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LEGAL ASPECTS OF SUBMARINE WARFARE

A Thesis

Presented To

The Judge Advocate General's School, U.S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

Historically, submarines have been subject to the same rules of international law that govern the conduct of surface vessels during their actions against belligerent shipping. Although the London Protocol of 1936 bound 48 nations to this concept, the traditional law was consistently violated during World War II. Are submarines exempt from the long standing restrictions on belligerent rights at sea or has international practice established different standards?

Moreover, many submarines are now equipped with ballistic missiles designed to strike land targets. Do the present rules contain guidelines for the regulation of the submarine in its role as a mobile guided missile platform? What effect will future evolution of the submarine have on its traditional role as a destroyer of commerce and on the international rules to which it is subject?

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Chapter I

Conditions in International Society Influencing Development of Rules of Submarine Warfare

A. Impact of Submarine as New Weapon of Warfare

The arrival of a new weapon on the international scene can be likened to the birth of a child. One legitimately wonders if the initial agony, the floundering attempts at formulating rules of conduct, are worth the flush of success when respectability is achieved. Although conceived in earlier times, the submarine as we know it is basically a child of the twentieth century. During the course of two world wars it has gained international acceptance as a weapon, if not international respectability. Although the weapon itself appears to have reached majority, the maturity of the rules which govern its conduct have been questioned and thus will be considered in some detail.

1. Development

The first commissioned American submarine was the Holland, which was accepted by the Navy in 1900.¹ Other seagoing nations throughout the world had launched, or would be launching, similar submersibles. The concept of a vessel capable of operating on, and under, the ocean was by no means new. Legend² credits Alexander the Great with a

¹ Sea Power 390 (E.B. Potter & C.W. Nimitz ed. 1960).

² R.H. Barnes, United States Submarines 1 (1944).

trip to the ocean floor in a watertight glass barrel where he confronted a whale.

Throughout history other attempts at submerging in some type of watertight compartment have been recorded, and self-propelled vessels capable of erratic operation beneath the surface were not uncommon in the 18th and 19th centuries.³ The first submarine for war purposes was an American innovation, the Turtle, which was used unsuccessfully against the British fleet during the Revolutionary War.⁴ It was not until the Civil War that the first warship was sunk by a submarine. This was the Union Housatonic which sank in Charleston harbor following an attack by the Confederate submarine Hunley.⁵ Thereafter, both the Union and the Confederacy experimented with submarine vessels but achieved no notable success.⁶ None of these early vessels were considered sufficiently reliable to be accepted by the navies of the world, and it was not until 1888 that the French launched the first commissioned submarine, the Gymnote.⁷

³ See Id. at 1-4.

⁴ Id. at 4-7.

⁵ Id. at 11-12. Unfortunately, the Hunley and her crew also went down with the Housatonic. The state of the submarine art during the Civil War is evidenced by the fact that on five previous occasions the Hunley had sunk to the bottom out of control with a total loss of thirty-five crewmen.

⁶ Id. at 13-15.

⁷ Sea Power 390 (E.B. Potter & C.W. Nimitz ed. 1960).

After 1900 progress was steady and when World War I began the submarine had developed to such a degree as to be a major factor in warfare. The Germans in particular found this new weapon to be most effective and its impact was so great that only the combined efforts of the British and United States Fleets prevented strangulation of the British Empire.

2. World War I Allied Losses

The German U-boat in fact very nearly won the war for the Axis powers. Although 187 U-boats were lost by the Germans, the U-boat fleet sank, either through direct attack or through mine-laying, 5,234 allied merchant vessels.⁸ In addition they sank 10 battleships, 18 cruisers, 20 destroyers, and 9 submarines.⁹

3. World War II Losses

The submarine's success was repeated during World War II. Axis U-boats again nearly proved to be the decisive weapon, and are credited with the destruction of 2,775 allied vessels.¹⁰ American submarines in the Pacific also achieved notable success during the same conflict and are credited with the sinking of 1,178 Japanese merchant vessels, as well as 214 warships.¹¹

⁸ Id. at 474. This amounted to a loss of 12,185,832 Gross Register Tons.

⁹ Id. at 475.

¹⁰ Id. at 564. Amounting to a loss of 14,573,000 tons.

¹¹ T. Roscoe, United States Submarine Operations in W.W.II 491 (1949).

4. Functional Aspects

The foregoing statistics graphically illustrate the pre-eminence of the submarine in the field of commerce destruction. However, from a functional standpoint, the submarine is clearly not limited to this one activity, and the records are replete with examples of this weapon's versatility.¹² The scope of this writing, however, will be limited to a consideration of the role of the submarine in commerce destruction, bombardment, and blockade, and the legal issues arising from this role.

B. Evolution from Territorially Limited to Total Warfare

The rules of naval warfare evolved from the practices and customs of the great maritime powers, and their validity was determined largely by the continuing willingness of these powers to abide by them. In order to properly evaluate the existing rules it is necessary to devote some thought to their origin as well as the conditions in international society which influenced their development.

1. Change in Geographic Scope

Most early wars were limited in scope not only as to the geographic area concerned, but also as to the percentage of a nation's population actually involved in combatant activity. Battles were normally fought in the territory of

¹² See Id. at 508-522 for examples of special missions performed by United States Submarines in the Pacific during World War II.

one of the belligerents and had little direct effect on the world at large. On land the feudal militarism in Europe gave rise to a military class society with a virtual monopoly on arms. This in effect deprived the peasant and town-dweller of the means for fighting during most of the feudal period. At sea the transportation of wealth in the form of goods led to the institution of piracy and the increase of overseas commerce led to clashes between rival trade interests. Since merchant vessels as a class were poorly equipped to defend themselves, seafaring communities early set aside certain vessels to act as men-of-war to protect the commercial shipping, thus giving rise to the concept of the navy.¹³

Toward the close of the Middle Ages, two forces arose, which, in combination with other factors, would lead to an expansion in the scope of warfare. One of these was the concept of nationalism, which resulted in the establishment of the new European system of sovereign states. These monarchies developed standing armies with professional forces traditionally led by the unemployed feudal nobility and composed of foot-loose commoners. This type of military organization fought the various religious and politico-economic wars prior to the time of Napoleon, but the French Revolution ushered in a new era in warfare. The aristocratic

¹³ Sea Power 3 (E.B. Potter & C.W. Nimitz ed. 1960)

monopoly in military leadership ceased, and the professional soldiery found itself outnumbered by citizens called for the defense of the republic. Revolutionary idealism made war the concern of the nation as a whole.¹⁴

The second factor acting as a catalyst in this situation was the growth of commerce. Trade in the Baltic and the Mediterranean posed problems of regulation and control over merchants and shipping. Expanding populations required more goods and more land. The discovery of the new world opened new vistas for trade and exploration. Progress in the art of navigation permitted merchant vessels and their attendant men-of-war to contemplate voyages far in excess of the usual coast hugging trade expeditions, and ships began to venture farther and farther into the open sea.¹⁵ As national interest in maritime commerce grew, so did the interest in protecting that valuable commodity by increasing the size and strength of the guardian naval vessels. Mutual agreements and complimentary customs offered some insurance against mutual disruption and consequently doctrines respecting the rights and duties of belligerents at sea began to develop.

2. Technological Change

During this same period a revolution in technology was beginning. The development of gunpowder antiquated the man

¹⁴ See II H.G. Wells, The Outline of History 724-34 (1961).

¹⁵ See Sea Power 21 (E.B. Potter & C.W. Nimitz ed. 1960)

in armor. The growing populations gave larger numbers to be armed, and machine technology was poised ready to make every man a soldier. As steam and iron replaced sail and wood, nations found themselves bound together in alliances based on political, ideological, and economic interests, or on necessity, and engaged in conflicts with "common enemies" which involved great land masses and ocean bodies. To meet the demands of such warfare new and better weapons were required and produced, and rules were propounded to govern the use of these weapons.

The twentieth century has seen fantastic advances in all forms of technology. Nuclear energy is available both as a fuel and as a weapon. However, as will be demonstrated herein, the majority of the rules now deemed applicable to the submarine antedate the submarine itself as well as the advanced potential it now enjoys. One question which may well be considered as raised by the experience of the two major wars of this century is whether the old rules are to be considered applicable by analogy or whether new rules which realistically consider modern technology should be applied.

Chapter II

Desirable Policies for the Development of the Law of Submarine Warfare

A. Basic Humanitarian Goals

From the beginning it may be assumed that man has been aware that the very fact of his humanity requires some sort of limitation on his wartime activity. Recognition of this limitation finds expression in the basic distinction drawn between combatants and noncombatants,¹⁶ and by the efforts to offer some sort of protection to both. Neutrals, as non-parties to a conflict, represent a particular kind of non-combatant, and are also accorded certain basic rights in their relationship to the parties engaged in the conflict. Therefore, as a starting point in the consideration of submarine

¹⁶ This is implicit in the various codifications of rules governing specific aspects of warfare. For example: Article 4 of Hague Convention IX of 1907 prohibits bombardment of undefended areas, which presumably would be occupied by non-combatants; Article 22 of the London Naval Protocol of 1936 requires that the noncombatant crew and passengers of merchant vessels be placed in safety before their ship is destroyed; Article 3 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, requires certain minimum standards of treatment in the case of, "(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms...." Colombos notes the distinction as follows, "These rules of the laws of naval warfare are embodied in the practice of the principal naval powers... as between the belligerents themselves, their rights must be exercised in accordance with the customary law of nations and the principles of humanity and chivalry, and that in their execution, the lives of noncombatant enemy persons must not be endangered." International Law of the Sea 488 (6th ed. 1967)

warfare, three basic humanitarian goals may be postulated from these basic distinctions.

1. Prevention of Unnecessary Casualties

The first of these goals is the prevention of unnecessary casualties among the combatant forces of the enemy. Among the customary rules of warfare one of the basic principles of the law of war is the principle of humanity. This has been stated in the following terms:¹⁷

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

2. Protection of Noncombatants

The principle of humanity is obviously equally applicable to noncombatants. One of the legitimate aims in warfare is a direct attack on belligerent combatant forces, but this is not true in the case of noncombatants, who in most circumstances are entitled to more consideration than that afforded by the principle of humanity alone. This consideration has been expressed as follows:¹⁸

Under customary international law, individuals who do not form a part of the armed forces and who refrain from the commission of all acts of hostility must be safeguarded against injury not incidental to military operations directed against combatant forces and other

¹⁷ U.S. Dep't of Navy, NWIP 10-2, Law of Naval Warfare para. 220a (1955) hereinafter cited as Naval Warfare.

¹⁸ Id. at para. 221b.

military objectives. In particular, it is forbidden to make non-combatants the object of a direct attack by the armed forces of a belligerent, if such attack is unrelated to a military objective. Attack for the sole purpose of terrorizing the civilian population is also forbidden.

This concept arose, most probably, from the early ideal of chivalry, which required a certain fairness in offense and defense and mutual respect between combatants, the desire for victory notwithstanding.¹⁹ While it is arguable that the depersonalization of the modern destructive process, as evidenced by mass bombing raids, atomic weapons, and shoot on sight submarine tactics, has rendered this concept obsolete, the better view is that this impersonal slaughter makes the limiting factor inherent in the principle of humanity even a more urgent requirement.

3. Recognition of Neutrality

The final postulated goal for consideration is the recognition of neutrality. Neutrality is defined as the voluntarily assumed status of non-participation in a particular conflict and this status may be discontinued at the discretion of the neutral state which enjoys no rights other than those granted to neutrals in time of war by the general principles of international law.²⁰ The status of neutrality should be distinguished from the status of the so-called

¹⁹ See Stone, Legal Controls of International Conflict 335-41 (1959) hereinafter cited as Stone.

²⁰ B.H. Brittin & L.B. Watson, International Law for Seagoing Officers 22 (1960) hereinafter cited as Brittin & Watson.

"neutralized" states. Neutralization is a condition of permanent neutrality imposed on a state, generally by treaty, and guaranteed by other states.²¹

From a humanitarian standpoint, recognition of neutrality serves at least two ends. First it tends to limit the number of states actually engaged as belligerents in a given conflict, and secondly it extends generic rights as noncombatants to nationals of the neutral state. However, although the practice in this regard has been subject to erosion, neutrals are generally recognized to have rights in excess of those accorded to noncombatant nationals of a belligerent state.²² The extent of this erosion will be considered herein.

B. Military Necessity

It is uncontroverted that the primary goal of any belligerent in any conflict is to win. It is also likely that any

²¹ Switzerland is the prime example of a neutralized state. See Brittin & Watson at 22.

²² The most logical right to adhere to a neutral would of course be freedom from attack of any kind. Historically neutrals were permitted to carry on trade among each other and among belligerents subject only to having certain items intercepted and confiscated as contraband when one party to a conflict found such goods destined for any enemy. Legitimate goods found on board neutral or enemy vessels were normally not subject to confiscation. As regards individuals, neutral nationals customarily enjoyed free personal movement regardless of hostilities. Neutral maritime prizes found to be laden with contraband goods were exempt from destruction. Threats of an armed neutrality to take reprisals for encroachment of these rights operated as a sanction as long as one or more major powers remained neutral in a conflict. See generally, Stone at 297-371.

belligerent will attempt to achieve this victory by utilizing the means that he, not international society, deems necessary. Therefore, any consideration of humanitarian goals in warfare leads necessarily to a discussion of the doctrine of military necessity.

1. In Conflict with Basic Goals

The principle, or doctrine, of military necessity has been variously defined and interpreted. The German jurists have, in the past, accepted it as meaning that, "... a violation of the laws of war must be regarded as not having taken place if the military operation is necessary for the preservation of the troops or the averting of a danger that threatens them and cannot be averted in any other way, or even if it is advantageous either for the effectual carrying out of a military enterprise not inadmissible in itself or for the securing of its success."²³ This approach is in consonance with a German maxim to the effect that necessity in war overrules the manner of warfare.²⁴

C. Resolution of the Conflict

It is obvious that international application of the views cited above would lead to complete negation of any semblance of humanitarian order. Yet, it is obvious also that necessary military operations must be completed if victory is

²³ C.J. Colombos, International Law of the Sea 501 (6th ed. 1967) hereinafter cited as Colombos

²⁴ Id.

to be obtained. Certainly, some sort of balance between these opposing considerations must be reached.

1. Practicality of Retaining Humanitarian Approach

Evidence that international society has not adopted the doctrine of military necessity to the exclusion of humanitarian considerations can be found. The preamble to Hague Convention IV, Respecting the Laws and Customs of War on Land, recited that military necessity had been taken into account when the limiting rules were drafted. The prevailing British, American, French, and Italian interpretation appears to limit the doctrine's applicability to cases of national self-preservation.²⁵ An international tribunal has considered the doctrine in the following language:²⁶

Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. In general it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of war; but it does not permit the killing of innocent inhabitants for the purposes of revenge or the satisfaction of a lust to kill. The

²⁵ See Stone at 352-3.

²⁶ The Hostages Case (United States v. List et al), Trials of War Criminals, Vol. XI 1253-4 (1950).

destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law.

This has, in effect, been restated in the Law of Naval Warfare in the following language:²⁷

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

From the foregoing it can be determined that a balance must be reached between the dictates of humanity and the exercise of the doctrine of necessity and that the practical aspects of modern warfare do not limit a continued consideration of humanitarian goals.

²⁷ Para. 220a.

Chapter III

The Issues Which Have Been Raised Relative to Functional Aspects of Submarine Warfare

A. Commerce Destruction

The development of the submarine as a weapon has given rise to certain issues relative to the manner in which it has been employed, or may be employed, in wartime. In order to fully appreciate the significance of these issues it is necessary to examine them both from the standpoint of historical derivation and existing submarine doctrine.

1. Right to Destroy

Generally, all combatant naval units of the enemy, including auxiliary service and supply vessels, may be sunk on sight without preliminary warning or demand for surrender.²⁸ Moreover, the right of a belligerent to sink the merchant vessels of the enemy, under certain conditions, is recognized by international law and practice,²⁹ although there are certain classes of vessels which are exempt from capture, and of course, destruction.³⁰ The law regarding destruction of neutral vessels is more stringent, and traditionally they were regarded as immune from attack.³¹

²⁸ Stone at 585.

²⁹ I. J. Garner, International Law & The World War 362 (1920) hereinafter cited as Garner.

³⁰ Hague Convention XI, 1907, listed these as vessels employed in religious, scientific or philanthropic missions, as well as coastal fishing vessels and mail packets.

³¹ Colombos at 791.

The present rules which govern the conduct of war vessels in their belligerent activities against merchant vessels can be traced to the concept of a captured vessel as a prize, to be taken intact if possible, and to be delivered to the sovereign of the capturing vessel. The prize and its cargo could then be disposed of, enriching both the treasury and the capturing crew.³²

The concept of prize must be considered in its relation to the belligerent right of visit and search. This is a right of ancient application and is described in treaties dating back to the fifteenth century.³³ It may be described as the right of a belligerent warship to visit any merchant vessel encountered upon the high seas to ascertain if the cargo includes military goods destined for delivery to the enemy.³⁴ Enemy vessels so visited are, of course, captured, and if for some reason they cannot be taken into port as prizes, are destroyed. Legitimate reasons for destruction include unseaworthiness of the prize, lack of a prize crew, stress of weather, imminent danger of recapture, or serious danger to the success of naval operations.³⁵ The extension of the right to visit and search neutral vessels stemmed from a logical desire on the part of belligerents to prevent the shipping of

³² See II A.B. Keith, Wheaton's International Law 315-35 (1944) hereinafter cited as Wheaton.

³³ Colombos at 753.

³⁴ Brittin & Watson at 145.

³⁵ Wheaton at 315.

war goods to an enemy by any means.³⁶ However, the destruction of a neutral vessel found to contain contraband was customarily permitted only under extraordinary conditions.³⁷

There have been several efforts in the past to obtain general international agreement on the rules of naval warfare in this area. The Hague Convention VI of 1907, respecting the status of merchant vessels at the outbreak of hostilities, authorized the destruction of merchant vessels of the enemy, subject to compensation, when such vessels were found on the high seas, but were ignorant of the fact that hostilities had commenced.³⁸ The Declaration of London of 1909 contained provisions for the destruction of neutral prizes if the capturing warship was in some way endangered, or if taking the neutral vessel into port would have endangered the success of the warship's mission.³⁹ It should be noted that these rules were being formulated in a time frame which contemplated a commerce destroyer as a heavily armed surface vessel and not the then fledgling submarine.

With the onset of World War I, however, the submarine became a positive factor in the field of maritime warfare. One of the first and more painful introductions to this new order occurred on 7 May, 1915, when The Lusitania, an unarmed British passenger liner, was torpedoed by a German U-boat

³⁶ See Colombes at 754.

³⁷ Stone at 595-8.

³⁸ Article 3.

³⁹ Articles 48 & 49.

without prior warning and sank with a loss of over eleven hundred lives.⁴⁰

Further indication of the capability of this new weapon was demonstrated by the cruise of the German submarine, U-53. This lone U-boat crossed the Atlantic in the summer of 1916 and entered the harbor at Newport, Rhode Island, where its commander paid courtesy calls on still neutral American naval officers. Thereafter, the submarine took position near the Nantucket lightship and proceeded to sink five merchant vessels. Some of these sinkings were accomplished in the presence of American destroyers and in one instance a destroyer complied with a polite request to move so that a ship could be torpedoed.⁴¹

As a result of the adverse international reaction following the sinking of The Lusitania, and other similar incidents, the German navy for a time abandoned the U-boat campaign against merchant vessels.⁴² However, on 1 February, 1917, the Kaiser ordered unrestricted submarine warfare on all shipping, thereby directing a wholesale destruction of surface vessels, without consideration of customary prize law, which continued until the end of the war.⁴³ The German arguments supporting unrestricted warfare included claims that submarines had no room to take personnel from the destroyed

⁴⁰ Colombes at 789.

⁴¹ Admiral Scheer, Germany's High Fleet in the World War 264-7 (1934).

⁴² Id. at 232-3.

⁴³ See Id. at 253-8.

vessels on board, and in addition could not spare men from the small submarine crews to act as prize crews.⁴⁴

By the end of World War I it had become obvious that special consideration of the role of the submarine in warfare was required. The Washington Naval Conference of 1922 provided a forum for this consideration. The resulting treaty stipulated that merchant vessels should be requested to submit to visit and search prior to any seizure, that merchant ships could not be attacked except in case of failure to submit to visit and search or refusal to proceed as directed after seizure, and could not be destroyed until the crew and passengers had been placed in safety.⁴⁵ In addition, signatories to the treaty were asked to agree that submarines must conform to these rules or permit merchant vessels to pass unharmed.⁴⁶ Violations of the rules were to be declared as piracy.

This effort was followed by the Naval Treaty of 1930 between Great Britain, the United States, Japan, France, and Italy, although the latter did not ratify the agreement.

Part IV, Article 22 of this treaty provided:

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

(b) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance

⁴⁴ Garner at 377-81.

⁴⁵ Wheaton at 316-7.

⁴⁶ Stone at 581-2. The treaty was ratified by the United States, the British Empire, Italy, and Japan but never came into force due to the defection of France, one of the original parties.

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 ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or in the presence of another vessel which is in a position to take them on board.

Article 23 of the treaty stipulated that the provisions (Article 22) regarding submarines should remain in force without any time limit. Article 22 was thereafter incorporated verbatim into the London Protocol of 1936,⁴⁷ to which 48 states had become signatories by 1939.⁴⁸

World War II began, therefore, with near total agreement internationally as to the methods which submarines might legitimately employ against merchant vessels. It came as a rude shock when on the first day of the war a German submarine torpedoed the British passenger liner Athenia,⁴⁹ signalling thereby a return to the days of unrestricted undersea warfare. German submarines continued to attack merchant vessels, both belligerent and neutral, in violation of customary international law and the London Protocol.⁵⁰

This activity was not, however, limited to the Axis powers. On 7 December 1941, the United States Chief of Naval

⁴⁷ British Treaty Series, No. 29 (1936).

⁴⁸ Colombos at 493-4.

⁴⁹ Sea Power 492-3, 542 (E.B. Potter & C.W. Nimitz ed. 1960).

⁵⁰ Stone at 597.

Operations ordered unrestricted submarine warfare against the Japanese Empire.⁵¹ Great Britain also adopted the practice of sinking without warning all merchant vessels discovered in certain specified war zones.⁵²

Following World War II, the various war crimes tribunals had occasion to consider several cases involving submarine activity. The most meaningful of these was the trial of Admiral Karl Doenitz, who directed the German U-boat campaign during the war. Admiral Doenitz was indicted on two counts, alleging (1) crimes against the peace, and (2) war crimes.⁵³ The former count involved the preparation and the waging of aggressive war and will not be considered here. The second count involved the waging of unrestricted submarine warfare in violation of the 1936 Protocol and was subdivided into three parts.

The first of these charged Doenitz with waging unrestricted warfare against armed British merchant vessels. The Tribunal, in finding Doenitz not guilty of this charge, reasoned that since the British had armed their merchant ships at the beginning of the war, and had directed them to attack submarines, the armed merchantmen were not entitled to the warning provisions of the protocol.⁵⁴

The second allegation concerned the declaring of certain operational zones in which all neutral merchant vessels were

⁵¹ Sea Power 796 (E.B. Potter & C.W. Nimitz ed. 1960).

⁵² Stone at 597.

⁵³ International Military Tribunal, Trials of Major War Criminals, Vol. XXII, 556-7 (1948).

⁵⁴ Id. at 558.

sunk without warning. This action was held to be a violation of the provisions of the protocol.⁵⁵

The final charge involved the general failure of German submarine commanders to rescue their victims following the destruction of ships. This also was declared to be a violation of the protocol,⁵⁶ and will be discussed hereinafter in more detail.

The remarkable part of this entire proceeding was the failure of the Tribunal to assess the sentence awarded to Admiral Doenitz on the basis of the findings of guilty to violations of the protocol. The judgment in this respect reads:⁵⁷

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

In this then, the latest authoritative treatment of international law respecting submarine warfare, no punishment was awarded for proven breaches of the law.

The present United States position, as reflected in the Law of Naval Warfare, is stated as follows:⁵⁸

⁵⁵ Id. at 559.

⁵⁶ Id. at 559.

⁵⁷ Id. at 559.

⁵⁸ Para. 503b(3).

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.

As regards neutral vessels, the same publication states in part:⁵⁹

Although the destruction of a neutral prize is not absolutely forbidden, it involves a much more serious responsibility than the destruction of an enemy prize. A capturing officer, therefore, should never order such destruction without being entirely satisfied that the military reasons therefor justify it, i.e., under circumstances such that a prize can neither be sent in, nor in his opinion, released.

It is obvious that modern international practice, and decision, permits the destruction of enemy vessels and, in limited situations, neutral vessels. While the overall question of the viability of the traditional rules regarding submarine warfare will be considered at length hereafter, the judgment at Nuremberg, and the practices which preceded it, raises immediate questions. While the language of the judgment

⁵⁹ Para. 503e.

indicates that the Tribunal believed that it was applying the existing law to Doenitz's case, it is at least arguable that the old rules no longer existed in view of continued state practice, and that in fact the Tribunal was reinstating the old rules rather than reaffirming them.

2. Duty Towards Survivors

From the foregoing it may be observed that the belligerent right to destroy the merchant vessels of any enemy, or of neutrals, is under certain circumstances, accepted if not condoned. Such action necessarily places in peril the lives of the crew and passengers of the destroyed vessel. It is clear that there is an obligation imposed by customary international law requiring the belligerent to provide for the safety of the passengers and crew of the destroyed vessel.⁶⁰

International agreements on maritime warfare have generally recognized this principle. Article 3 of the Hague Convention VI of 1907, previously discussed, conditioned the right to destroy merchant vessels of the enemy, at the outbreak of hostilities, upon provision being made for the safety of the persons on board as well as for the preservation of the ship's papers. In addition, the Declaration of London of 1909, after providing for the destruction of neutral vessels in certain circumstances,⁶¹ declared that all persons on board the vessel must be placed in safety prior to its destruction.⁶²

⁶⁰ Garner at 370.

⁶¹ Op. cit. supra, n. 39.

⁶² Article 50.

The sinking of The Lusitania, and other similar acts during World War I indicated a disregard of this principle. Thereafter, the parties to the Washington Naval Conference of 1922 inserted a provision requiring the crew and passengers of merchant vessels to be placed in safety prior to destroying the vessel.⁶³ A similar provision was inserted in Article 22 of the Naval Treaty of 1930 which, of course, was then incorporated into the 1936 London Protocol.

As in World War I, the practices of World War II did not comply with these standards. Thus, the Nuremberg Tribunal, in commenting on the failure of Doenitz's German submarines to rescue their shipwrecked victims, stated:⁶⁴

The evidence further shows that the rescue provisions were not carried out and that the defendant ordered that they not be carried out. The argument of the defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Doenitz is guilty of a violation of the protocol.

Further consideration to the plight of survivors at sea was granted by the 1949 Geneva Convention.⁶⁵ The

⁶³Wheaton at 316-7.

⁶⁴International Military Tribunal, Trial of Major War Criminals, Vol. XXII 559 (1948).

⁶⁵Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949.

convention provides for the humane treatment of persons at sea who are wounded, sick, or shipwrecked;⁶⁶ requires that wounded, sick and shipwrecked belligerents who are captured shall be treated as prisoners of war,⁶⁷ and provides that after each battle, parties to the conflict shall search for and collect wounded, sick and shipwrecked personnel and insure their safety.⁶⁸

Although it is arguable that international practice in the two World Wars, and the failure of the Nuremberg Tribunal to punish Doenitz for violations of the rescue provisions of the 1936 Protocol, have negated any duty towards survivors, it is clear that this humanitarian concept was, at the least, revived by the signatories to the 1949 convention.

B. Bombardment

The second major issue to be considered is the role of the submarine in naval bombardment. While the role of the submarine in the past has not notably included bombardment, the nature of the weapons routinely carried by many modern submarines constitute this a very timely issue.

1. Legitimate Targets

Customarily, the bombardment of fortified coastal areas

⁶⁶Article 12.

⁶⁷Article 16.

⁶⁸Article 18.

has always been considered a legitimate act of naval warfare.⁶⁹ The status of unfortified areas has not been as well defined, although historical precedent for the destruction of open and undefended cities has been shown.⁷⁰

Hague Convention IX of 1907 developed certain provisions respecting naval bombardment which have been described as "clearly quite ambiguous and inadequate for any useful purpose".⁷¹ Article 1 of this convention prohibited the naval bombardment of undefended ports and cities, but failed to define the term "undefended". It did state, however, that the presence of mines in a harbor was insufficient reason to bombard a port. Article 2 excepted from the prohibitions of Article 1, "military works, military or naval establishments, depots of arms or war material, workshops or plants which could be utilized for the needs of a hostile fleet or army", and permits their destruction if the local populace fails to do so after having been given notice. Other articles provided for the sparing of churches, hospitals, scientific and historical buildings, and like edifices.

While naval bombardment was commonplace during World Wars I and II, research has failed to disclose that sub-

⁶⁹Colombes at 542.

⁷⁰Wheaton at 336.

⁷¹Id., at 337

marines played a major part in this activity. There are a few scattered reports of U-boats bombarding the British coast during World War I and inflicting minor damage.⁷² A chronology of United States submarine operations in the Pacific during World War II lists only 13 missions reporting submarine bombardment.⁷³ This was in a large part attributable to their limited armament and their pre-emption for more suitable missions.

The present United States position reflects the traditional view:⁷⁴

The term bombardment as used herein includes both naval and aerial bombardment. This section is not concerned with the legal limitations on land bombardment by land forces.

a. DESTRUCTION OF CITIES. The wanton destruction of cities, towns, or villages, or any devastation not justified by military necessity are prohibited.

b. NONCOMBATANTS. Belligerents are forbidden to make noncombatants the target of direct attack in the form of bombardment, such bombardment being unrelated to a military objective. However, the presence of noncombatants in the vicinity of military objectives does not render such objectives immune from bombardment for the reason that it is impossible to bombard them without causing indirect injury to the lives and property of noncombatants. In attempting to bombard a military objective, commanders are not responsible for incidental damage done to objects in the vicinity which are not military objectives.

⁷²Garner at 425-6.

⁷³Roscoe, United States Submarine Operations In World War II 508-22 (1949).

⁷⁴Naval Warfare Para. 620-21.

- c. **TERRORIZATION.** Bombardment for the sole purpose of terrorizing the civilian population is prohibited.
- d. **UNDEFENDED CITIES.** Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by own or allied forces.

Provision is also made for the respecting of medical establishments and units, as well as buildings devoted to religious, artistic or charitable purposes, and historical monuments.⁷⁵

The customary law respecting naval bombardment was concerned with the notion of coastal areas. The 1907 Hague provisions were clearly designed without thought of the long range submarine missile and the present rules contained in LAW OF NAVAL WARFARE are essentially a restatement of these earlier rules. The practical problems in attempting to limit the target area of a missile armed with a nuclear warhead and fired inland from a distance of hundreds, or thousands of miles appear insurmountable. However, the viability of these rules will be discussed hereinafter.

2. Duty to Warn.

The obligation to warn the inhabitants of a target area prior to bombardment would appear to be a logical application of the customary distinction between combatants and non-combatants.

Article 6 of Hague Convention IX of 1907 codified this

⁷⁵Id., Para. 622

obligation in the following language:

If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

This apparently is a corollary to Article 27 of the regulations annexed to Hague Convention IV of 1907, respecting land warfare, which states:

The officer in command of an attacking force must, before commencing the bombardment, except in cases of assault, do all in his power to warn the authorities.

It would appear then, that the general rule requires warning, but an exception is granted for bombardments preceding assaults, on the assumption that an assault in the nature of a surprise attack will be more successful without warning, and in this limited area, military necessity prevails.

The two World Wars do not furnish much data on which to base a judgment as to the practice of submarines in this regard. However, it is deemed likely that, because of the vulnerability of the submarine to retaliatory attack after warning, submarine commanders almost universally determined that the military situation did not permit warning prior to bombardment.

The Law Of Naval Warfare contains a clause similar to the Hague provision:⁷⁶

⁷⁶Para. 623

Where a military situation permits, commanders should make every attempt to give prior warning of their intention to bombard a place so that the civilian population in close proximity will have an opportunity to seek safety.

A literal evaluation of the rules, both past and present, compels the conclusion that the warning requirement is, in documentary form at least, applicable to missiles fired from submarines. The humanitarian principles leading to this restriction on conventional naval bombardment appear even more pressing when applied to more advanced weaponry. The problem of military practicality remains to be resolved, however.

C. Blockade

One of the legitimate means which a belligerent may utilize to interdict an enemy's commerce is the imposition of a blockade. Traditionally, a blockade has been defined as an act of war carried out by the warships of a belligerent and designed to prevent access to, or departure from, a detailed portion of the enemy's coast by vessels of any nation, enemy or neutral.⁷⁷ A term which must be distinguished from blockade as used herein is the so-called "pacific blockade" which is employed only in peacetime to coerce the "blockaded" state to conform to some desired end or comport itself in accordance with treaty obligations.⁷⁸ Recent wartime practice has given

⁷⁷ See Wheaton at 525-6.

⁷⁸ See Brittin & Watson at 144.

rise to problems concerning the type of belligerent action that may legitimately be termed a blockade, and the role that the submarine may play in enforcing blockades.

1. Requisites for Establishment of a Blockade

(a) Short Range. Historically the concept of a blockade dates from 1584 when the Dutch declared a blockade of all Flemish ports occupied by Spanish conquerors.⁷⁹ This early blockade was primarily concerned with preventing war supplies or contraband from falling into Spanish hands. However, in 1630 the Dutch issued a proclamation denying the Spanish access to any sort of ocean commerce in the area, and declaring that neutral ships would be confiscated if captured attempting to enter or leave the Spanish ports in Flanders.⁸⁰ Blockades were thereafter used with varying degrees of success by others, including the English against Napoleon's France, the North during the Civil War, and in other major and minor conflicts.⁸¹

A customary blockade, in order to be legally binding, must be supported and enforced by a sufficient number of vessels to cut off enemy communications and to afford a risk of capture to ships attempting to pass through, or, as stated in Article 3 of the 1856 Declaration of Paris, "Blockades, in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to

⁷⁹Wheaton at 526.

⁸⁰Colombos at 715.

⁸¹Id. at 716.

the coast of the enemy." However, a blockade remains in force for as long as the conditions necessary for its establishment exist and is not ended by a momentary interruption of effectiveness.⁸²

The Declaration of London of 1909, although unratified, represented a major codification of traditional blockade law. It adopted the effectiveness requirement of the Declaration of Paris,⁸³ and added that the question of effectiveness is one of fact to be determined by the courts.⁸⁴ It declared that a blockade was not terminated by the withdrawal of blockading forces due to inclement weather.⁸⁵ It required that a blockade be applied impartially to the ships of all nations,⁸⁶ after declaration of blockade, and appropriate notice.⁸⁷ The declaration was required to be made by the blockading power, or by naval authority acting in the name of the power, and must set forth the date the blockade began, the geographic limits, and a period of grace in which neutral vessels may safely leave the area.⁸⁸ Notification was required to all affected neutral powers and to local authorities,⁸⁹ as the liability of a neutral vessel to capture for breach of blockade was contingent on her actual or presumptive

⁸² Stone at 496.

⁸³ Article 2.

⁸⁴ Article 3.

⁸⁵ Article 4.

⁸⁶ Article 5.

⁸⁷ Article 8.

⁸⁸ Article 9.

⁸⁹ Article 11.

knowledge of the blockade.⁹⁰ However, a blockade was not permitted to extend to neutral ports.⁹¹

The foregoing discussion of the traditional doctrine and its codifications is indicative of the customary concept that, in order to be effective, a large number of ships are required to maintain station near an enemy's coast so as to prevent an attempted breach of the blockade at any time. This customary approach is definitive of the short range, or so-called "close" blockade.⁹²

(b) Long Range. It was perhaps inevitable that the advances in technology of the twentieth century, including the advent of the submarine and the aircraft, would lead to the concept of the long range, or distant, blockade. World War I gave birth to this new development. Great Britain blockaded German occupied Belgium with a combination of mines, aircraft, and surface vessels.⁹³ In addition, a British cruiser squadron operated in the North Atlantic, 1000 miles from German ports, where it intercepted neutral traffic on the northern sea lanes.⁹⁴ The major innovation in this regard, however, was the decision of the British government to prevent all commodities from reaching or leaving Germany by the expedient of requiring all ships carrying goods of either

⁹⁰ Article 14.

⁹¹ Article 18.

⁹² See Brittin & Watson at 144.

⁹³ Stone at 500.

⁹⁴ Id.

enemy origin or destination to deviate to British ports where the goods were confiscated, even though not contraband.⁹⁵ Neutral objections to these proceedings hinged on the traditional grounds that this "blockade" was illegal since because of the large area involved it could not be effectively maintained, and in addition, it operated in effect as a blockade of neutral ports. The British justified their position as being a retaliatory departure from existing blockade law which was justified because of the German action in declaring the waters surrounding the United Kingdom to be a war zone in which all shipping might be destroyed.⁹⁶ Regardless of the justification, and despite the breach with tradition, there is no doubt that the British considered their action to be a blockade.⁹⁷

World War II again saw Britain, and France, put into effect similar requirements that goods laden in Germany, or destined for enemy delivery, must be discharged in allied ports. This action was again designated "retaliatory".⁹⁸

The American submarine offensive against Japan in World War II, while lacking some of the attributes for traditional blockade since it was directed primarily against enemy shipping rather than including neutrals, has on occasion

⁹⁵ Stone at 500.

⁹⁶ *Id.* at 501-2.

⁹⁷ *Id.* at 500-6. See Colombes at 732-5.

⁹⁸ Stone at 540.

been referred to in these terms.⁹⁹ "Blockade" strategy called for submarine strikes which would completely interdict shipping to and from the Japanese Empire.¹⁰⁰ The effectiveness of this operation can be measured in the words of Japan's Admiral Nomura, "Submarines initially did great damage to our shipping, and later combined with air attack, made shipping very scarce."¹⁰¹

The present United States position as set forth in the Law of Naval Warfare, follows closely the provisions of the 1909 London Declaration.¹⁰²

Despite the position of some writers that submarines alone cannot constitute a blockading force,¹⁰³ it does not follow that they are inherently incapable of doing so. Any

⁹⁹ T. Roscoe, United States Submarine Operations in World War II 169 (1949). The text reads, "During the summer and autumn of 1942 the Pearl Harbor submarines clamped and tightened a blockade on the home islands of Japan . . . Long before the Japanese strike, it had been evident to American naval leaders that a submarine blockade of Japan should counter that nation's plunge into World War II."

¹⁰⁰ Id. at 174.

¹⁰¹ Id. at 183.

¹⁰² See para. 632.

¹⁰³ Colombes at 718-9 states, "The conditions contemplated in this chapter apply to the establishment of a blockade at sea carried out by surface men-of-war. They do not, however, exclude the co-operation of submarines or aircraft in naval operations although neither of these two arms, singly or jointly, be considered, in their present state of development, as capable of enforcing a real blockade without the assistance of surface warships." Accord, in regard to submarines, See II J.W. Garner, International Law & The World War 317 (1920) who states that the German action in 1915 of declaring a war zone could not have been a blockade measure because, "...no adequate naval forces were stationed off the coasts of England to make it effective, its enforcement being left entirely to submarines."

argument that there cannot be a legal blockade by submarine because of their inability to follow normal practices regarding visit and search is unrealistic in view of the modern practice respecting the destruction of merchant vessels.¹⁰⁴ The only valid limitation on the submarine as an instrument for blockade would appear to be the limitations placed on submarine anti-commerce warfare in general.

D. Summation

1. Viability of International Rules Respecting Commerce Destruction.

Invention is the mother of necessity. This reverse cliché becomes very applicable when considering the role of the submarine in commerce destruction. The early submarines with their thin hulls and puny deck guns were no match for surface vessels in a shoot-out, or ramming situation, and their size and crew limitations made the furnishing of prize crews, or the embarking of survivors, practically impossible. Warning a prospective target prior to attack brought the risk of retaliation from other enemies summoned by wireless. Consequently, considerations of operational necessity required this new sea weapon to adopt tactics which overrode traditional methods of warfare.

¹⁰⁴See Stone at 496.

The modern submarine, although a larger and more durable ship than its predecessors, suffers from many of the same deficiencies, from the standpoint of rescue and prize crew, and retaliation can now come by bomb or missile almost instantaneously. In view of this, and other factors, it is unlikely that the old rules will ever again be followed in practice. Other writers have expressed similar doubt as to the viability of the rules in view of international practice.¹⁰⁵

One compelling reason for this viewpoint has been the shift in emphasis from attacks on an enemy's war machines to attacks on his war potential. Economic chaos has come to be recognized as a legitimate belligerent end and the submarine is recognized as a most effective means to obtain that end.¹⁰⁶

International law can be said to reflect the practice of states. The practice has been to abandon the traditional rules as represented by the 1936 London Protocol. In part this resulted because these rules were in effect a restatement of earlier rules which had doubtful applicability to submarine warfare, and partially because of the overwhelming necessity in modern conflict to hasten victory by destroying

¹⁰⁵ Stone at 598 in discussing Admiral Doenitz's unpunished violations of the London Protocol states, "It may well be that the future of this part of the law will be more clearly seen through the eyes of the economist and the naval strategist, than through those of the lawyer or even the moralist." See Columbo at 828-9.

¹⁰⁶ See Stone at 599-602:

the economy of the enemy.

The latest authoritative international decision in this area was written at Nuremberg. There the Tribunal declined to punish Admiral Doenitz, recognizing that his conduct corresponded with international practice. In view of this judgment, and the practices which lend it support, it may be concluded that although the Protocol exists on paper, it does not represent the international law regarding submarine warfare.

2. Viability of International Rules Respecting Bombardment

Occasional breaches of a rule, not amounting to practice, do not make the rule obsolescent. By the very nature of man, it is unquestioned that the customary rules regarding naval bombardment have been violated on occasion during past conflicts. However, it appears that the customary rules, permitting, as they do, a great deal of discretion in the area of military necessity, are capable of being followed in modern conflicts of a conventional nature. However, in this writer's opinion, a far more serious flaw in a rule of law exists, if it is inapplicable to what is considered to be a new, but permanent factual situation. The existence of submarines, which are clearly naval vessels, capable of bombarding with long range missiles armed with nuclear warheads is a fact, and for the foreseeable future, a permanent one which was not contemplated when the rules came into existence. In a total war environment, adherence to the customary rules would be highly

unlikely, and from the standpoint of national self preservation, perhaps impossible.

It is therefore concluded that the international rules respecting naval bombardment are presently viable in the conventional sense, but probable future trends in warfare, combined with present potential, require a re-evaluation of their overall applicability.

3. Viability of International Rules Respecting Blockade

The concept of blockade has been a part of customary maritime law since at least 1584. Historically, most of the period since has been concerned with the short range, or "close" blockade. Only in the twentieth century has the concept of the distant blockade developed through the usage of the great maritime powers. The customary law, and subsequent codifications thereof, were concerned only with development of international law based on the traditional concept. The long range blockade, a child of reprisal, is in derogation of the traditional doctrine, and its right to bear the generic title, "blockade", has been challenged, primarily because of failures to respect the customary requirements regarding neutral ports, and because of alleged military ineffectiveness. However, in view of the global nature of modern wars, it is likely that future practice will continue to favor the new form, regardless of the past or how it may be designated, since economic effectiveness appears

now to be as valid a criteria as any other. In this regard, Professor Lauterpacht has stated in respect to future development of the concept:¹⁰⁷

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

Considering the range of the modern nuclear submarine, and its minimal fueling requirements,¹⁰⁸ as well as the destructive capability demonstrated in two World Wars by its conventional ancestors, there should be little doubt of the ability of the modern submarine to enforce future blockades. Objections to the possible method of enforcement must be tempered by a consideration of general international practice towards commerce destruction, which appears to have resulted in new, if ill-defined, international law in the area.

It is therefore concluded that while the customary rules may be viable in respect to the concept of traditional blockades, they have, at the very least, been supplemented by the rising concept of the distant blockade and are, in this respect, obsolete.

¹⁰⁷ II Oppenheim's International Law 656 (6th ed. H. Lauterpacht ed. 1944).

¹⁰⁸ As early as 1960 the nuclear powered Triton circumnavigated the earth without surfacing for fuel, or otherwise. See Sea Power 881 (E.B. Potter & C.W. Nimitz ed. 1960)

Chapter IV

Projection of Future Trends of Decision

A. Total War

The decision-maker in future conflicts will find himself faced with several options as to the conduct of the war, depending on its totality, and the nature of the enemy. The goals for which he may strive will be influenced by the military and economic orientation he must frustrate. Obviously a land power with little access to the sea will present few opportunities for maritime commerce attrition, but may well provide legitimate targets for submarine, or other, bombardment. If a goal is obtainable through economic "persuasion" rather than military annihilation, then the degree of force required to reach the goal may fall well within conventional limits. The very real danger that a total war situation could result in complete elimination of the belligerents on both sides will hopefully deter the prospects of such a conflict. However, to strategically ignore the possibility of such conflicts invites disaster.

1. Commerce Destruction

Economic paralysis is recognized as a legitimate goal in warfare and massive destruction of enemy commerce achieves that result. The decision-makers of the past, when faced with the choice of prolonged war, or possible defeat, chose

to tip the scales in favor of military necessity, and by so doing abrogated the customary rules holding the submarine to the standards which govern the conduct of surface warships. The judgment at Nuremberg left the field open to the future with only recent practice as a guide.

With the choice of weapons now available, including a submarine arsenal far superior to that existing in World War II, any global conflict of the future will be more "total" than past total conflicts. Concern will be directed to national survival and it is easily postulated that unrestricted submarine warfare, if deemed necessary for survival, will be the rule. Practical considerations regarding probable destruction by retaliatory weapons will preclude warning merchant vessels prior to attack, and the continuing problems of size and crew limitations will militate against prize crews and the rescue of survivors. Humanitarian considerations under these conditions will not be lost, but by necessity will be limited to precluding deliberate hostility against survivors and, possibly, to notification of their position if the military situation permits.

2. Bombardment

The past does not offer the graphic guidelines in this area that may be found in respect to commerce destruction. Future decisions can only be postulated on the existence of weapons whose magnitude and effectiveness can only be imagined.

The permissiveness of the customary rules in allowing the destruction of military objectives adjacent to undefended cities raises problems for future decision as to the degree of legitimate destruction more than the legitimacy of the target. The validity of the military objective, in the general context of the overall conflict, and the degree of force reasonably deemed necessary to accomplish the objective, will determine the legality of the destruction. It is likely, however, that any enemy area having either military or economic importance will be considered a valid object of attack.

Considering the general destructive potential of long range submarine missiles,¹⁰⁹ one would agree that it would obviously be desirable to warn the noncombatants in the target zone prior to attack. A surfaced, or submerged, submarine might well find this requirement impossible since radio warnings would expose it to immediate destruction. It may therefore be assumed that operational necessity will preclude warnings prior to attack originating from a submarine in most operational situations, although this does not preclude the possibility of the warning originating elsewhere.

3. Blockade

The concept of the long range, or distant, blockade as

¹⁰⁹ It is estimated that the Polaris missile is capable of delivering a one megaton warhead. See H. W. Baldwin, The New Navy 58-63 (1964).

another method of economic attrition appears to be well entrenched as an aspect of total warfare. The submarine, contrary to views previously recognized, appears to be an ideal weapon furthering this new concept. In view of the continuing trend towards mass destruction of commerce as an end in warfare, it is projected that the decision-makers of the future will find it feasible to utilize the submarine to the fullest extent compatible with recognized international law.

B. Limited War

Fear that local, or limited, conflicts will accelerate into major conflicts operates as a deterrent to the expansion of belligerent objectives. The period subsequent to World War II has been marked by the existence of several of these geographically oriented conflicts. Thus far such confrontations have been notable for their lack of reported submarine activity. This is keeping with the fact that major submarine activity has been experienced in the past only in those conflicts which approached total dimensions. The potential entrance of the submarine into this type of warfare requires a consideration of its possible role, or roles, particularly in view of the probability that only in limited warfare situations can a true balance between humanitarian considerations and military necessity be anticipated.

1. Commerce Destruction

In limited war situations in the future, it may be postulated that the decision-makers will make efforts to channel their efforts in such a manner as to avoid retaliatory efforts that might increase the scope of the conflict. Consequently, if it becomes necessary to utilize the submarine to stifle a belligerent's flow of commerce, it is probable that political reality will necessitate reasonable compliance with the conventional rules regarding commerce destruction.

2. Bombardment

It may be assumed that, in the limited war situation postulated above, traditional weapons and traditional rules would be favored for naval bombardment. Such bombardment would logically be limited to fire from surface vessels rather than submarine launched missiles. Considering the danger of acceleration, decision-makers would be hardpressed to justify the utilization of a nuclear missile, and from the standpoint of economy, the use of a conventional submarine missile is unlikely. Generally speaking, the role of the submarine in bombardment may be considered negligible in the limited war situation.

3. Blockade

Future limited wars probably represent the only occasions when utilization of the traditional close blockade could be

considered feasible, since historically it was a development of this type of confrontation. The decisions of the future could well result in a cordon of warships preventing access or departure from enemy ports, as envisioned under the customary doctrine of blockade. Such a blockade could be expected to be composed of both surface vessels and submarines, since in the limited aspect contemplated, visit and search, and possible confiscation, would be the desired goal, rather than potentially more drastic submarine measures.

Chapter V

Comparison of Future Trends with Postulated Goals

Having examined both the past and the future, it now appears possible to compare the probable course of the latter with the humanitarian goals previously postulated as being desirable attributes of submarine warfare.

A. Commerce Destruction

As an instrument of commerce destruction it appears likely that the submarine will retain its pre-eminence in any immediately foreseeable conflict. The example of the past indicates that in a total war situation the customary rules would not prevail. Unrestricted submarine warfare can logically be expected to be the rule rather than the exception. Under such conditions it is likely that prevention of unnecessary casualties, protection of noncombatants, and recognition of neutrality will again be secondary considerations.

There exists a probability that in limited wars, limited both as to geographic area and as to the number of participants, the goals will be realized. In such a context, belligerents would hesitate to violate a norm which might bring the wrath of a powerful neutral, shift the balance of world opinion against them, or accelerate the conflict beyond desirable proportions. In addition, it is likely

that the concept of military necessity will not be as pressing in a limited war where ultimate survival is not the immediate concern.

B. Bombardment

In view of the destructive capability of the modern missile carrying submarine, the possibility of naval bombardment from such vessels poses tremendous problems. The traditional rules governing naval bombardment originated, and were codified, when the deck mounted cannon was the principle weapon for such warfare. With its limited range, and generally excellent accuracy, the probability of such a weapon doing extensive damage outside a target area was limited. There was, and is, a reasonable expectation of realizing humanitarian goals while utilizing this type of weapon, assuming that the existing rules in this regard are observed.

In the absence of a universally accepted ban on the use of nuclear weapons the difficulty of achieving humanitarian ends in a future total war situation is obvious.¹¹⁰ The extended range of a missile brings within firing distance

¹¹⁰ United Nations General Assembly resolution 1653 (XVI) of 24 November 1961, declares the use of nuclear weapons to be illegal and "contrary to the spirit, letter and aims of the United Nations", and also contrary to the rules of international law and humanity. With the exception of the USSR, none of the major powers voted for adoption of the resolution. For this reason, and others, its binding force is questionable. For a discussion on the effect of the resolution and the power of the assembly to legislate, see generally, O.Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations 101-120 (1966)*.

targets which cannot be seen, only calculated.¹¹¹ Even the slightest human or machine error could result in total destruction of untargeted areas. In addition, a direct nuclear hit on the designated target is no guarantee of safety for the persons or property within range of blast, burn, or radiation.

C. Blockade

The examples presented in the past by parties to the two total conflicts of this century who innovated the long range blockade, with its attendant emphasis on near total destruction of surface commerce, indicate fully the course that future total conflicts may be expected to follow. Heavy reliance on the submarine to enforce belligerent objectives will raise the same issues which were discussed under the general topic of commerce destruction. In the opinion of this writer, the submarine will play even a larger role in any such future conflicts. Opportunity to observe humanitarian practices will be present, but such practices will once again be limited by the necessity which operations will impose on the submarine commander.

¹¹¹ See J.T. Clark & D. H. Barnes, *Sea Power and its Meaning* 106-III (1966) where the range of the present Polaris missile is estimated as being at least 2500 miles.

Chapter VI

Recommendations

A. Reconciliation of Future Trends with Postulated Goals

Assuming the validity of the trends examined, is it possible for international society to reconcile these trends in such a manner that humanitarian goals can continue to be valid considerations in submarine warfare, and if so, how?

It may be argued that a vigorous enforcement of the old rules respecting commerce destruction, as represented by the 1936 London Protocol, would accomplish that end in this area. However, a realist would be forced to conclude that the old rules, if they were ever a valid statement of the international law in this area, died at the hands of international practice, and were buried at Nuremberg. It is an unfortunate truism that the bulk of "enforcement" of international rules in the war law area is accomplished after the fact of violation at tribunals convened, or instigated, by victorious belligerents. Future enforcement of these rules would require a tribunal infused with equal parts of hypocrisy and unreality.

International practice does not appear to have antedated the traditional rules governing naval bombardment. Time itself has accomplished this act. Enforcement of existing doctrine would completely ignore the vast tech-

nological advances which render questionable the applicability of conventional humanitarian criteria. Recognition of the change coupled with realistic attempts to meet the humanitarian challenge is a more rational course of action.

The concept of the long-range blockade has rendered obsolete, except in limited situations, the traditional short-range or "close" blockade. The economic success enjoyed as a result of the application of the new version indicates that attempts to apply traditional concepts would be fruitless. The applicability of the submarine to the long-range blockade poses important problems in determining the permissible limits of submarine activity.

Two further courses of action are open for consideration, i.e., abandonment of the submarine as a weapon of war, or formulation of new and realistic rules for the conduct of submarine operations in future conflicts. The possibilities for the success of the former are remote. Past practice indicates the unlikelihood of outlawing the use of an effective military weapon by agreement. Normally the reverse is true when such weapons are possessed by the majority of the international community, or by the more powerful of the potential belligerents. This has been demonstrated in the past by recognition of the high explosive shell, shrapnel, and the torpedo as legitimate weapons of war, and by the present failure to effectively ban nuclear weapons, although only a handful of nations

possess them. Accordingly, any attempt to discard the submarine as a weapon should be regarded as pre-ordained to fail.

It remains finally to determine whether new doctrines can be developed which will permit maximum utilization of the submarine's potential as a weapon without totally negating basic humanitarian goals. As a premise such rules should be formulated so as to be applicable to conditions of both limited and total belligerency. It is rational to presume that under the conditions visualized as existing in future total conflicts, any confrontation between necessity and humanity will result in a paramount consideration of the former. Unrealistic rules, as evidenced in the past, can only lead to breaches, which in turn require only minor extension to become total disregard. If any semblance of humanitarian order is to be preserved, such rules, while maintaining opportunities for mitigation, must be capable of application under the most extreme conditions.

The most recent codification of rules regarding submarine warfare occurred in 1936. Rules drafted in the early twentieth century still have paper authority, at least in certain areas of submarine activity. Even earlier customary doctrines predominate. Clearly the time has come for an international body to re-evaluate the existing standards. It is submitted that the following is a rea-

listic starting point on which such a body might build an acceptable doctrine of submarine warfare:

RULES RESPECTING CONDUCT TOWARDS SURFACE VESSELS

- (1) It is recognized that submarine vessels, because of peculiarities in design, construction, and operating environment, are not inherently subject to the rules of international law which govern the conduct of surface warships. However, in the conduct of warfare against merchant vessels, commanding officers of submarines shall make every effort, not inconsistent with the safety of their command, or the completion of their assigned mission, to insure the well-being of the crew and passengers of the vessel under attack.
- (2) Such efforts may, in applicable situations, include permitting the crew and passengers of a target vessel to abandon ship prior to attack; signalling the position of survivors to potential rescuers; taking wounded or able bodied survivors on board the submarine vessel; providing foodstuffs or medical supplies to survivors afloat, and such other humanitarian conduct as the commanding officer may deem advisable under the circumstances of his operational commitments.
- (3) Under no circumstances may the commanding officer, or crew of a submarine, take deliberate aggressive action against the survivors of a destroyed vessel, unless such survivors commit acts which endanger the safety of the submarine or crew.
- (4) Vessels clearly designated as hospital ships, in accordance with the provisions of international law, shall not be subjected to attack unless such vessels have abandoned their medical function in favor of military pursuits.

The following proposal for rules governing naval bombardment will be seen to be an adaptation of those presently stated in the Laws Of Naval Warfare:

RULES RESPECTING NAVAL BOMBARDMENT

- (1) The term bombardment as used herein denotes the use of any type of projectile fired or launched by surface or submarine vessels at terrestrial targets.
- (2) All enemy installations of a military nature; temporary or permanent concentrations of troops, equipment, and supplies, and industrial sites engaged in the manufacture of war material, may be considered legitimate targets.
- (3) Any destruction of cities, towns, villages, or agricultural areas not justified by military necessity is prohibited. Such areas will not be bombarded unless legitimate targets are present and capture of such targets by own or allied forces is not feasible.
- (4) Whenever a desired objective may be obtained by utilization of conventional weapons, as opposed to nuclear devices, such weapons will be utilized. Simple expediency will not dictate the choice of weapons.
- (5) If the utilization of nuclear weapons is required, a weapon will be chosen which will accomplish the military objective with the least possible direct and incidental nuclear consequences to the local populace.
- (6) Known concentrations of noncombatants; medical establishments and units; religious, historical, and educational institutions will not be made the deliberate object of any bombardment.

The following suggested rules are considered to be of general application in the regime of blockade:

RULES RESPECTING BLOCKADE

- (1) The term blockade denotes a belligerent action against an enemy, or enemies, calculated to interdict the free flow of maritime commerce to or from the ports of such enemy.
- (2) A blockade is not effective until the blockading party has given notice to other interested parties

stating the commencement date of the action, the geographic limits of the blockade, and anticipated measures to enforce the blockade. A grace period for the withdrawal of affected shipping may be declared.

(3) A blockade may be enforced against all parties having notice by aircraft, and surface and sub-surface warships, subject, however, to international law governing the conduct of such aircraft and vessels.

(4) To be binding on all the parties, a blockade must be diligently enforced by the blockading party.

(5) A blockade remains in effect until withdrawn or until the military defeat of the blockading party.

The foregoing, while not offered as a panacea for the ills afflicting international law in wartime, hopefully offer courses of conduct which can be realistically applied to operational submarine conditions, while still retaining opportunities for the effectuation of humanitarian goals in wartime. It is firmly believed that the old rules should be discarded, since although they may offer some utility in the limited war situation, a rule which is applicable to only that situation can be of little value to the decision-maker faced with a total conflict.

While the suggested rules in some aspects represent a surrender of older, more humane concepts to the harshness of our technological age, it is believed that they also represent a necessary step forward which will prevent

the paying of lip service to doctrines which fail to accord with either legal practice or nuclear fact and which can only result in their complete disregard when necessity dictates. It is a short and easy step from disregard of one outmoded concept, regardless of the apparent justification, to disregard of all legal concepts, no matter how valid.

War at its best will obviously never be humane, and efforts to completely humanize conflict are doomed to failure. However, a consideration of the number of threatened lives in modern violence increases the urgency of framing rules which will, within the leeway left by military urgency, conform to the dictates of humanity. The immediate task required is the regulation of naval warfare, from the standpoint of the submarine, in such a manner that the utility of the submarine, its need for surprise and secrecy for safe and effective operation, as well as the claims of neutrals and noncombatants to immunity and the overall demands of humanity, can be considered and a balance obtained.

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