become subordinated to the task of transporting casualties suffered as a result of operations on land.\(^7\) It has therefore become increasingly important to redefine—and, in so doing, to broaden—the categories of sick and wounded combatant personnel entitled to receive the benefits conferred by convention upon the sick and wounded at sea. In addition, the attack and destruction of enemy merchant shipping no longer permits the sanguine assumption that the wounded and shipwrecked at sea will be confined to the combatant naval forces of belligerents.\(^7\)

\(^6\) "It is axiomatic," one writer has observed in a survey of hospital ships during World War II, "that in the present state of international law it is essential to preserve some balance between the humanitarian benefit to be gained by an alteration in the law and the military advantage thereby conferred on one of the belligerents: if this balance is seriously disturbed the other side will certainly seek and find a pretext for denunciation." J. C. Mossop, "Hospital Ships in the Second World War," B. Y. I. L., 2.4 (1947), p. 400. These words, written in the context of proposals for a new convention to replace Hague X, are relevant to a consideration of the 1949 Convention. Doubtless, the provisions of the 1949 Convention are binding upon the states that ratify it, whatever the military advantages that may be sacrificed by its observance, and Article I declares that: "The High Contracting Parties undertake to respect and to insure respect for the present Convention in all circumstances." Nevertheless, the clarity of the legal obligation not to depart from the Convention for reason of military advantage does not detract from the possibility—and that is all it can be regarded—that belligerents may be reluctant to meet certain duties laid down in the Convention when such duties press hard upon considerations of military advantage. The occasions when this may be so can be surmised only on the basis of known experience. Besides, a substantial number of the provisions themselves permit the operation of military necessity as a justification for departing from behavior that must otherwise be observed. Finally, it need hardly be pointed out that in the interpretation of the provisions of the 1949 Convention—a number of which are far from being as clear and specific as is to be desired in an international convention—belligerents will not be unmindful of their respective military requirements. The latter reason alone constitutes sufficient justification for bearing in mind the experience of the two World Wars in considering the 1949 Convention.

\(^7\) A task in which the great majority of hospital ships were engaged in the two World Wars.

\(^2\) The civilian at sea was altogether excluded from the benefits of Hague X, which applied only to "sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies . . . ."—It is of course true that even prior to the 1949 Convention belligerents had recognized the necessity of expanding the categories of sick and wounded
The 1949 Convention clearly abandons the assumption which underlay
the earlier Convention and recognizes that the most important function of
hospital ships will be the transport of casualties resulting from warfare on
land. The individuals who are therefore entitled to receive the benefits of
the new Convention include the following categories: members of the
armed forces of a Party to the conflict, as well as members of militias or
volunteer corps forming part of such armed forces; members of other militias
and members of other volunteer corps, including those of organized resist­
ance movements which belong to a Party to the conflict and which comply
with certain conditions; members of regular armed forces who profess
allegiance to a Government or an authority not recognized by the Detaining
Power; persons who accompany the armed forces without actually being
members thereof, provided they have received authorization from the
armed forces which they accompany; and members of the crews of the
merchant marine and the crews of civil aircraft of the Parties to the conflict
who do not benefit by more favorable provisions of international law.

So far as warfare at sea is concerned, the last of the above categories may
be regarded as the most significant of the extensions made by the 1949
Convention. (However, it may be pointed out that during World War II
the belligerents were already allowing the carriage of sick and wounded
members of the merchant marine in hospital ships.) On the other hand,
Article 13 of the 1949 Convention fails to include civilians among those
entitled to receive the benefits of the Convention, though this omission is
tempered by a later provision, Article 35, that hospital ships shall not be
deprived of the protection due to them for the reason that the humanitarian
entitled to be carried on board hospital ships. Nevertheless, the evolution that accompanied—
in this respect—the two World Wars still left unsettled many and controversial questions, even
as regards individuals claiming to be assimilated to the armed forces of belligerents.

73 Article 13. This article makes the same enumeration as is made in Article 4 (A) of the
Prisoners of War Convention. Apart from the categories enumerated in Article 4 (B) of the
Convention relating to prisoners of war, which are not relevant to the present analysis, it
will be apparent that any individual entitled to the status of prisoner of war is entitled to
receive the benefits of the Convention on the sick, wounded and shipwrecked. In a formal sense
the converse appears equally true (since Article 16 provides that "the wounded, sick and ship­
wrecked of a belligerent who fall into enemy hands shall be prisoners of war"), though as will
presently be seen the Convention seems to provide that persons other than those entitled to the
status of prisoners of war may be accorded at least certain benefits granted the wounded and
shipwrecked.

74 These conditions are: that of being commanded by a person responsible for his subordinates;
that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly;
and that of conducting operations in accordance with the laws and customs of war.

75 One further category not listed above includes individuals making up a so-called levée en
masse. The naval equivalent of a levée en masse has been thus defined in the Oxford Manual of
Naval Warfare, 1915: "The inhabitants of a territory which has not been occupied who, upon
the approach of the enemy, spontaneously arm vessels to fight him, without having had time
to convert them into war-ships . . . shall be considered as belligerents, if they act openly
and if they respect the laws and usages of war."
activities of such vessels have been extended to the "care of wounded, sick or shipwrecked civilians." 76

According to Article 12, the categories of individuals to whom the Convention is applicable "who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances, it being understood that the term 'shipwreck' means shipwreck from any cause and includes forced landings at sea by or from aircraft." 77 The Parties to the conflict in whose power such persons may be are obliged to care for them and to treat them in a humane manner, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. 78

In a general sense, almost all of the detailed rules laid down in the 1949 Convention may be considered as the application of the general duty to respect and protect the wounded, sick or shipwrecked. Thus the rules relating to the respect and protection that must be accorded hospital ships (which make up the heart of the Convention) can have no other purpose

76 Does this refer to civilians wounded, sick or shipwrecked because of action at sea, or to civilians wounded and sick from any cause, or to both? It is surely reasonable to assume that civilians—of whatever nationality—wounded, sick or shipwrecked as a result of naval action are entitled to receive the benefits of the humanitarian activities of hospital ships, even though this is not expressly provided for in the Convention. More debatable, however, is the presence on board hospital ships of sick or wounded enemy civilians that have been taken on in port. Mossop (op. cit., p. 400) states that during World War II the protection of hospital ships was extended to the sick and wounded wives and dependents of members of the armed forces, and goes on to suggest that "it is essential as a matter of both logic and common humanity to extend the protection offered by hospital ships to sick and wounded civilians when the Convention is next revised." Yet it seems clear that the 1949 Convention has not been so extended, save perhaps through the backdoor of Article 35. And Article 35 is itself, in this respect, somewhat anomalous. For if civilians are not included within the categories entitled to receive the benefits of the Convention then what is the precise meaning of the stipulation that hospital ships carrying wounded, sick or shipwrecked civilians are not to be denied the protection normally due to them? May a belligerent at least object to such carriage, and ultimately take some sort of action if it nevertheless continues as a regular practice? This ambiguity and potential source of confusion with respect to a highly important matter must be regarded as a serious defect in the drafting of the 1949 Convention.

77 But the passage cited above is preceded by the words "members of the armed forces and other persons mentioned in the following Article (i. e., Article 13)." Thus Article 12 does not formally extend the benefits of the Convention beyond those categories earlier enumerated. The fact that "shipwreck" is defined as meaning "shipwrecked from any cause" does not alter this situation, since whatever the cause it still applies only to the persons mentioned in Article 13. And here again the restrictiveness of the wording so far as wounded, sick or shipwrecked civilians are concerned must be noted.

78 The care and humane treatment to be accorded the sick, wounded and shipwrecked is further elaborated in Article 12 as follows: "Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created. — Only urgent medical reasons will authorize priority in the order of treatment to be administered. — Women shall be treated with all consideration due to their sex."
than that of insuring the respect and protection of the wounded, sick or shipwrecked. Nevertheless, it is useful to distinguish—if only for reasons of convenience—between the rules directly applicable to, and enjoining the respect and protection of, the wounded, sick or shipwrecked, and the rules designed to accomplish this same end by enjoining the respect and protection of hospital ships, sick bays, medical transports and the religious, medical and hospital staffs of captured vessels. Within the former category may be placed the obligation of the parties to the 1949 Convention to take all possible measures after each engagement at sea—and without delay—"to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled." 79 For this purpose the Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick, or shipwrecked persons, and to collect the dead; and neutral vessels responding to this appeal shall enjoy special protection and facilities to carry out such assistance. 80

The respect and protection owed to the wounded, sick or shipwrecked does not extend to immunity from capture, however. In the 1949 Convention, as in the earlier Convention (X) of 1907, 81 all warships of a belligerent have the right to demand that the wounded, sick or shipwrecked—regardless of nationality—on board hospital ships, as well as merchant vessels and other craft, shall be surrendered. 82 In the 1949 Convention, though, the belligerent right of removal has been qualified by the stipulation that removal is justified "provided that the wounded and sick are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment." 83 Apart from this, it should be made

79 Article 18. On the above obligation, also see pp. 71-3. Article 19 details the procedure to be followed in establishing the identification—as soon as possible—of each shipwrecked, wounded, sick or dead person of the adverse Party. This information is to be recorded and forwarded to the information bureau described in Article 12 of the prisoners of war Convention. Article 20 contains further prescriptions regarding the handling of the dead and the conduct of burial at sea.

80 Article 21. At the same time Article 21 goes on to provide that although neutral vessels may not be captured on account of such transport, "in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed."

81 Article 12.

82 Article 14. It is of interest to observe that Article 14 speaks of the right of "all warships of a belligerent Party," whereas most of the other provisions of the Convention speak only of "Party to the conflict." Presumably the reason for the different wording of Article 14 is that the right of removal extends to neutral vessels as well (neutral warships and military aircraft, of course, being excluded) and that in order to interfere in such manner with neutral vessels a formal state of belligerency is required. But as between the "Parties to the conflict" this formal condition is not required for the operation of the Convention (see pp. 134-5).

83 This qualification, it will be noted, does not extend to the shipwrecked. How effective the qualification contained in Article 14 will prove in practice is quite another question.

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clear that the belligerent right of removal \(^{84}\) applies to all hospital ships—whether belligerent or neutral—as well as to all other vessels and aircraft which may be carrying the sick, wounded or shipwrecked, the only exceptions being neutral warships and neutral military aircraft.

The wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be considered, in accordance with Article 16 of the 1949 Convention, "prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them." \(^{85}\) The captor may—according to circumstances—hold them, convey them to his own country, to a neutral port, or even to an enemy port. But if returned to their home country they may not serve for the duration of the war.

The disposition of the wounded, sick or shipwrecked who are landed in neutral territory either by neutral warships (and neutral military aircraft) or by belligerent warships—with the consent of the local authorities—is dealt with in Articles 15 and 17. \(^{86}\) In both cases, the neutral state must insure, where so required by international law, that these persons take no

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\(^{84}\) The objection occasionally taken in the past to the belligerent right of removal has been based, in part, upon the contention that it is both unnecessary and inhumane. Belligerents apparently made no use of it during World War I, but in World War II the German hospital ships *Tübingen* and *Gradisca* were taken in to Allied ports, and the enemy individuals carried on board made prisoners of war. The vessels had earlier been permitted to pass through Allied lines in the Adriatic in order to take on sick and wounded in Salonica, the diversion taking place on the outward voyage. See Mossop (op cit., p. 405), who, in relating this incident, declares that "a high percentage were only slightly wounded and the great majority were considered likely to be fit for active service within twelve months. This action brought forth no protest from the German Government, who considered it justified by the terms of the Convention." In the Pacific theatre no similar incidents appear to have occurred. Objection to the belligerent right to remove the sick, wounded and shipwrecked from neutral vessels has been—in the past—merely one facet of the broader objection made against the removal at sea of any enemy persons from neutral vessels, a problem that is dealt with later (see pp. 325–9). It is sufficient to observe here that the belligerent right to remove the sick, wounded and shipwrecked from neutral vessels is firmly established in law.

\(^{85}\) Following Article 14 of the 1907 Convention, Article 16 of the 1949 Convention is a further indication—if such were needed—that the intent was to make the categories of individuals to which the Convention shall apply identical with those individuals liable to treatment as prisoners of war. It is true that Article 16 is prefaced by the words "subject to the provisions of Article 12," but this seems only for the purpose—as Genet (op. cit., 20 (1951), p. 185) points out—of defining with greater precision the extent of protection due the sick, wounded or shipwrecked who fall into the hands of an enemy. Yet it is difficult—for reasons already noted—to take Article 16 quite literally, since hospital ships may be carrying sick, wounded or shipwrecked who are not entitled to the status of prisoners of war, and a belligerent in receiving such enemy individuals need not—and perhaps even ought not—treat them as such.

\(^{86}\) Articles 15 and 17, concerning the problem of neutral asylum to naval forces, may be cited in full:

"Article 15. If wounded, sick or shipwrecked persons are taken on board a neutral warship or a neutral military aircraft, it shall be ensured, where so required by international law, that they can take no further part in operations of war.

Article 17. Wounded, sick or shipwrecked persons who are landed in neutral ports with the consent of the local authorities, shall, failing arrangements to the contrary between the neutral
further part in operations of war. But the Convention does not provide for the disposition to be made of the wounded, sick or shipwrecked who are brought into neutral ports by neutral merchant ships. Nor does it provide for the disposal of shipwrecked members of armed forces who reach a neutral coast by their own efforts. This silence in the 1949 Convention may be taken as reinforcing the opinion—which is believed to be correct—that the neutral state is under no obligation to resort to internment in these two latter cases.  

b. Hospital Ships

The 1949 Convention permits the use of three types of hospital ships.

...
First and foremost are military hospital ships, defined as ships specially built or equipped by the Powers solely to assist, treat and transport the wounded, sick and shipwrecked. It is declared that military hospital vessels may "in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed." The notification must include the following characteristics: registered gross tonnage, the length from stem to stern, and the number of masts and funnels. The same protection and exemption from capture is accorded to private enemy hospital ships—utilized by National Red Cross Societies, by officially recognized relief societies or by private persons—on condition that they have been given an official commission by the Party to the conflict on which they depend and have complied with the provisions concerning notification applicable to military hospital ships. Finally, the protection and exemption granted to military hospital ships are likewise granted to private neutral hospital vessels—utilized by National Red Cross Societies, officially recognized relief societies, or private persons of neutral countries—on condition that they have placed themselves under the control of one of the Parties to the conflict, with the previous authorization of their own government, and have complied with the provisions concerning notification applicable to military hospital ships.

Although the tenth Hague Convention permitted—at least by implication—the conversion of merchant vessels into hospital ships, it contained no provisions concerning the case in which a belligerent might reconvert a hospital ship, that had earlier been a merchant vessel, once again to its

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88 Article 22. The corresponding provision of Hague X, Article 1, merely required notification to the adverse Party before use. Genet (op. cit., 21 (1952), p. 32) points out in criticism of Article 22 that with the speed of communications today, ships can be transformed into hospital vessels very quickly in order to carry out errands of mercy. The ten-day requirement may well mean that hospital ships converted and ready for use in a shorter period would have to suspend operations of a humanitarian character while waiting for a time limit to expire.—The respect and protection to be accorded hospital ships is extended, by Article 23, to shore establishments entitled to the protection of the Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Bombardment or attack from the sea against such establishments is prohibited.

89 A new provision, designed to facilitate identification.

90 Article 24— which further declares that these ships must be provided with certificates from the responsible authorities, stating that the vessels have been under their control while fitting out and on departure.

91 Article 25. With respect to the protection of sick bays Article 28 of the 1949 Convention states: "Should fighting occur on board a warship, the sick-bays shall be respected and spared as far as possible. Sick bays and their equipment shall remain subject to the laws of warfare, but may not be diverted from their purpose so long as they are required for the wounded and sick. Nevertheless, the commander into whose power they have fallen may, after insuring the proper care of the wounded and sick who are accommodated therein, apply them to other purposes in case of urgent military necessity."
original use. Nor did Hague X deal with the problem regarding the places where conversion of vessels into hospital ships might legitimately be accomplished. A still further question left open by the tenth Hague Convention related to the minimum tonnage that might be required of hospital ships. During the two World Wars each of these questions provided ground for controversy between the belligerents. The 1949 Convention takes a long step forward in clarifying hitherto disputed issues. With respect to the tonnage required of hospital ships Article 26 of the Convention expressly extends protection to hospital ships "of any tonnage as well as to their lifeboats, wherever they are operating." Nevertheless, in order to insure the maximum comfort and security, the Parties to the conflict "shall endeavor to utilize, for the transport of wounded, sick and shipwrecked over long distance and on the high seas, only hospital ships of over 2000 tons gross." Earlier controversy over the question of reconversion is resolved in Article 33 of the new Convention by the stipulation that merchant vessels "which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities." No indication is given, however, as to the possible restrictions upon the places where the conversion of vessels into hospital ships might legitimately be carried out. It would appear that, in principle, the latter question must be governed by the consideration that belligerents need not recognize such conversion when it has clearly been effected for the purpose

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92 See Mossop (op. cit., pp. 403-4) for a consideration of these matters in World War II. Great Britain announced a lower limit of 3000 tons on hospital ships, though in practice it enforced—over German and Italian protests—a limit of 2000 tons. However, in the case of the 1500 ton German hospital ship Freiburg, the British Government, after first seizing the vessel, released her on the apparent ground that she was a bona fide hospital ship. In fact, Hague X did not provide any lower limit, and the British position appears to have been very doubtful on this point. In the Pacific theatre no lower limit was placed on the tonnage required of hospital ships in order to enjoy protection. As will be noted shortly in the text above, the question as to where conversion might legitimately take place is really a part of the larger question concerning conversions that have been made merely to avoid capture. The British Prize Court has long held that conversion made merely to avoid capture may nevertheless result in the seizure of a hospital ship so converted and her condemnation as lawful prize. In this connection Mossop cites the cases of the Ramb IV and the Rostock. The former, an Italian merchant vessel converted into a hospital ship while lying blocked in Massawa, was seized by British forces and taken into an Allied port. Later, however, the conversion was recognized as having been genuine and not made simply to avoid capture. The seizure of the Rostock, a German warship hastily converted into a hospital ship, was clearly a different matter. Not only was the vessel converted while lying in the besieged port of Bordeaux, but when intercepted was found to be carrying codes and engaging in weather reporting—activities which deprived her of the right of continued protection.

93 This provision is purely optional.

94 The wisdom of this provision has been questioned by Genet (op. cit., 21 (1952), p. 38) as placing an undue restriction upon belligerents, who—instead—should be allowed to convert merchant vessels into hospital ships—and reconvert them back again—as the necessities of war may require. And Mossop (op. cit., p. 404), looking at World War II experience, expresses the opinion that "a prohibition against denotification is of little practical value."
of avoiding capture. If this position is correct the decisive consideration will concern the purpose of conversion rather than the place where conversion is actually carried out, though the place of conversion may frequently provide an important indication of purpose (e.g., if conversion is carried out in a besieged port).

By a novel provision in the 1949 Convention—Article 27—the respect and protection accorded to hospital ships is further extended—subject to the requirements of notification—to "small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations." But this extension of protection to coastal rescue craft is expressly subordinated to the "operational requirements" of the belligerents, a qualification that is not unlikely to limit severely the practical significance of the provision.

It is not only at sea that hospital ships are granted exemption from capture. Article 29 of the 1949 Convention provides that exemption from capture shall be granted hospital ships caught in a port that has fallen into the hands of the enemy. "Any hospital ship in a port which falls into the hands of the enemy shall be authorized to leave the said port." 97

The protection given hospital ships has always been dependent upon their not being used for any purpose other than to "afford relief and assistance to the wounded, sick and shipwrecked without distinction of nationality." To undertake to use hospital ships for what is clearly a military purpose would obviously constitute a serious breach of faith on the part of a belligerent sanctioning such a practice. Experience has shown, however, that the problem of defining those acts forbidden to hospital ships is not always an easy one. Not only is it difficult on occasion to determine the extent of the acts which, if performed, could be regarded as serving a

95 Though even this principle—whose soundness ought not to be questioned—is not expressly enumerated in the 1949 Convention. In part, of course, it is met by the stipulation that hospital ships shall be "built or equipped . . . specially and solely with a view to assisting the wounded, sick and shipwrecked."

96 On the small craft used for air-sea rescue purposes by the German Government off the British coast in 1940, and the refusal of the British Government to extend immunity to these craft—as well as to ambulance aircraft—see Mossop, op. cit., p. 403. The British argument that airmen shot down over the sea could not be considered as "shipwrecked" would no longer hold, since the 1949 Convention includes this newer category. But the British refusal to assimilate light craft engaged in rescue operations to hospital ships—thereby granting them special protection—for fear of intelligence activities, would still be clearly permissible under Article 27 of the 1949 Convention.

97 Article 29 has no counterpart in Hague X.—Article 32 of the 1949 Convention declares: "Vessels described in Articles 22, 24, 25 and 27 are not classed as warships as regards their stay in a neutral port." On the conditions governing the stay of belligerent warships in neutral ports, see pp. 240-5.

98 Article 30.

99 And Article 30 of the 1949 Convention obligates the contracting parties "not to use these vessels for any military purpose."
military purpose—hence forbidden; even more difficult may be the determination of acts which, though not supporting a military operation, are nevertheless forbidden to hospital ships. In an attempt to reduce future uncertainty in this regard Article 35 of the 1949 Convention lists certain conditions which shall not be considered as depriving hospital ships or sick bays of vessels of the protection due to them. These conditions are:

1. The fact that the crews of ships or sick bays are armed for the maintenance of order, for their own defense or that of the sick and wounded.

2. The presence on board of apparatus exclusively intended to facilitate navigation or communication.¹

3. The discovery on board hospital ships or in sick bays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service.

4. The fact that the humanitarian activities of hospital ships and sick-bays of vessels or of the crews extend to the care of wounded, sick or shipwrecked civilians.

5. The transport of equipment and of personnel intended exclusively for medical duties, over and above normal requirements.²

Clearly, the presence on board hospital ships of any arms or communications apparatus in excess of that allowed above will give rise to suspicion of abuse. Furthermore, equipment of any kind, save that intended exclusively for medical duties, ought not to be carried, however innocent it may appear. Nor should hospital ships be used to carry convalescent personnel. And although hospital ships are not to be considered as deprived of protection because their humanitarian activities have been extended to wounded and sick civilians, it remains true that Article 35 does not contemplate such carriage as a regular practice. Finally, even though not being used for any military purpose, hospital ships must not act in such a manner as to hamper the movements of the combatants. It is probably due to the latter consideration that the removal of the wounded and sick by sea from a besieged or encircled area, and the passage of medical and religious personnel and equip-

¹ Paragraph 2 of Article 35 must be read with the second paragraph of Article 34, which declares that hospital ships "may not possess or use a secret code for their wireless or other means of communication."

² Both paragraphs 4 and 5 are novel, having no counterpart in Hague X. In practice, belligerents have permitted the carriage of medical and religious personnel as passengers, whether going to or from the forces in the field. So also in the case of medical supplies and equipment intended for armies in the field, the practice appears to have been to allow hospital ships to carry such supplies and equipment on their outward voyage. Article 35 now formally sanctions these activities.
ment to such an area, is made dependent upon the express agreement of the parties to the conflict.³

In order to ensure that hospital vessels and small craft are not being used improperly, as well as to guarantee that the movements of the combatants will not be hampered even by legitimate activities, the Parties to the conflict are given the right to control and search these vessels and small craft. Article 31 declares that the Parties to the conflict "can refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires." A commissioner may be placed on board for a temporary period in order to see that the orders given hospital ships are carried out. Provision is also made in Article 31 for placing neutral observers on board hospital ships, and this may be done either unilaterally or by agreement between the Parties to the conflict.

It has always been true that if hospital ships are used to commit acts harmful to an enemy, and outside their humanitarian duties, the protection to which they are otherwise entitled ceases. Article 34 of the 1949 Convention reaffirms this rule, but at the same time provides that protection may cease "only after due warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded." The procedure thus laid down in Article 34 constitutes an innovation upon Hague Convention X (1907), which merely provided—without further qualification—that hospital ships were no longer entitled to protection if employed for the purpose of injuring the enemy.⁴

³ Article 31, paragraph 2: "Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area."

Mossop (op. cit., pp. 405-6) relates two occasions during the 1939 war in which the German High Command sought to send a hospital ship through Allied patrol lines to a besieged port. In one of these instances the request was granted, though in the other it was denied for the reason that it would hamper the movements of the attacking forces.—No doubt belligerents will also be reluctant to grant removal of wounded and sick from a besieged area if the result will be to ease noticeably the burden of the defenders.

⁴ Article 34.—The meaning of Article 34 is not altogether free from doubt, however. Presumably, neither attack nor capture is permitted under Article 34 without prior "due warning." In the case of a hospital ship found—after search—to be carrying signalling equipment in excess of a reasonable need Article 34 would prohibit seizure of the vessel—at least if the phrase "only after due warning has been given" is to be interpreted literally. If so, this clearly represents a change from previous practice, and—it is submitted—an undesirable change. On the other hand, the effect of Article 34 need not prove to be a substantial deterrent to a belligerent intent upon avoiding its obligations. Article 34 does not render any more difficult the manufacture of unfounded charges; and these charges apparently may be followed by the sternest of measures—including attack—provided only that a "reasonable time limit" is permitted in "appropriate" cases. Paradoxically, the effect of Article 34 could very well be to forbid the immediate seizure of hospital ships, even though found upon search to be performing acts harmful to an enemy, but at the same time to provide no insurance against unwarranted attacks upon hospital
c. Religious, Medical and Hospital Personnel

The religious, medical and hospital personnel of hospital ships and their crews must be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board. If such personnel fall into the hands of the enemy they must be respected and protected, and the captor is to permit them to carry out their duties as long as is necessary for the care of the wounded and sick. They shall afterwards be sent back as soon as the commander-in-chief, under whose authority they are, considers it practicable; and on leaving the ship may take with them their personal property. However, should it prove necessary to retain some of these personnel owing to the medical or spiritual needs of prisoners of war, everything possible shall be done for their earliest possible landing.

d. Medical Transports

Among the provisions of the 1949 Convention that have no counterpart in the earlier tenth Hague Convention of 1907 are those dealing with medical transports and medical aircraft. Ships may be chartered for the purpose of transporting equipment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease, provided that the particulars regarding their voyage have been notified to the adverse Power and approved by the latter. In order to ensure that these ships are not being misused the adverse Party retains the right to board them, though not to capture them or seize their equipment. Further, through prior agreement, neutral observers may be placed on board such ships to verify the equipment carried.

Medical aircraft are defined in Article 39 of the 1949 Convention as ships by a belligerent that has been careful to observe the form of Article 34. Admittedly, these critical remarks would prove unjustified if, together with Article 34, adequate provision were made for an effective procedure whereby all charges of abuse could be made the subject of inquiry by an impartial third party. As will be seen (pp. 137-8), the 1949 Convention establishes a procedure of inquiry that may easily be frustrated by an unwilling belligerent.

It is difficult to ascertain, therefore, to what extent Article 34—and other relevant provisions of the 1949 Convention—will succeed in altering those practices built up during the two World Wars, and which have received the support of the majority of states. These practices may be summarized briefly. Save in the most exceptional of circumstances hospital ships suspected of abusing their privileged status were not to be attacked but rather to be visited and searched. If the result of visit and search was to confirm suspicions of abuse the vessel could be seized and taken into port for adjudication. Attack upon a hospital ship proved justified only if the attempt to visit and search was met by acts of forcible resistance on the part of the hospital ship itself.

5 Article 36.
6 Article 37.
7 Article 38. A distinction must be drawn between the conditions governing the use of hospital ships in Articles 22, 24 and 25 of the Convention and the conditions governing the use of medical transports in Article 38. With respect to the use of the latter there must be in each instance a special agreement concluded between the Parties to the conflict, whereas no such agreement is required in the case of hospital ships.
"aircraft exclusively employed for the removal of the wounded, sick and shipwrecked, and for the transport of medical personnel and equipment." The strict conditions governing the use of medical aircraft are not to be confused, however, with the far more liberal provisions governing the use of hospital ships. The former are to be respected, and not to be made the object of attack, "while flying at heights, at times and on routes specifically agreed upon between the Parties to the conflict concerned." In each instance, therefore, the use of medical aircraft is made dependent upon a prior agreement whose purpose is to ensure that the adverse Party may exercise close control over such aircraft. This control is further ensured by requiring medical aircraft to be clearly marked with the distinctive emblem provided for in the Convention, together with their national colors, on their lower, upper and lateral surfaces. Additional markings may be made the subject of agreement. Special precaution is taken in Article 39 to prohibit flights of medical aircraft over enemy or enemy-occupied territory, unless otherwise agreed. Finally, medical aircraft are obliged to "obey every summons to alight on land or water," but in the event of alighting involuntarily on land or water in enemy-occupied territory, the wounded, sick and shipwrecked, as well as the crew of the aircraft—medical personnel excepted—are to be made prisoners of war.

The strict rule forbidding belligerent aircraft to fly over or land in neutral territory is mitigated in the special case of medical aircraft. Article 40 of the 1949 Convention permits the medical aircraft of the Parties to the conflict to fly over the territory of neutral Powers, land thereon in case of necessity, or use it as a port of call. But every flight over neutral terri-

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8 It is readily apparent from Article 39 that the inclusion of medical aircraft in the 1949 Convention was—at best—done only reluctantly. To what extent belligerents will be able to utilize medical aircraft in future hostilities remains to be seen, though if Article 39 is any indication of future developments in this respect such use will certainly be very sparing.

9 There is nothing in Article 39 or in the other provisions of the 1949 Convention which expressly prevents medical aircraft from being used to rescue the wounded and shipwrecked at sea—particularly such personnel as have been forced into the sea by or from aircraft. But it is quite clear that if medical aircraft are allowed to perform the function of so-called "seaplane ambulances" they are subject to the same strict conditions laid down for medical aircraft engaged in any other tasks. Hence, the recurrence of a controversy—between parties to the 1949 Convention—similar to the controversy that took place between Germany and Great Britain in 1940 regarding the use by Germany of seaplane ambulances to rescue German airmen shot down at sea, would still support the position taken by Great Britain. At that time the British Government insisted that the use of seaplane ambulances was subject to the prior approval and control of the adverse Power, an approval that was not given by Great Britain after it had been ascertained that some of these aircraft were being used for intelligence activities.

10 The relevant paragraph of Article 39 reads: "Medical aircraft shall obey every summons to alight on land or water. In the event of having thus to alight, the aircraft with its occupants may continue its flight after examination, if any."—It is not unreasonable to assume that the power thus given belligerents to compel medical aircraft to alight is to be exercised with due discretion (e.g., having regard to the availability of safe landing facilities), though no such phrase is contained in Article 39.
tory must be preceded by notice given to the neutral state concerned, and every summons to alight, on land or water, must be obeyed. In addition, the immunity of medical aircraft from attack is guaranteed “only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned."¹¹

e. The Distinctive Emblem; The Problem of Identification

The distinctive emblem to be displayed on the flags, armlets and all equipment employed in the medical service is the red cross on a white ground. However, Article 41 of the 1949 Convention permits, in place of the red cross, the red crescent or the red lion and sun on a white ground, though only for those countries which already use these emblems. In the case of medical, religious and hospital personnel a water resistance armlet bearing the distinctive emblem is to be worn, and the armlet is to be issued and stamped by the competent military authority.¹² In addition, such personnel are to wear an identity disc and to carry a special identity card bearing the distinctive emblem and described in Article 42.¹³

The effectiveness of the protection from attack granted to hospital ships quite naturally depends very largely upon the ease with which belligerents can make the proper identification. In practice, the problem of insuring the proper identification of hospital vessels proved quite difficult during the 1939 war, and it is widely agreed that in the all too numerous cases of attacks made upon hospital ships the cause was nearly always attributable to a failure—particularly on the part of aircraft—to make the proper identification.¹⁴ The 1949 Convention has sought to ensure that instances

¹¹ The second paragraph of Article 40 goes on to declare—though somewhat redundantly—that: “The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.”—Apparentl y these conditions or restrictions are of a special character and in addition to the restrictions governing routes, heights and times mentioned in paragraph 1 of Article 39. Finally, Article 40 provides that: “Unless otherwise agreed between the neutral Powers and the Parties to the conflict, the wounded, sick or shipwrecked who are disembarked with the consent of the local authorities on neutral territory by medical aircraft shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment shall be borne by the Power on which they depend.”

¹² Article 42.

¹³ The card is to be water resistant, of pocket size, and should bear—at the very least—the name, date of birth, rank and service number of the bearer, in what capacity he is entitled to receive protection, the bearer’s photograph, fingerprints and stamp of the military authority. In no circumstances are personnel to be deprived of their insignia or identity cards or of the right to wear the armlet. In case of loss they shall be entitled to receive duplicates of the cards and to have the insignia replaced.

¹⁴ Article 5 of Hague X provided that military hospital ships were to be distinguished by being painted white outside with a horizontal band of green about a metre and a half in breadth. Private (enemy or neutral) hospital ships were to be painted white outside with a horizontal band of red about a metre and a half in breadth. In addition, Hague X declared that in order to ensure by night freedom from interference, hospital ships must—with the belligerent’s consent—take the necessary measures to render their special painting sufficiently plain. Mossop
of mistaken identification will be reduced to a minimum, and to this end prescribes—in Article 43—that hospital ships shall be distinctively marked as follows:

(a) All exterior surfaces shall be white.
(b) One or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air.\(^{15}\)

Further provisions of Article 43 are directed toward providing more accurate identification of hospital ships, though apart from the specific provision regarding the use of flags on hospital vessels\(^{16}\) they are stated in the most general terms. Thus it is declared that hospital ships “which may wish to ensure by night and in times of reduced visibility the protection to which they are entitled, must, subject to the assent of the Party to the conflict under whose power they are, take the necessary measures to render their painting and distinctive emblems sufficiently apparent.”

(op. cit., p. 401), points out that: “During the 1939 war additional markings on the sides, stern, and deck of hospital ships to aid identification by day, and illumination at night with a band of green lights on the sides and red crosses on the sides and deck picked out with red lamps, were adopted by common consent and provide a high degree of protection against underwater attack—although errors are not unknown in practice.”—Spaight (op. cit., pp. 490–1) writes that despite these efforts toward better identification the instances of air attacks on hospital ships were numerous—on both sides—and that the record of World War II is, in this respect, “not a happy one.” But Spaight observes, as does Mossop, that in all probability these attacks from the air were accidental and not deliberate.

In World War I, however, German attacks upon Allied hospital ships were deliberate, though Germany defended these attacks by the claim that Allied hospital vessels were being used for military purposes (a charge denied by the British Government). An account of the World War I controversy is given in Hackworth, op. cit., Vol. VI, pp. 460–3. Among the British vessels sunk by German submarines were the Dover Castle and the Llandovery Castle, and the sinkings provided the occasion for two of the well-known trials held after World War I before the Reichsgericht. In the one case the commander of the submarine which sank the Dover Castle was found not guilty because he had acted under superior orders. In the second trial the Reichsgericht found the accused guilty of a violation of the law of war in having fired upon the survivors of the torpedoed Llandovery Castle who had taken to the lifeboats.\(^{15}\) In this connection Article 44 declares that the distinguishing signs referred to in Article 3—and cited above—“can only be used, whether in time of peace or war, for indicating or protecting the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned.”

\(^{15}\) “All hospital ships shall make themselves known by hoisting their national flag and further, if they belong to a neutral state, the flag of the Party to the conflict whose direction they have accepted. A white flag with a red cross shall be flown at the mainmast as high as possible.” In case hospital ships are provisionally detained by an enemy they must haul down the flag of the Party to the conflict in whose service they are or whose direction they have accepted.—The identification system provided for hospital ships is, in general, applicable as well to the lifeboats of hospital ships, coastal lifeboats and all small craft used by the medical service.
And in an even more general way the Parties to the conflict are directed to endeavor at all times "to conclude mutual agreements in order to use the most modern methods available to facilitate the identification of hospital ships."

Despite the improved system of marking hospital ships, provided for in the 1949 Convention, and the exhortation made to facilitate further the proper identification of such vessels by the use of modern devices, it seems altogether likely that the difficulties attending identification in World War II will remain largely unsolved. It is only to be expected that belligerents will refrain from facilitating the identification of hospital ships if in so doing they run the risk of endangering the safety of their combatant forces. Illumination at night of hospital ships has proven feasible when such vessels travel alone upon the high seas. But belligerents have been understandably reluctant to illuminate these vessels when in port or when accompanying combatant forces at sea. In these latter situations hospital ships—though, of course, not liable to direct and deliberate attack—must accept the risk attendant upon their presence in the immediate area of legitimate military objectives.17

It may be, however, that through the use of modern devices belligerents will be able to resolve at least some of the past difficulties encountered in the identification of hospital ships. The suggestion has been made that radar could be effectively used to facilitate proper identification. But the ease with which this device, as well as others, could be misused by belligerents presents an obstacle to future developments along this line, particularly in a period that is not marked by a high degree of mutual trust between belligerents. At the very root of the problem, it would seem, is the difficulty of reconciling the belligerent practice of waging unrestricted warfare upon enemy merchant shipping with the precautions that are normally required if hospital ships are to be ensured against accidental attack as a result of faulty identification. In large measure, therefore, the problem of ensuring the proper identification of hospital ships must be

17 To this extent it is hardly adequate that the 1949 Convention repeats in Article 30 the formula earlier used in Hague X that: "During and after an engagement, they (hospital ships) will act at their own risk." It is clear that hospital ships act at their own risk whenever they place themselves in the immediate vicinity of legitimate military objectives. For even though every effort must be made to avoid firing upon—or bombing—hospital ships, the presence of the latter cannot serve to exempt nearby military objectives from attack for fear that a hospital vessel might thereby suffer incidental injury. In this connection, however, it should be observed that there is no basis for the contention—put forward by Germany during the 1939 war—that hospital ships under convoy of belligerent warships surrender their right to claim exemption from direct attack. There is no provision either in the 1949 Convention or in Hague Convention X forbidding hospital ships from sailing under convoy. Indeed, in accompanying fleet forces to the scene of an engagement in order to succor the wounded and shipwrecked—a task specifically conferred upon hospital ships—it is obvious that hospital vessels are—in a sense—sailing under convoy.
seen in the broader context of the present liability of belligerent merchant shipping to attack and destruction. 18

f. Application and Enforcement

Each of the four 1949 Geneva Conventions For the Protection of the Victims of War contain a number of similar provisions relating to application and enforcement of all. However, the relevance of these provisions will necessarily depend largely upon the particular category of war victims under consideration. With respect to the wounded, sick and shipwrecked at sea, many of the general provisions found in the four Geneva Conventions have only a limited relevance and warrant no more than a brief summary. 19

The 1949 Convention on the wounded, sick and shipwrecked at sea is applicable "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." 20 In the event that one of the Powers in conflict is not a party to the Convention, those Powers who are Parties shall nevertheless remain bound by it in their mutual relations. Moreover, those Powers already bound by the Convention shall be bound in relation to a Power not a Party, provided the latter accepts and applies the provisions of the Convention. 21 Special provision is also made—in Article 3—for the collection and care of the wounded, sick and shipwrecked during an armed conflict which is "not of an international character" (i.e., in a civil war and analogous situations); each Party to such conflicts being obligated to treat the sick, wounded and shipwrecked in a humane manner and without any adverse distinction

18 See pp. 57-70. It need hardly be pointed out that the above remarks are not intended as a justification for the fact that hospital ships were frequently attacked during World War II. It is apparent, however, that a policy allowing unrestricted warfare against merchant ships by submarines and aircraft must—almost of necessity—render the hospital ship's position a far more hazardous one. And this is especially true when the weapons used to implement such a policy permit destruction at great distances.

19 For a detailed analysis of these general provisions see, in particular, Paul de La Pradelle, La Conférence Diplomatique Et Les Nouvelles Conventions de Genève du Août 1949 (1951).

20 Article 2. The general significance of this provision has been noted elsewhere in the text (see pp. 23-4).

21 The above provisions of Article 2 are completed by the further stipulation that the Convention applies "to all cases of partial or total occupation of the territory of a High Contracting Party even if the said occupation meets with no resistance."—Although the Convention normally comes into force for a Party six months after the instruments of ratification have been deposited, Article 61 declares that situations "provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation."—Denunciation of the Convention shall take effect one year following notification, but a denunciation during a period of armed conflict shall not take effect until peace has been concluded and until operations connected with the release and repatriation of the persons protected by the Convention have been terminated (Article 62).
founded on race, colour, religion, sex, or any other similar criteria.22

The field of application of the 1949 Convention is limited by Article 4 to forces on board ship. Once forces are put ashore they immediately become subject to the provisions of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.23

The Convention takes precaution to ensure that the rights conferred upon protected persons shall not be adversely affected by special agreements Parties to the conflict may conclude in the course of hostilities.24 Similar care is taken to emphasize that protected persons may “in no circumstances” renounce in part or in entirety the rights secured to them by the Convention.25 Nor can this obligation imposed upon the parties to the Convention to respect the rights of the wounded, sick and shipwrecked be restricted by the operation of reprisals. For Article 47 of the Convention declares that: “Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.26

The importance of the provisions in the Convention dealing with the Protecting Powers—neutral states whose duty it is to safeguard the interests of the Parties to the conflict—is limited. The difficulties involved in obtaining the presence of representatives of the Protecting Powers at the scene of operations—particularly at sea—are well known. Besides, Article 8 of the Convention directs such representatives of Protecting Powers to “take account of the imperative necessities of security of the

22 Article 3 raises many novel problems which cannot be dealt with here. It is interesting to note, however, that this article seeks to obligate not only the present Parties to the Convention but also future rebel forces that may rise up within the territory of any of the Parties. There is no assurance, though, that such future forces will agree to consider themselves bound by the “fundamental” obligations laid down in Article 3. Nevertheless, Article 3 is—so far as the Parties to the Convention are concerned—unconditional and not dependent upon reciprocity of treatment on the part of unrecognized forces in a future civil war. However, once the rebellious forces are recognized by the parent state—and, perhaps, if not by the parent state then by third states—the conflict takes on an “international” character, and Article 2 applies. But once Article 2 applies the parent state is released from any of the obligations laid down by the Convention, if the newly recognized belligerent refuses to accept and apply the provisions thereof.

23 And Article 5 declares that neutral Powers “shall apply by analogy the provisions of the present Convention to the wounded, sick and shipwrecked, and to members of the medical personnel and to chaplains . . . received or interned in their territory, as well as to dead persons found.”

24 Article 6.

25 Article 7.

26 A provision whose rigid observance may prove difficult with respect to an enemy who insistently refuses to adhere to the provisions of the Convention, and—in particular—resorts to inhumane measures in treating the wounded, sick or shipwrecked falling under its power.
State wherein they carry out their duties." 27 Nevertheless, provision is made for Protecting Powers, and in order to fulfill their tasks of safeguarding the interests of the Parties to the conflict these Powers may appoint delegates chosen from their diplomatic or consular staff, from amongst their own nationals or the nationals of other neutral Powers. The delegates so chosen are subject to the approval of the Power with which they are to carry out their duties, and once approved the task of the delegates is to be facilitated to the greatest extent possible. 28 One function of the Protecting Powers warrants special mention. Article 11 of the Convention provides that where they deem it advisable in the interest of protected persons, and particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreements. For this purpose a Protecting Power may, either on its own initiative or at the invitation of one Party, propose a meeting of the representatives of the Parties to the conflict. The latter are bound to give effect to the proposals made to them for this purpose.

In general, the Parties to the Convention are obliged to ensure—through their Commanders-in-Chief—that the specific provisions of the Convention are properly executed and that unforeseen cases are provided for in conformity with the general principles laid down therein. 29 The text of the convention must be disseminated as widely as possible. 30 Of particular significance—not only for what they contain but also for their omissions—are the provisions dealing with the repression of abuses and infractions. The High Contracting Parties undertake, in Article 50, "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention . . ."—the latter being defined 31 as "wilful killing,

27 And although Article 8 goes on to state that the activities of representatives of Protecting Powers "shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities," it will be apparent that such "imperative military necessities" may prove to be of frequent occurrence in operations at sea.

28 Article 9 provides that the provisions of the Convention "constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded, sick and shipwrecked persons, medical personnel and chaplains, and for their relief." And Article 10 contains provisions which allow the Parties at any time to agree to entrust "to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention." The organization referred to in Article 10 is not to be confused with the Red Cross or other humanitarian organizations already in existence. Instead, it refers to the possible future creation of an organization capable of taking over the functions of Protecting Powers in a war in which there may be no neutral states.

29 Article 46.
30 Article 48.
31 Article 51.
torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." The obligation is laid upon each contracting Party to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring them—regardless of nationality—before its own courts. As an alternative it may—though only if it so prefers—hand such persons over for trial to another contracting Party, provided the latter has made out a prima facie case. And apart from the acts held to constitute grave breaches of the Convention the Parties are further obliged to take whatever measures are necessary for the suppression of all acts contrary to the provisions of the Convention. 

Finally, attention may be directed to the inquiry procedure provided for in Article 53 of the Convention. Article 53 reads:

At the request of a Party to the conflict, an inquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the inquiry, the Parties should agree on the choice of an umpire, who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

Although the Convention does not so state, the "grave breaches" enumerated in Article 51 are certainly war crimes. It can hardly be said, however, that the procedure set out in the 1949 Convention for the punishment of grave breaches of the Convention constitutes a marked departure from traditional procedures. For all practical purposes Article 51 of the 1949 Convention obligates the contracting parties to do little more to repress abuses and infractions than did its predecessor—i.e., Hague X, in Article 21. This is all the more significant in view of the fact that the 1949 Convention was concluded during a period in which the establishment of new procedures to ensure individual responsibility for violations of international law through the creation of international criminal courts has been widely proclaimed as one of the essential tasks of the present international legal order. And the obvious reticence of the drafters of the 1949 Geneva Conventions even to use the term "war crimes," let alone to initiate a truly international procedure for the apprehension of war criminals, stands in clear contrast to many of the rather sweeping estimates of the significance to be attached to the recently concluded war crimes trials as well as to resolutions—without binding effect—made by the General Assembly of the United Nations concerning war crimes and individual responsibility for such crimes.

A further provision of the 1949 Convention—Article 52—states that: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by any other High Contracting Party in respect of breaches referred to in the preceding Article (51)." The obligation imposed by this Article does not refer to the war but to the peace treaty concluded between Parties to the Convention (see Kunz, op. cit., p. 286). The apparent intent is to prevent a victor from absolving himself of liability incurred for grave breaches of the Convention by means of a provision in the peace treaty he may impose upon the defeated state.
The inquiry procedure is optional, therefore, and dependent entirely upon the prior agreement of the Parties to a dispute. A similar procedure for investigating alleged violations was laid down in Article 30 of the 1929 Convention for the Amelioration of the Condition of Wounded and Sick of Armies in the Field, though this Article was never once used during World War II.  

G. RUSES IN NAVAL WARFARE  

It has already been observed that one of the general principles of the law of war is the principle forbidding the resort to treacherous means, expedi­ents or conduct in the waging of hostilities. Although belligerents are permitted to resort to ruses, or stratagems, in order to obtain an advantage over an enemy, acts of treachery are prohibited. Whereas both ruses as well as acts of treachery usually partake of the element of deception, the former are regarded as “measures for mystifying or misleading the enemy against which the enemy ought to take measures ot protect himself.”  

Acts of treachery, on the other hand, are held to consist of measures of deceit which involve a breach of faith with an enemy.  

To the extent that the general principle forbidding the resort to treachery (and, conversely, permitting the resort to ruses) has been given express application in the form of specific rules of custom or convention no particular difficulty arises with respect to its interpretation. Thus it is  

33 And doubt may be expressed over the future effectiveness of Article 53 of the 1949 Conven­tion. Nor is this glaring defect of the 1949 Convention compensated for by the Resolution accompanying the Final Act of the Conference, which recommended that Parties unable to settle disputes by other means should endeavor to submit such disputes to the International Court of Justice.  

34 U. S. Army Rules of Land Warfare, paragraph 49. There is a certain terminological confusion with respect to the term “ruse”. Many writers use the term to cover only those acts of deception permitted to belligerents. The term treachery—or perfidy—is then used to cover forbidden acts of deception. In the Hague Regulations (1907) Article 2.4 speaks of “ruses of war” as “permissible measures,” and Article 2.3b forbids “treacherous” action. Not infrequently, however, the term “ruse” is used to cover both legitimate and illegitimate acts of deception; treachery then meaning an illegitimate ruse. In the text the former usage is adhered to.  

35 In the absence of specific rules considerable difficulty may arise. It has never been easy to establish general criteria that could be applied to all possible acts of deception in order to determine whether such acts may be regarded as permissible ruses or forbidden treachery. The difficulties involved are very similar to the difficulties involved in the attempted interpretation and application of the principle of humanity (see pp. 46-9). If it is stated that treachery consists of acts of bad faith which are forbidden by custom or convention, while ruses consist of acts permitted (at least negatively) by law, then this answer merely amounts to saying that deception expressly forbidden by law is treachery whereas acts of deception not expressly forbidden are ruses. This statement is quite true, but it is of little or no assistance as applied to novel acts of deception in order to determine whether such acts fall within the category of permissible ruses or within the category of treachery.  

English and American writers generally follow Halleck, who distinguished between ruses and treachery by stating that “whenever a belligerent has expressly or tacitly engaged, and is,
clearly forbidden to use a flag of truce as a means of deceiving an enemy and in order to obtain an advantage over him. It is also forbidden to use the red cross, or other equivalent distinctive emblems, for any purpose other than those humanitarian purposes which such emblems are universally understood to signify. Hence in warfare at sea, hospital vessels and medical aircraft, as well as their personnel, which bear these distinctive emblems and enjoy the protection offered thereby, must not be used for any military purpose. The same considerations apply to the attempted use for military purposes of cartel ships and any other vessels which—by special agreement between belligerents—have been accorded exemption from attack and capture.

The most important ruses employed in naval warfare relate to the measures belligerent warships may take in order to conceal their identity. Subject to those prohibitions indicated above, almost every conceivable form of disguise is permitted to belligerent warships. They may even take on the disguise of merchant vessels. In addition, they are permitted, according to custom, to disguise their true identity by the use of false colors, provided only that prior to the exercise of belligerent rights (attack, visit or search, seizure) they show their true colors.

therefore, bound by a moral obligation, to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith... But when has a belligerent the obligation to speak the truth, particularly in an era (as both Stone (op. cit., p. 56) and Spaight (op. cit., p. 169) well point out) in which false communications and false reports have become standard practices? Spaight suggests that the preferable formula run as follows: "A procedure, emblem, or signal to which a recognized significance is attached by international law or custom, may not be diverted to another purpose prejudicial to its being respected when used for its original restrictive or humanitarian purpose." Apart from the fact that this formula does not seem to cover all possible acts of deception, it does not really solve the problem. The phrase "recognized significance" begs the decisive question. If "recognized significance" means "embodied in a rule of customary or conventional law" then Spaight's formula simply states that the law should be observed. To say, for example, that the red cross emblem should "not be diverted to another purpose" is merely to state what the law governing the use (and misuse) of this emblem already states. Stone proposes that "the test (between ruses and treachery) on principle should be whether the deceit attacks the security of some interest or principle to which States generally, whether enemies or not, attach special importance. Thus, using civilians as a shield, or misuse of the flag of truce, undermines the principle of immunity of civilians, and that negotiations should be possible even between enemies. Of course, evaluations are here involved, which allow diversity of opinion even if such a test were accepted." There is much to be said for this proposal, despite the fact that it also raises some of the difficulties already referred to.

See pp. 126-8 for a discussion of the provisions which deal with the misuse of the red cross emblem in the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

See Law of Naval Warfare, Section 64oa.—It is customary for writers to point out the well known case of the German cruiser Emden which, in 1914, "hiding her identity by rigging up a dummy fourth funnel and flying the Japanese flag, passed the guardship of the harbour of Penang in the Malay States, made no reply to its signals, came down at full speed on the Russian cruiser Zemshug, and then, after lowering the Japanese flag and hoisting the German flag, opened fire.
Although the use of false colors (i.e., enemy or neutral) by belligerent warships is clearly permitted by custom—and was frequently resorted to during both World Wars—the practice has been the object of some criticism. It has been claimed that whereas the use of enemy flags, uniforms and insignia is forbidden at all times in land warfare an analogous practice is permitted, in part at least, in naval warfare. In fact, however, the position with respect to the wearing of enemy uniforms and insignia in land warfare is—at present—unsettled. Be that as it may, it does not appear entirely useful to compare, in this respect, land warfare to naval warfare. Even if it is assumed that in land warfare belligerent forces are permitted to wear enemy uniforms and insignia save when engaged in actual combat, this practice will involve only the combatants. In naval warfare the practice of permitting warships to disguise themselves as

and torpedoed her.” Oppenheim-Lauterpacht, op. cit., p. 510.—During World War II the Germans enjoyed a measurable degree of success through the skillful disguise they provided for their armed raiders. Roskill (The War at Sea, p. 277) describes this disguise as follows: “Their funnels and topmasts were telescopic, dummy funnels and derrick posts could be fitted; false bulwarks, false deck houses and dummy deck cargoes were other devices employed; and repainting was often carried out at sea to render valueless any reports of their colouring which the Admiralty might obtain and promulgate.” The tactics of the armed raiders were to reveal their true identity only after having come within close enough range to overwhelm the victim (usually armed enemy merchant vessels) by surprise.—One of the most notable actions involving these armed raiders took place in November 1941 between the Australian cruiser Sydney and the German armed raider Kormoran. The disguised raider, when approached by the Sydney, identified herself as a Dutch merchant vessel. Before the Sydney could establish the truth or falsity of her claimed identity the Kormoran cast off her disguise and opened fire at a distance of 2,000 yards. As a result of the action the Sydney was destroyed with complete loss of officers and crew. The incident is described by Roskill, pp. 547-9. Also Von Gosseln, “The Sinking of the Sydney,” U.S. Naval Institute Proceedings, 79 (1953), p. 25.

38 For example, by H. A. Smith, op. cit., pp. 91-3, and Erik Castren, op. cit., pp. 264-6. Article 7 of the U.S. Naval War Code of 1900 declared that “the use of false colors in war is forbidden.” Later discussions, however, indicated uncertainty over the desirability of this provision in the absence of international agreement. U.S. Naval War College, International Law Discussions, 1903, pp. 37-42; also for the year 1906, pp. 7-20. Neither the 1917 nor the 1941 Instructions issued to the U.S. Navy contained a provision relating to the use of false colors by warships.

39 Article 23f of the Hague Regulations merely forbids the “improper use” of the “military insignia and uniform of the enemy,” leaving unsettled (at least by a literal interpretation) the question as to precisely what acts may constitute improper use. It has been contended that the wearing of enemy uniforms at any time is forbidden and that this was the true intent of Article 23f. Thus, one writer concludes, after a careful survey, that “international law, customary as well as conventional, forbids under all circumstances the use of enemy uniforms for purposes of deceiving the enemy.” Valentine Jobst III, “Is the Wearing of the Enemy’s Uniform a Violation of the Laws of War?,” A. J. I. L., 35 (1941), p. 441. Some writers contend, however, that this rule only extends to combat, and the U.S. Army Rules of Land Warfare, state in paragraph 54: “In practice it has been authorized to make use of national flags, insignia, and uniforms as a ruse. The foregoing rule (Article 23, paragraph (f) HR) does not prohibit such employment, but does prohibit their improper use. It is certainly forbidden to employ them during combat, but their use at other times is not forbidden.”
merchant vessels has as one effect to render more difficult the retention of the distinction made between combatants and non-combatants. Experience has shown that it is futile to expect a belligerent to adhere to the traditional law when this can be done only under circumstances of great peril to the visiting warship. Besides, the prohibition in land warfare against employing enemy uniforms and insignia in actual combat does serve to prevent further deception on the battlefield, and to insure that when engaged in combat belligerents will be able to distinguish friend from foe. In naval warfare it is difficult to see how the same purpose—or, for that matter, any purpose—is served by the rule requiring that a warship show its true colors prior to attack. The show of colors may be carried out almost simultaneously with the act of attack. But once the attack begins there is no longer any possibility to deceive. It is for this reason that the rule has been considered by some writers as arbitrary since it forbids certain acts of deception from the moment at which they cease to deceive.

It is also true that the use of false colors may affect adversely the interests of neutral states. In the past the view has been that the use of neutral colors by belligerent warships was a matter primarily of concern to belligerents, neutral states having only an indirect interest. This view must assume, however, that belligerents will rigorously observe the traditional rules governing belligerent interference with neutral trade. But in a

40 "As things stand, the warship which honestly tries to conform to the traditional rules places herself in great peril. She may stop a vessel wearing some neutral flag and approach her in accordance with the prescribed routine. At any moment the other ship may hoist her true colours and discharge a heavy broadside upon the ship which is trying to obey the law." H. A. Smith, op. cit., p. 92. Smith considers the rule permitting false colors to be an anachronism, a survival from the days of pirates and privateers. "In earlier times there were good reasons for the old rule, which often helped ships to make their escape from pirates or privateers. Pirates obeyed no law and privateers were often not much better. The outwitting of such enemies could call for no censure." There is, in addition, a considerable difference between the effectiveness of the ruse in modern combat, as distinguished from naval battles of earlier days. The speed and firepower of vessels allowed in earlier days time to establish identity and to provide for action in case of mistake. Today the loss of a few minutes, or even seconds, is likely to prove decisive, as the case of the Sydney seems to bear out.

41 W. E. Hall, A Treatise On International Law (5th ed., 1904), pp. 538-9. "A curious arbitrary rule affects one class of stratagems by forbidding certain permitted means of deception from the moment at which they cease to deceive. It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held that soldiers clothed in the uniforms of this enemy must put on a conspicuous mark by which they can be recognized before attacking, and that a vessel using the enemy's flag must hoist its own flag before firing with shot or shell. The rule, disobedience to which is considered to entail grave dishonor, has been based on the statement that 'in actual battle, enemies are bound to combat loyally and are not free to ensure victory by putting on a mask of friendship.' In war upon land victory might be so insured, and the rule is consequently sensible; but at sea, and the position is spoken of generally with reference to maritime war, the mask of friendship no longer misleads when once fighting begins, and it is not easy to see why it is more disloyal to wear a disguise when it is absolutely useless, than when it serves its purpose."
period when belligerent claims of control over neutral trade are already extensive, the use of neutral colors by belligerent warships can serve only to provide belligerents with an additional reason for making still greater claims of control over neutral shipping.42

The criticisms raised against the ruse which permits the use of false colors is therefore not without substantial merit. Nevertheless, as matters now stand the law is reasonably clear, despite the fact that continuance of the practice forms a contributing cause in the increased liability of merchant vessels to attack. It is doubtful, however, that belligerent military aircraft are permitted to make use of similar ruses in operations at sea. Although there are no conventional rules regulating the marking of aircraft in time of war, the practice of belligerents during World Wars I and II would appear to indicate acceptance of a prohibition against the false marking of aircraft in order to deceive an enemy.43

42 These neutral difficulties are considerably increased by the use of the neutral flag by belligerent merchant vessels in order to avoid capture or destruction. As between belligerents the practice of so disguising merchant vessels is not open to objection and probably should not be classified as a ruse de guerre in the strict sense. The neutral state may claim, however, that the practice represents the misuse of its flag and endangers its interests. When during World War I Great Britain ordered its merchant vessels to simulate neutral vessels as closely as possible, and to use the flags of neutral states, several neutrals protested. In particular, the United States declared that while the neutral flag could be used on occasion by belligerent merchant vessels in order to escape seizure by an enemy this did not mean that such vessels could make use of the neutral flag as a general practice or that the belligerent state could claim this as a right with respect to its merchant vessels. Great Britain did not accept the protest, maintaining that custom allowed belligerent merchant vessels to resort to such disguise. The British Government did state though that it had no intention of advising merchant shipping “to use foreign flags as general practice or to resort to them otherwise than for escaping capture or destruction.”

43 Spaight (op. cit., pp. 169 ff.), in reviewing this practice, considers it as constitutive of a customary rule. Presumably this prohibition extends to aircraft which bear no markings. Stone (op. cit., p. 612) states that: “Protests by each side against alleged false use in both World Wars, and the care taken to deny such charges, suggests an inchoate prohibition. But no details of any such prohibition have emerged, for instance, as to whether (as in naval warfare) false marks could be used while cruising, provided true colors are shown before opening fire.”
H. BOMBARDMENT

In principle, bombardment may be undertaken either for the purpose of effecting the immediate entry and occupation of the area bombarded or for the purpose of attacking objectives the destruction of which would constitute a military advantage to the belligerent. Traditionally, the former purpose has been associated with the operations of forces on land, and in the circumstances of warfare that prevailed up to World War I the principal test for determining the legitimacy of land bombardment was whether or not the place attacked was "defended." 44 Perhaps the main circumstance that formerly characterized bombardment on land was the short range of artillery, which meant that a city or town being bombarded by land forces was within the combat zone. An "undefended" city or town was, in effect, one that was open to the immediate entry of and occupation by enemy forces, and because of its situation the further bombardment of such a place would merely cause unnecessary destruction of lives and property. 45

In naval operations, however, the occupation of enemy coastal areas—even if only temporary in character—may prove exceptional. Instead of serving as a prelude to occupation the object of naval bombardment is frequently limited to that of denying an enemy the continued use of his military resources. For this reason the rules laid down in Hague Convention IX (1907), regulating bombardment in naval warfare, while forbidding the bombardment by naval forces of "undefended ports, towns, villages, dwellings, or buildings," 46 expressly exempted from this prohibition "military works, military or naval establishments, depots of arms or war material, workshops or plants which could be utilized for the needs of the hostile fleet or army, and ships of war in the harbor . . ." 47

44 Article 25 of the Land Warfare Regulations annexed to Hague Convention IV (1907) provided that the "attack or bombardment by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited."

45 Thus John Westlake (International Law, (1907), part II, p. 77) wrote that the principle upon which Article 25 of Hague IV was based "is that a land force can occupy an undefended place and, if it must afterwards evacuate it, can destroy before doing so all that its military value to the enemy exposes to lawful destruction; therefore bombarding the place without or before occupying it would be wantonly to endanger both the lives of the population and the property not lawfully subject to destruction. The same reason will apply to the dealings of a fleet with the undefended coast town, unless it cannot spare the force or the time required for landing and occupying it, including re-embarkation if necessary: in that case only can the question of its right to bombard it arise."

46 Article 1.

47 Article 2. Furthermore, according to Article 2 the commander of a naval force could—as a rule—destroy such objectives in an "undefended" town or port only after the local authorities had been summoned to destroy them and had failed to do so. But this latter obligation was qualified by the further provision that "if military necessity demanding immediate action permits no delay, it is nevertheless understood that the prohibition to bombard the undefended
Hague Convention IX therefore expressly recognized the belligerent right to bombard certain "military objectives" even though located in or near an "undefended" enemy area. Nevertheless, this particular juxtaposition of the criterion of defense and the criterion of the military objective has been the source of some uncertainty and confusion in dealing with bombardment in naval warfare, and, it may be added, this confusion has carried over into aerial warfare as well. In naval warfare a town or port may be completely without defenses 48 though not open to entry by the naval forces of an enemy, for the reason that enemy naval forces may be incapable of occupying the undefended place. If enemy naval forces are not capable of occupation then bombardment is permitted, but only against military objectives. It is only if a town or port contains neither defenses nor other legitimate military objectives that bombardment is prohibited. Immunity from bombardment by naval forces need not result from the fact of being actually open to entry—in the sense that these forces are capable of effecting entry—but from the reason that the area contains no object that may lawfully be attacked. Of course, if an enemy place, though containing military objectives, can be entered and occupied by naval forces then further bombardment of these objectives is evidently superfluous and—if undertaken—would constitute a violation of the rule forbidding wanton destruction. 49

48 Precisely when this will in fact be the case is a question over which there has been a good deal of controversy. It seems clear that the second paragraph of Article 1 of Hague IX, stating that a place "cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor," is neither generally indicative of an answer to this question nor satisfactory in itself. For example, would fortifications placed on adjacent coasts be enough to turn a nearby town or port into a defended area in the sense of Hague IX?

49 See Law of Naval Warfare, Article 62rd.—It should be made clear, however, that the "incapacity" of a naval force to enter and occupy an undefended coastal town or port may be the result of the mission upon which it is engaged at the time. If the military mission upon which the naval force is engaged does not permit entry and occupation a coastal town or port containing military objectives may be bombarded even though undefended. Hence the phrase "can be entered and occupied"—and used in the text above—must be understood as implying not only the absence of any defense but also a compatibility between entrance and occupation and the military mission assigned to the naval force. In aerial warfare a city or town located well behind the front lines, i.e., in the hinterland or well outside the zone of combat, is certainly not open to entry, even though not itself possessing any defenses. Terminology drawn from land warfare becomes very misleading here and it is best to omit altogether the term undefended town, as did Article 24 of the unratified 1923 Rules of Aerial Warfare. The criterion to be used in reference to cities or towns in rear areas is that of the military objective, and any defenses located within the city or town are simply considered as military objectives. Hence a town containing neither defenses of its own nor any other military objectives is immune from bombardment. Some confusion on this score arose during World War II, when claims for immunity from air
With respect to the military objectives that may be made the target of lawful attack according to Article 2 of Hague IX, it would appear that recent developments have rendered this list unduly restrictive, and it can no longer be accepted as exhaustive. It is clear, for example, that communication systems used for military purposes may be bombarded by naval forces, even though not included in the list given in Hague IX. The same may be said for other objectives that belligerents have now come to recognize as forming legitimate targets for attack.  

Bombardment were made on behalf of "undefended" cities located, in many instances, at considerable distances behind the combat zone. Not being open to immediate entry and occupation they were not accorded exemption from aerial bombardment if containing military objectives. The fact that these cities did not possess defenses of their own, nor even attempt to intercept aerial attackers, was not held to be decisive. These cases are reviewed by R. Y. Jennings ("Open Towns," B. Y. I. L., 22 (1945), pp. 258–64) who observes: "There is no virtue in mere lack of defense. Unless accompanied by its corollary of freedom of entry the exemption of the undefended town would lead to the absurd result that a belligerent could secure the immunity of his production centres and lines of communication from lawful bombardment simply by omitting to defend them, and could thus concentrate all his arms for attack" (pp. 260–1). It does appear, however, that on several occasions during World War II immunity was claimed on the basis that the belligerent putting forth the claim was allegedly prepared to deny himself the use of all military resources within the city. This raises a different question. In principle, it would seem, as Jennings points out, "that a belligerent may claim exemption for a town if he voluntarily ceases to use its resources for military purposes..." Nevertheless, the experience of World War II is of little guidance on this point, and there are no instances where such a claim was conceded. Certainly, the practical difficulties in the way of insuring that an enemy would in fact forego use of the military resources of a city would be very great. Besides, there is the further objection that even if such abstinence could be insured there could be no guarantee that the agreement would not be broken off at any time with the result that the belligerent accorded immunity would be able to place in use those resources preserved intact. But the other belligerent would then be confronted with the task of destroying those resources at a time when, for various reasons, he might be unable to do so.—Finally, a careful distinction should be drawn—for the purposes of aerial bombardment—between bombardment in the zone where land operations are proceeding and bombardment carried out against cities in the rear areas. Within the combat zone aerial bombardment is restricted only by the rule forbidding wanton destruction—e.g., in attacking cities open to entry by the land forces. This follows for the reason that the zone of combat is regarded as constituting one vast military objective.  

Though Article 5 of Hague IX certainly remains valid and obligates the commander of naval forces undertaking the bombardment either of defended or undefended places to take "all necessary measures... to spare as far as possible buildings devoted to religion, to the arts and sciences, or to charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on condition that they are not used at the same time for military purposes." The inhabitants have the duty of indicating such places by visible signs consisting of large stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white. The provisions of Article 5 have been generally recognized as applicable to aerial warfare as well. See Law of Naval Warfare, Article 62.2, and notes thereto, for the relevant provisions of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field which deal with the protection of medical establishments and units as well as with the establishment of hospital zones and localities. Special note should also be taken of the provisions of the 1949 Geneva Convention Relative to The Protection of Civilian Persons in Time of War dealing with
But where the limits of the legitimate "military objective"—against which bombardment is lawful—are to be drawn is a question to which no precise answer can presently be given. It need hardly be stated that the outstanding feature of warfare in the twentieth century is the constant expansion of the military objective. The effects of this expansion have not been without substantial effect in broadening the scope of action permitted to belligerent naval forces in attacking the cities, towns and ports of an enemy. It is in aerial warfare that the effects of this expansion have proven the most far-reaching though, and given the importance of aircraft as a component part of the naval forces of belligerents the problem of aerial bombardment deserves at least brief comment.

The developments to date in aerial warfare provide an impressive illustration of the limited results that may follow from the attempt to apply directly to a novel form of warfare the general principles of the law of war, and particularly the principle requiring that a distinction be drawn between combatants and non-combatants. It has been asserted time and again on high authority that the minimum restrictions upon aerial bombardment are that non-combatants must not be made the object of direct attack, such attack being unrelated to a military objective, and that attack for the purpose of terrorizing the civilian population is forbidden. Yet the establishment of hospital, safety and so-called neutralized zones. Thus Article 14 of this Convention provides for the conclusion of agreements between the Parties to a conflict establishing "hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven." And Article 15 provides for the establishment, again only by mutual agreement, of neutralized zones intended to shelter from the effects of war "(a) wounded and sick combatants or non-combatants; (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character." These provisions are indicative of the state to which the practices of belligerents, and particularly the practices of aerial bombardment, have reduced the combatant-non-combatant distinction. It is significant to note that those civilian persons able to enjoy the protection of neutralized zones must perform no work of a "military character." Presumably this would include—though the phrase is far from clear—all those working in factories producing war materials, at the very least a large percentage of the population.

Finally, passing note should be taken of Article 6 of Hague IX requiring that, military exigencies permitting, the commander of attacking naval forces "before commencing the bombardment, must do his utmost to warn the authorities." And see Law of Naval Warfare, Article 623. In effect, warning is dependent upon the discretion of the commander of the attacking naval or aerial forces, though whenever possible it should be given.

51 Law of Naval Warfare, Article 621 b, c.—Article 22 of the 1923 Rules of Aerial Warfare stated: "Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited." The principles embodied in Article 22 were subsequently reaffirmed on several occasions prior to World War II by the League of Nations and other international bodies. Further, they were given prominent expression in the military manuals of many states. During World War II the belligerents never failed to render verbal service to these principles, if only by resolutely denying that aerial raids were taken against non-military objectives or in order to terrorize the civilian population.
practical significance of these restrictions in their application to aerial bombardment ought not to be overestimated, particularly by drawing misleading analogies with other forms of warfare. In bombardment by land or by naval forces it may still prove possible to determine with some degree of assurance when the civilian population deliberately has been made the object of direct attack, such attack being unrelated to a military objective. In aerial bombardment the difficulties involved in reaching a similar determination are obviously far greater; so much greater, in fact, that in the absence of specific rules commanding the general agreement of states, and providing for the detailed regulation of aerial bombardment, the mere attempt to apply directly the general principle distinguishing between combatants and non-combatants must prove in its effects far more apparent than real. 52

It should be made clear, therefore, that the ominous threat posed by aerial warfare is not simply a result of the failure to agree upon what constitutes a military objective, against which bombardment is permitted,

52 This would appear to be one reason for the significant absence of war crimes trials in which the accused were charged and convicted of terror bombing undertaken against the civilian population. And although one of the charges of war crimes listed in Article 6 of the Charter of the International Military Tribunal at Nuremberg was "the wanton destruction of cities, towns, or villages, or devastation not justified by military necessity", none of the accused was convicted of deliberately ordering the bombardment of civilian populations. In the Einsatzgruppen Trial there is an interesting passage in the Tribunal's judgment which reads as follows:

"A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them. (U. S. v. Otto Ohlendorf et al.) Trials of War Criminals 4 (1949), p. 467.

No doubt there is a difference in law between the deliberate killing of the civilian population by forces on land and the incidental—though unavoidable—injury to the civilian population through aerial bombardment of military objectives. But this difference does not do away with the consideration that the danger to the non-combatant population may be, in fact, far greater as a result of the "unintentional" injury inflicted by aerial bombardment than intentional acts committed by land forces. More important, however, there remains unanswered the question as to the methods of determining in practice when the civilian population has been made the deliberate object of attack by aerial bombardment. It is precisely the difficulties involved in reaching such a determination that has led Lauterpacht to admit that the practical importance of the prohibition against resorting to the bombing of the civilian population for the "mere purpose of terrorization . . . is of limited value. In most cases centres of civilian population will in any case constitute centres of communication or contain or be located in the vicinity of some objectives which the attacking belligerent will claim to be of military importance. In these cases the terrorization of the civilian population, however real in intention and effect, can plausibly be represented as being incidental to attack upon military objectives." "The Revision of the Law of War," p. 368.
though of course this failure is itself one of considerable moment. Even if it were possible to assume substantial agreement today upon this latter question there would remain the problem of determining the limits of the “incidental” or “indirect” injury that may be inflicted upon the civilian population in the course of attacking such objectives from the air.53

Here again, analogies drawn from land or naval warfare are frequently resorted to whose relevance can only prove—at best—extremely limited. It is quite true that the immunity of non-combatants from the injurious effects of bombardment by land or naval forces has never been considered absolute. In land warfare those measures permitted within the immediate zone of military operations may afford very little protection to the civilian population located therein. In naval warfare a commander need not abstain from the bombardment of “undefended” coastal areas even though “unavoidable damage” may be inflicted upon the lives and property of the civilian population located in the near vicinity of military objectives.54

53 The solution to these problems put forward in Article 2.4 of the draft 1923 Rules of Aerial Warfare may be summarized. Bombardment undertaken outside the immediate neighborhood of the operations of land forces (i.e., combat zone) was considered as legitimate only when “directed exclusively” at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well known centres engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes. In addition, Article 2.4 stipulated that where these objectives are so situated that they cannot be bombarded without the “indiscriminate bombardment of the civilian population” aircraft must abstain from attacking them. This prohibition against “indiscriminate bombardment” is not made dependent upon the intent of the attacker, but simply upon whether it is in fact possible in a specific instance to bombard military objectives without indiscriminately bombing the civilian population in the near vicinity. The point raised is an important one even today, since experience seems to indicate that although it is next to impossible to determine when the civilian population has been made the deliberate object of attack, unrelated to a military objective, it is by no means impossible to determine when the civilian population has been indiscriminately bombarded in the course of attacking military objectives. Indeed, it seems reasonably clear that the so-called target-area bombings of World War II entailed the indiscriminate bombardment of the civilian population, even though the primary purpose was to strike at an enemy’s military resources. It is submitted that on this decisive point Spaight (op. cit., pp. 259 ff.) is—at best—confusing. On the one hand, he endorses the legality of target-area bombing by declaring that: “If in no other way than by target-area bombing can a belligerent destroy his enemy’s armament centres and interrupt his enemy’s process of munitionment, then target-area bombing cannot be considered to offend against the principles of the international law of war . . . . Military effectiveness has been the test and by that test target-area bombing passes muster” (p. 274). On the other hand, Spaight insists that: “nothing that has happened in the second World War has shaken the legal objection to indiscriminate bombing. Against that kind of war-waging international law still sets its face” (p. 277). Presumably, this approval of target-area bombing and disapproval of indiscriminate bombing has as its basis the belief that the latter is unlawful because it is deliberately aimed against the civilian population. But this opinion is misplaced, since indiscriminate bombardment need not depend upon the element of intent. Nor is it easy, in this connection, to follow Spaight’s stricture that: “while target-area bombing comes close to the border-line of permissibility, atom bombing definitely overshoots it” (p. 278). The latter need not prove any more indiscriminate in its effects than the former.

54 Hague IX, Article 2.
Generally speaking, however, these examples—taken from the older forms of warfare—applied only to limited areas, and even then have been regarded as exceptional departures from the normal rule. But in aerial warfare the potential area of bombardment operations has no limitations save that of the ever expanding concept of the military objective, and what has formerly been an exceptional situation now threatens to become a normal condition. Given these circumstances the problem of determining the limits of the “incidental” injury that may be inflicted upon the civilian population in the course of attacking military objectives becomes crucial. The failure to provide a concrete solution to this problem may well mean that from a practical point of view the general prohibition against making non-combatants the direct object of attack will prove no more than nominal. At the present time though there is no indication that any solution holding the possibility of imposing detailed and effective restraints upon belligerents is in sight.55

55 Of necessity, the above remarks cut short a rather complicated development. But the essential outlines of this development have been presented. They may be summarized by stating that so long as uncertainty exists both as to the nature of the military objective against which aerial bombardment is permitted and the limits of the indirect injury that may be inflicted upon the civilian population in attacking such objectives the reaffirmation of general principles must unfortunately prove largely illusory. Thus it is of little use to suggest that the limits of the indirect injury permitted against non-combatants may be determined by weighing the military advantage to be gained against the injury that will be caused to non-combatants. If the experience of World War II is at all indicative of how belligerents will carry out this vague procedure it is clear that the scales will be weighted heavily in favor of military advantage. In fact, it would seem that this path easily leads to the justification of indiscriminate bombardment and the consequent obliteration of the combatant—non-combatant distinction.—In a penetrating criticism of the problems raised by aerial bombardment in World War II, Professor Stone (op. cit., p. 630) writes that the protection afforded civilians against deliberate attack through aerial bombardment ‘when such ‘incidental’ attack is clearly licensed, is verbal merely . . .” and that even more important than the “deceptive futility” of the general prohibition against the deliberate attack on civilians is “that by preserving the confusion of issues it prevents any real approach to agreed legal regulation.” The confusion, according to Stone, lies in the failure to distinguish between the “quasi-combatant workforce and genuine civilians,” and to recognize that belligerents “do regard the morale of the enemy’s quasi-combatant workforce as a military objective.” His proposal, therefore, is to effect a separation between these two categories of the civilian population, acknowledge the belligerent’s right to strike at the quasi-combatant workforce, and set up effective safeguards for other civilians. The practical difficulties in the way of this proposal—already made prior to World War II—are admittedly enormous when applied to the entire populations of states. At the very least it would be essential to provide clear criteria for distinguishing between those individuals engaged in work of a “military character” and those not so engaged. As already noted, Article 13 of the 1949 Geneva Convention on the Protection of Civilian Persons makes this same distinction with respect to “neutralized zones,” though offering no criteria for applying it in practice. Furthermore, even if such criteria could be provided the resulting dislocation involved in so separating belligerent populations would be staggering. Finally, the guarantee of effective observance would require both continuous inspection by neutral parties and a rather large degree of mutual trust as between the belligerents. Recent experience indicates, however, that there is small reason for believing that either of these conditions could be readily obtained.