

# Legal Aspects of Modern Submarine Warfare

*J. Ashley Roach\**

- I. Submarines
- II. The Laws Governing Submarine Warfare
- III. Sources of the Law
- IV. The Law of the Sea
- V. The Law of Neutrality
- VI. The Law Regulating the Conduct of Military Operations
- VII. Attacks at Sea
- VIII. Interdiction of Enemy Merchant Shipping by Submarines
- IX. Enemy Vessels exempt from Submarine Interdiction
- X. Interdiction of Neutral Merchant Shipping by Submarines
- XI. Land Attack
- XII. Summary and Conclusions

## I. Submarines

It is no secret that modern submarines have come a long way from those employed in World War II. Just compare what you could see in the movie *Das Boot* with those in the movies *Hunt for Red October* and *Crimson Tide*!

The question is whether the law regulating the conduct of submarine warfare has come just as far. Let me posit that the answer is yes, no and somewhat!

---

\* This lecture was given in honor of Professor Reimar Lüst, at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany, 24 September 2001. The views expressed are personal and do not necessarily represent the views of the U.S. Government or any of its departments.

## II. The Laws Governing Submarine Warfare

The international rules governing the conduct of submarine warfare, particularly in the 21st century, seek to accommodate three branches of international law. The first is the law of the sea, the second is the law of neutrality, and the third is the law regulating the conduct of military operations. I propose to summarize the relevant rules as I understand them and apply them to three of the missions of the modern submarine: reconnaissance,<sup>1</sup> anti-shipping, and land-attack.

## III. Sources of the Law

One of the limitations in trying to understand the law of naval warfare, particularly as it relates to submarines, is the uneven nature of sources available for research.

Trying to learn the facts is very difficult because of the inherently limited sources of information in the public domain about modern submarine operations and doctrine.<sup>2</sup> Secrecy is inherent in the “silent service”. Access to the law is also uneven, although for very different reasons. There is virtually no modern treaty law governing the use of force in naval warfare — the Protocols of 1977 Additional to the Geneva Conventions of 1949 generally avoided the subject.<sup>3</sup> On the other

---

<sup>1</sup> S. Sontag/ C. Drew, *Blind Man's Bluff: The Untold Story of American Submarine Espionage*, 1998 and J. Piña Craven, *The Silent War: The Cold War Battle Beneath the Sea*, 2001.

<sup>2</sup> R. Hutchinson, *Janes' Submarines: War Beneath the Waves from 1776 to the Present Day*, 2001; J. G. Roos, “Weighing the Options: US Navy Faces Tough Options In Modernizing Its Attack-Sub Fleet”, *Armed Forces Journal International*, April 2001, 48 et seq.; M. Kauchak, “Transformation In Their Scope: an exclusive interview with Admiral Frank L. “Skip” Bowman”, Director, Naval Reactors, *ibid.*, November 2001, 34-37; and G. Gugliotta, “For Attack Subs, New Roles in an Changing World”, *Washington Post* of 5 March 2001, A9.

<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *ILM* 16 (1977), 1391, hereinafter Additional Protocol I, and Additional Protocol II, *ibid.*, 1442 et seq., relating to the Protection of Victims of Non-International Armed Conflicts.

hand, there is the UN Convention on the Law of the Sea<sup>4</sup> that sets out and develops the maritime law regarding the non-forcible uses of ocean space by warships. Given its wide adherence (138 ratifications as of May 2002), it is the principal modern source of the law of the sea. However, there has not been a lot of warfare at sea since World War II that could contribute to our appreciation of how the law is applied in conflict.

Consequently, researchers and analysts turn to secondary sources for further guidance and insight. Fortunately there are a few publicly available modern military manuals written for the military officer and more detailed versions prepared for the military lawyer. Most notable among those are the Federal Republic of Germany Ministry of Defense's manual *Humanitarian Law in Armed Conflicts* (1992)<sup>5</sup> and for lawyers, *The Handbook of Humanitarian Law in Armed Conflicts* (1995),<sup>6</sup> as well as the U.S. Navy's *Commander's Handbook on the Law of Naval Operations*<sup>7</sup> and the *Annotated Supplement to the Commander's Handbook*<sup>8</sup> (latest editions published in 1995 and 1997 respectively).

---

<sup>4</sup> United Nations Convention on the Law of the Sea, Doc. A/CONF. 62/122 and Corr.

<sup>5</sup> FRG Ministry of Defense, *Humanitarian Law in Armed Conflicts-Manual* (Zdv 15/2, 1992) (English version).

<sup>6</sup> D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, 1995.

<sup>7</sup> Office of the Chief of Naval Operations, U.S. Dep't of the Navy, *The Commander's Handbook on the Law of Naval Operations*, Naval Warfare Pub. No. NWP 9 (Rev. A)/FMFM 1-10, 1989, hereinafter *Commander's Handbook NWP 9*, reprinted in: H.W. Robertson (ed.), *U.S. Naval War College, The Law of Naval Operations*, 385, International Law Studies No. 64, 1991, hereinafter *The Law of Naval Operations*; Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps, U.S. Dep't of the Navy, U.S. Coast Guard & U.S. Dep't of Transportation, *The Commander's Handbook on the Law of Naval Operations*, Naval Warfare Pub. No. NWP 1-14M (formerly NWP 9 (Rev. A)/MCWP 5-2.1/COMDTPUB P5800.7, 1995), hereinafter *Commander's Handbook NWP 1-14M*.

<sup>8</sup> Office of the Judge Advocate General, U.S. Dep't of the Navy, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 1989. The author drafted the *Annotated Supplement* while assigned to the faculty of the Naval War College in 1986-1988 and completed it after being assigned to the Department of State. The second edition of the *Annotated Supplement* was published by the U.S. Naval War College in 1997, hereinafter *Annotated Supplement*; a third edition is in preparation.

Finally, there are the results of two modern multinational projects. I refer first to the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.<sup>9</sup> This book and its explanation were prepared by international lawyers and naval experts convened by the International Institute of Humanitarian Law between 1987 and 1994. Second, I refer to the *Helsinki Principles on the Law of Maritime Neutrality* adopted by the International Law Association in 1998 after eight years of deliberation by the ILA's Committee on Maritime Neutrality.<sup>10</sup>

#### IV. The Law of the Sea

The law of the sea is no where as simple as it was during World War II. At that time international law recognized only two jurisdictional zones at sea: first, a narrow territorial sea, adjacent to the shoreline, of no more than 3 nautical miles in breadth, which was under the sovereignty of the coastal state; and second, the high seas, extending seaward from the outer limit of the territorial sea, which were open to all but subject to the duty of each user to respect the rights of the others. Consequently, during World War II belligerent naval operations were permitted anywhere at sea except within neutral territorial seas.

---

<sup>9</sup> L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 1995, hereinafter *San Remo Manual*. Cf. L. Doswald-Beck, "The San Remo Manual on International Law Applicable to Armed Conflicts at Sea", *AJIL* 89 (1995), 192 et seq.; H.B. Robertson, "An International Manual for the Law of Armed Conflict at Sea", *Duke L. Mag.*, Winter 1995, 14. Between 1987 and 1994, the author participated, in his personal capacity, in the development of the *San Remo Manual*. The *Manual* also contains an extensive "commentary explaining the legal background to the provisions and the discussions of the participants where there was a certain controversy as to the state of the law". Doswald-Beck, see above *AJIL*, 193. The commentary is denominated the "Explanation" and is so termed in this article. The text of the *San Remo Manual* (without the Explanation) also appears in *Int'l Rev. of the Red Cross* 309 (1995), 595 et seq.

<sup>10</sup> *Helsinki Principles on the Law of Maritime Neutrality*, *ILA Conference Report* 68 (1998), 497 et seq., hereinafter *Helsinki Principles*. The final report of the ILA Committee on Maritime Neutrality, which prepared the *Helsinki Principles*, also contains commentaries on each of the principles, *ibid.*

Today, marine areas subject to coastal state sovereignty have greatly expanded in breadth. Not only has the acceptable breadth of the territorial sea grown to 12 nautical miles,<sup>11</sup> which has increased the number of international straits with overlapping territorial seas, but a new concept of archipelagic waters is now recognized by international law. Today, waters enclosed by archipelagic straight baselines connecting the outermost islands and drying reefs, as well as the adjacent territorial sea, of island states that meet the specified requirements fall under the sovereignty of the archipelagic state.<sup>12</sup> Indonesia and the Philippines are two notable examples of archipelagic states. As a result the area of potentially neutral waters where belligerent naval operations would normally be prohibited has multiplied.

Moreover, today, international law recognizes the 200-mile exclusive economic zone (EEZ) and the continental shelf,<sup>13</sup> with the high seas only beginning at the outer limit of the EEZ (if claimed, otherwise the outer limit of the territorial sea).<sup>14</sup> Accordingly, belligerents are now required to have due regard for the rights of coastal states in those zones when conducting hostilities in sea areas between the territorial sea and the high seas and on the continental shelf.<sup>15</sup>

To be more precise, beginning nearest to shore, the law of the sea today divides ocean waters into three categories: first, those subject to the sovereignty of the coastal state;<sup>16</sup> second, those in which the coastal state has sovereign rights and jurisdiction while other states have navigation rights;<sup>17</sup> and third, the high seas where all states share the rights of navigation with each other.<sup>18</sup>

---

<sup>11</sup> As the U.S. Navy has pointed out, "extension of the breadth of the territorial sea from 3 to 12 nautical miles removes over 3,000,000 square miles of ocean from the arena in which belligerent forces may conduct offensive operations and significantly complicates neutral nation enforcement of the inviolability of its neutral waters." Commander's Handbook NWP 1-14M, see note 7, para. 7.3.4.1, at 7-13.

<sup>12</sup> LOS Convention, see note 4, arts 46, 47, 49.

<sup>13</sup> Ibid., Parts V and VI.

<sup>14</sup> Ibid., article 86.

<sup>15</sup> San Remo Manual, see note 9, para. 10, 8; Helsinki Principles, see note 10, para. 4, 505.

<sup>16</sup> LOS Convention, see note 4, article 2.

<sup>17</sup> Ibid., Part V.

<sup>18</sup> Ibid., article 87.

The first maritime area includes both internal waters and the territorial sea. In the territorial sea, but not in internal waters, the submarine has the right of innocent passage, but only if it navigates on the surface and shows its true flag.<sup>19</sup> The territorial sea may extend no more than 12 nautical miles from baselines drawn in accordance with the law of the sea.<sup>20</sup>

For archipelagic states, such as Indonesia, the rules are similar with one major exception. All the waters enclosed by archipelagic straight baselines around the archipelago are subject to the archipelagic state's sovereignty, as is the territorial sea measured seaward from the archipelagic straight baselines, no more than 12 nautical miles.<sup>21</sup> The right of innocent passage again exists in the archipelagic waters and adjacent territorial sea, and to be in innocent passage the submarine must navigate on the surface and fly its flag.<sup>22</sup> However, there is one important exception in archipelagic waters. Submarines may transit submerged through the routes used for normal navigation through the archipelago (and adjacent territorial sea) exercising the right of archipelagic sea lanes passage. This same right exists in designated sea lanes, although none have yet been designated by any archipelagic state.<sup>23</sup>

In straits used for international navigation overlapped by territorial seas, submarines may pass through the straits exercising the right of transit passage.<sup>24</sup> This means the ship must proceed without delay, submerged if it is safe to do so, must refrain from the threat or use of force against states bordering straits (except as to a state which is a belligerent *vis á vis* the submarine), and must refrain from activities other than those incident to its normal modes of continuous and expeditious transit (unless rendered necessary by *force majeure* or distress).<sup>25</sup> The great majority of strategically important international straits fall into this category: e.g., Bab el Mandeb, Bonifacio, Gibraltar, and the Northwest and Windward Passages.

If the straits are not overlapped by territorial seas and there is a high seas or EEZ corridor suitable for submerged navigation through the strait, the high seas freedom of navigation applies and there is no right

---

<sup>19</sup> Ibid., article 20.

<sup>20</sup> Ibid., article 3.

<sup>21</sup> Ibid., Part IV.

<sup>22</sup> Ibid., article 52 (1).

<sup>23</sup> Ibid., article 53.

<sup>24</sup> Ibid., article 38.

<sup>25</sup> Ibid., article 39.

of transit passage through the portions of the strait that are territorial sea.<sup>26</sup> (The GIUK gap comes to mind). However, if the high seas route is not of similar convenience with respect to navigational or hydrographical characteristics, the regime of transit passage applies within those straits. Thus, for example, a submarine may transit submerged through the territorial sea in a strait not completely overlapped by territorial seas where the territorial sea route is the only one deep enough for submerged transit.

Parenthetically I should note that innocent passage, rather than transit passage, applies in two special geographical situations: first, in straits used for international navigation that connect a part of the high seas or an EEZ with the territorial sea of a coastal state — the so-called “dead-end” straits.<sup>27</sup> Head Harbor Passage between Canada and Maine is an example. And second, the regime of non-suspendable innocent passage applies in those straits formed by an island of a state bordering the strait and its mainland, where there exists seaward of the island a route through the high seas or EEZ of similar convenience with regard to navigational and hydrographical characteristics.<sup>28</sup> The Strait of Messina, between the Italian island of Sicily and the toe of mainland Italy, is a prime example where this rule applies.

For purposes of navigation, the same general rules apply in the second and third maritime areas. Seaward of the territorial sea, the coastal state may claim an exclusive economic zone of no more than 200 nautical miles measured from the baseline, in which it may exercise sovereign rights and jurisdiction over the economic resources of the zone, but concurrently the ships of all states may exercise the high seas freedom of navigation and other internationally lawful uses of the sea related to that freedom, such as those associated with the operation of ships and compatible with the international law of the sea.<sup>29</sup> This includes operating military devices, intelligence collection, operations and conducting military surveys.<sup>30</sup> In the EEZ, as in the high seas, the submarine may operate submerged.<sup>31</sup>

---

<sup>26</sup> Ibid., article 35.

<sup>27</sup> Ibid., article 45.

<sup>28</sup> Ibid., article 38(1).

<sup>29</sup> Ibid., arts 56-58.

<sup>30</sup> U.S. Commentary on LOS Convention, Sen. Treaty Doc. 139-139, 24, reprinted in: 6 U.S. State Dep't Dispatch Suppl. No. 1, Feb. 1995, 16; *Geo. Int'l Envtl L. Rev.* 7 (1994), 112 et seq.; *ILM* 34 (1995), 1400 et seq., (1411);

Why is it important to know these rules? Simply because permissible activities of the submarine differ depending on whether the coastal or strait state is neutral or belligerent.

## V. The Law of Neutrality

The basic rules of maritime neutrality of particular relevance to submarine warfare can be stated as follows:

Belligerents must respect the inviolability of neutral waters. Consequently, they may not conduct hostilities in neutral waters (except in self-defense). By neutral waters, I refer to internal waters, the territorial sea, and where applicable, archipelagic waters. Further, in conducting hostilities elsewhere, belligerents must exercise due regard to prevent to the maximum extent possible collateral damage to neutral waters.<sup>32</sup>

On the other hand, if neutral waters are permitted or tolerated by the coastal state to be used for belligerent purposes, the other belligerent may take such action as necessary and appropriate to terminate such use.<sup>33</sup>

In conducting hostilities in international waters (i.e., high seas and EEZ), the parties to the conflict must have due regard to the exercise of the freedoms of the high seas by neutral states.<sup>34</sup>

Neutral ships should be aware of the risk and peril of operating in areas where active naval hostilities take place. However, belligerents engaged in naval hostilities must take reasonable precautions including appropriate warnings, if circumstances permit, to avoid damage to neutral ships.<sup>35</sup>

It should be emphasized that the establishment by a belligerent of special zones at sea does not confer upon that belligerent rights in relation to neutral shipping which it would not otherwise possess. In particular, the establishment of a special zone cannot confer upon a belligerent

---

J. A. Roach/ R. W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd edition, 1996, 565.

<sup>31</sup> LOS Convention, see note 4, article 58(1) incorporating by reference, *inter alia*, article 87(1)(a).

<sup>32</sup> Helsinki Principles, see note 10, para. 1.4, 500.

<sup>33</sup> *Ibid.*, para. 2.1, 501.

<sup>34</sup> *Ibid.*, para 3.1, 503.

<sup>35</sup> *Ibid.*, para 3.2, 504.



erent the right to attack neutral shipping merely on account of its presence in the zone.<sup>36</sup>

However, a belligerent may, as an exceptional measure, declare zones where neutral shipping would be particularly exposed to risks caused by the hostilities. The extent, location and duration must be made public and may not go beyond what is required by military necessity, regard being paid to the principle of proportionality.<sup>37</sup>

It will be recalled that the British exclusion zones (MEZ and TEZ) during the 1982 war in the South Atlantic passed muster because the MEZ was limited to Argentine military shipping and there was no expectation of any neutral shipping in the TEZ sea area around the islands.<sup>38</sup> The same cannot be said of the war zones asserted shortly thereafter by the belligerents during the Tanker War of the Persian Gulf.<sup>39</sup>

Mention will shortly be made of a number of more specific rules that apply to neutral shipping.

## VI. The Law Regulating the Conduct of Military Operations

Before turning to the special rules applicable to warships, I should recall the fundamental principles of the laws of armed conflict:

- the right of belligerents to adopt means of injuring the enemy is not unlimited.
- it is prohibited to launch attacks against the civilian population as such.
- distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.<sup>40</sup>

---

<sup>36</sup> *Ibid.*, para 3.3, 504-505.

<sup>37</sup> San Remo Manual, see note 9, para. 106, 28; Helsinki Principles, see note 10, para. 3.3, 505.

<sup>38</sup> San Remo Manual Explanation, see note 9, para. 106.2, 182.

<sup>39</sup> J.A. Roach, "Missiles on Target: Targeting and Defense Zones in the Tanker War", *Va. J. Int'l L.* 31 (1991) 593 et seq., (600-608); G.K. Walker, *The Tanker War, 1980-88: Law and Policy*, U.S. Naval War College International Law Studies No. 74, 2000, 414-415.

<sup>40</sup> Additional Protocol I, see note 3, arts 35(1), 51(2) and 48.

These legal principles governing targeting generally parallel the military principles of the objective, mass and economy of force. The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary collateral destruction must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented. The law thus requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war.<sup>41</sup>

What are military objectives? Military objectives are combatants and those objects which, by their nature, location, purpose or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.<sup>42</sup> In the context of war at sea, military objectives obviously include enemy warships and naval auxiliaries, as well as, in the land attack role, military objectives ashore, both military and economic that effectively support and sustain the enemy's war-fighting capability.<sup>43</sup>

On the other hand, civilians and civilian objects may not be made the object of attack. Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy's war-fighting capability.<sup>44</sup>

However, it is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack. Commanders must take all reasonable precautions, taking into account military and humanitarian considerations to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force. In each instance, the commander must determine whether incidental injuries or collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him. Similarly, the commander must decide, in light of all the facts known or reasonably known to him, including the

---

<sup>41</sup> Commander's Handbook NWP 1-14M, see note 7, para. 8.1, 8-1.

<sup>42</sup> San Remo Manual, see note 9, para. 40, 15.

<sup>43</sup> Commander's Handbook NWP 1-14M, see note 7, para. 8.1.1, 8-1.

<sup>44</sup> *Ibid.*, para. 8.1.2, 8-1.

need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.<sup>45</sup>

As a result of the Gulf War a decade ago, rules have developed to provide reasonable protection to the environment in time of war. On the one hand, it is not unlawful to cause collateral damage to the natural environment during an attack upon a legitimate military objective. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment, to that end, and as far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited. Therefore, a commander should consider the environmental damage which will result from an attack on a legitimate military objective as one of the factors during targeting analysis.<sup>46</sup>

I think these rules are now generally accepted. Although there has been little need to apply them over the past 20 years, for that we should be grateful! Nevertheless the rub, as always, is in implementation of the rules when the time comes.

## VII. Attacks at Sea

The laws of armed conflict impose essentially the same rules on submarines as apply to surface warships. Submarines may employ their conventional weapons systems to attack enemy surface, subsurface or airborne targets wherever located beyond neutral territory. Enemy warships and military aircraft, including naval and military auxiliaries, may be attacked and destroyed without warning.<sup>47</sup>

The controversy surrounding the sinking of the Argentine cruiser *General Belgrano* by the British Churchill-class nuclear-powered attack submarine HMS *Conqueror*<sup>48</sup> on 2 May 1982 illustrates these rules.<sup>49</sup>

---

<sup>45</sup> Ibid., para. 8.1.2.1, 8-1 – 8-2.

<sup>46</sup> Ibid., para. 8.1.3, 8-2.

<sup>47</sup> Ibid., para. 8.3, 8-4.

<sup>48</sup> R. Jackson, *Submarines of the World*, 2000, 45.

No one suggested that the *Belgrano* wasn't *per se* a legitimate military objective. Rather some concerns were as to whether torpedoing the cruiser was permitted at that time by international law, that is whether a state of armed conflict existed between the United Kingdom and Argentina after the Argentine invasion and before the British ground campaign began. Those who argued a state of armed conflict did not exist, interpreted the new British Total Exclusion Zone (TEZ) in terms of self-defense. They felt the fact that the *Belgrano* did not at the time of *Conqueror's* attack pose an immediate threat to British forces meant the *Belgrano* could not be lawfully attacked. The British command saw things differently. But as I said, no one ever argued that the *Belgrano* was not a legitimate object of attack because she was an enemy warship!

Rules applicable to surface warships regarding enemy ships that have surrendered in good faith, or that have clearly indicated their intention to do so, apply as well to submarines.<sup>50</sup>

The Second Geneva Convention requires all ships, including submarines, to "take all possible measures" to search for and collect survivors after each engagement.<sup>51</sup> However, the practice of states during World War II suggests the rule more likely to be followed in war at sea, is more limited and applies only to the extent that military exigencies permit. If such humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, U.S. Navy guidance calls for the location of possible survivors

---

<sup>49</sup> House of Commons, *The Falklands Campaign: A Digest of Debates in the House of Commons 2 April to 15 June 1982*, 182-201 (HMSO 1982); M. Hastings/ S. Jenkins, *The Battle for the Falklands*, 1983, 147-151, 166-167; A. Gavshon/ D. Rice, *The Sinking of the Belgrano: The act of war that finally killed off all hopes of peace*, 1984; M. Middlebrook, *Operation Corporate: The Falklands War, 1982*, 1985, 142 et seq., id., *Task Force: The Falklands War, 1982*, rev. edition 1987, 142 et seq.; D. Brown, *The Royal Navy and the Falklands War*, 1987, 134 et seq.; M. Middlebrook, *The Fight for the 'Malvinas': The Argentine Forces in the Falklands War*, 1989, 104 et seq.; L. Freedman/ V. Gamba-Stonehouse, *Signals of War: The Falklands Conflict of 1982*, 1990, 247 et seq.; S. Woodward, *One Hundred Days: The Memoirs of the Falklands Battle Group Commander*, 1992, 147 et seq.

<sup>50</sup> Commander's Handbook NWP 1-14M, see note 7, para. 8.3, 8-4.

<sup>51</sup> Convention No. II for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 1949, UNTS Vol. 75 No. 971, art. 18(1).

to be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.<sup>52</sup>

### VIII. Interdiction of Enemy Merchant Shipping by Submarines

The rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine's effectiveness as a weapon system is dependent upon its capability to remain submerged (and undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 makes no distinction between submarines and surface warships with respect to attacks upon enemy merchant shipping. The London Protocol specifies that, except in case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship "whether surface vessel or submarine" may not destroy an enemy merchant vessel "without having first placed passengers, crew and ship's papers in a place of safety".<sup>53</sup> The impracticability of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping. As in the case of such attacks by surface warships, this practice was justified either as a reprisal in response to unlawful acts of the enemy, or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy's war-fighting/war-sustaining effort.<sup>54</sup>

Consequently, the United States now considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the re-

---

<sup>52</sup> Commander's Handbook NWP 1-14M, see note 7, para. 8.3, 8-4.

<sup>53</sup> London Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 6 November 1936, LNTS Vol. 173 No. 4025.

<sup>54</sup> Commander's Handbook NWP 1-14M, see note 7, para. 8.3.1, 8-4 – 8-5. See the collection of essays in, R.J. Grunawalt (ed.), *The Law of Naval Warfare: Targeting Enemy Merchant Shipping*, 1993, U.S. Naval War College International Law Studies No. 65.

sponsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel, unless:

- the enemy merchant vessel persistently refuses to stop when duly summoned to do so;
- it actively resists visit and search or capture;
- it is sailing under convoy of enemy warships or enemy military aircraft;
- it is armed;
- it is incorporated into, or is assisting in any way the enemy's military intelligence system;
- it is acting in any capacity as a naval or military auxiliary to an enemy's armed forces; or
- the enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with the London Protocol of 1936 would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.<sup>55</sup>

In contrast to the first six exceptions, this last exception has generated some controversy, as some (*San Remo Manual*<sup>56</sup> and Busutil<sup>57</sup>) fear the exception for war-sustaining swallows the rule of prohibition. Suffice it to say that the law may not yet have found an acceptable balance on this issue.

## IX. Enemy Vessels exempt from Submarine Interdiction

Provided they are innocently employed in their exempt category, the rules of naval warfare regarding enemy vessels that are exempt from capture and/or destruction by surface warships also apply to submarines. These specifically exempt vessels include:

- cartel vessels, i.e., those designated for and engaged in the exchange of prisoners of war;
- properly designated and marked hospital ships, medical transports and medical aircraft;

---

<sup>55</sup> Commander's Handbook NWP 1-14M, see note 7, para. 8.3.1, 8-5.

<sup>56</sup> *San Remo Manual*, see note 9, paras 60.7-60.11, 148-150.

<sup>57</sup> J.J. Busutil, *Naval Weapons Systems and the Contemporary Law of War*, 1998, 145 et seq.

- vessels charged with religious, non-military scientific, or philanthropic missions (vessels engaged in the collection of scientific data of potential military application are not exempt);
- vessels guaranteed safe conduct by prior arrangement between the belligerents;
- small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade (although they are subject to the regulations of a belligerent naval commander operating in the area); and
- civilian passenger vessels are exempt from destruction but are subject to capture.<sup>58</sup>

## X. Interdiction of Neutral Merchant Shipping by Submarines

A principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. By “neutral commerce” I include all commerce between one neutral nation and another not involving materiel of war or armaments destined for a belligerent nation, and all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise contributes to the belligerent’s war-fighting or war-sustaining capability. Neutral merchant vessels are subject to visit and search, but may not be captured or destroyed by belligerent forces, including submarines.<sup>59</sup>

These rules pertain because the law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations (unless, of course, the Security Council has ruled otherwise). However, a neutral government cannot itself supply materiel of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status. Although a neutral government may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so (absent a binding Security Council resolution). In effect, the law establishes a balance-of-interests test to protect neutral commerce from unreason-

---

<sup>58</sup> Commander’s Handbook NWP 1-14M, see note 7, para. 8.2.3, 8-3 – 8-4. The *San Remo Manual*, see note 9, para. 47, 16-17, is more detailed and adds a new category: vessels designed or adapted exclusively for responding to pollution incidents in the marine environment.

<sup>59</sup> Commander’s Handbook NWP 1-14M, see note 7, para. 7.4, 7-5.

able interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.<sup>60</sup>

All vessels operating under an enemy flag possess enemy character. However, the fact that a merchant ship flies a neutral flag does not necessarily establish a neutral character. Any merchant vessel owned or controlled by a belligerent possesses enemy character, regardless of where it is operating under a neutral flag or bears neutral markings. Vessels acquiring enemy character may be treated by an opposing belligerent as if they are in fact enemy vessels, and may be attacked under the circumstances I have already described.<sup>61</sup>

U.S. doctrine is that neutral vessels acquire enemy character and may be treated by a belligerent as enemy warships when engaging in either of the following two acts:

- taking a direct part in the hostilities on the side of the enemy; or
- acting in any capacity as a naval or military auxiliary to the enemy's armed forces.<sup>62</sup>

Neutral merchant vessels acquire enemy character and may be treated by a belligerent as enemy merchant vessels when engaged in either of the following acts:

- operating directly under enemy control, orders, charter, employment, or direction; or
- resisting an attempt to establish identity, including visit and search.<sup>63</sup>

The *San Remo Manual* puts the rules in another way: Merchant vessels flying the flag of neutral states may not be attacked unless they:

- are believed on reasonable grounds to be carrying contraband or breaching a blockade, after warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
- engage in belligerent acts on behalf of the enemy;
- act as auxiliaries to the enemy's armed forces;
- sail under convoy of enemy warships or military aircraft; or
- otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the

---

<sup>60</sup> Ibid., para. 7.4, 7-5.

<sup>61</sup> Ibid., para. 7.5, 7-6.

<sup>62</sup> Ibid., para. 7.5.1, 7-6.

<sup>63</sup> Ibid., para. 7.5.2, 7-6.



attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.<sup>64</sup>

The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.<sup>65</sup>

## XI. Land Attack

As I noted before, the portion of the law of armed conflict applicable to targeting applies equally to attacks against targets on land as they do to attacks against targets at sea. Consequently they apply to submarines just as they do to the surface warships — battleships, cruisers, destroyers — in the land attack role.<sup>66</sup>

However, land attack is a relatively new role for the submarine. Development and deployment of the cruise missile, such as the T-LAM, submarine-launched Tomahawk land-attack missile, has established the submarine as a formidable weapon for attacking targets ashore. Just recall their initial limited use during Desert Storm in early 1991,<sup>67</sup> and their use later in trying to reach terrorist headquarters in Afghanistan.<sup>68</sup>

## XII. Summary and Conclusions

So much for stating the rules and giving some examples. What do we make of the situation?

In my opening remarks I posed the question whether the law regulating the conduct of submarine warfare has come as far as the subma-

---

<sup>64</sup> San Remo Manual, see note 9, para. 67, 21-22.

<sup>65</sup> *Ibid.*, para. 69, 22.

<sup>66</sup> Commander's Handbook NWP 1-14M, see note 7, para. 8.1.1, 8-1.

<sup>67</sup> U.S. Naval Historical Center, E.J. Marolda/ R.J. Schneller Jr., *Sword and Shield: The United States Navy and the Persian Gulf War*, 1998, 144-145, 170, 181, 183, 245-246, 370.

<sup>68</sup> D.A. Fulghum/ R. Wall, "U.S. Stalks Taliban With New Air Scheme", *Aviation Week & Space Technology*, 15 October 2001, 32, 33; S.C. Truver, "The U.S. Navy in Review", U.S. Naval Institute Proceedings, May 2002, 74 et seq., (82).

rine has developed since the end of World War II suggested my answer would be yes, no and somewhat!

Certainly great strides have been made in accommodating the rules of naval warfare to the modern law of the sea. There has been considerable attention paid to the problem by legal and operational experts. Detailed guidance has been drawn up that will be drawn upon by officials of those governments, and that may be drawn upon by others. Some of these rules have been tested in the crucible of combat, but the last lesson has hardly been drawn. Reconciling dealing with the economic realities of enemy merchant shipping with the 65 year old rules remains a challenge. Unmanned autonomous underwater vehicles (AUV) may soon have a role in war at sea. How will the law deal with them? Now there's a topic for the Institute to consider.<sup>69</sup>

I for one take comfort in this situation. The history of attempts to codify the law of naval warfare is not positive. Recall, if you will, the failed efforts in Washington during 1921 and 1922 to achieve lasting naval disarmament after World War I. Recall the failed efforts in London in 1930 and 1936 to deal with unrestricted submarine warfare against merchant ships. Recall that the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva between 1974 and 1977, decided not to address the rules of international law applicable to war at sea when drafting the two Additional Protocols to the 1949 Geneva Conventions.

I have no confidence that a future diplomatic conference to revise the laws of naval warfare would adopt rules acceptable to those states whose conduct was to be constrained. Such a conference would presumably be open to representatives from all nations and non-governmental organizations. From my point of view, most of them would not have significant interests at stake, and would have little or no practical experience in the conduct they would seek to regulate. Of the more than 150 coastal states, only a small fraction have a significant naval capacity or experience in naval warfare. Another 30 states are land-

---

<sup>69</sup> E.D. Brown/ N.J.J. Gaskell, *The Operation of Autonomous Underwater Vehicles*, 2 Vols., 2000, Society for Underwater Technology; P. Almond, "British navy looks to unmanned subs", London Daily Telegraph, reprinted in: Washington Times of 29 May 2001, A11; R. Wall, "Navy Investigates UAV-Sub Teaming", *Aviation Week & Space Technology*, 9 July 2001, 67; B. Fletcher, "The U.S. Navy's Master Plan: A Vision for UUV Development", *Underwater*, July/August 2001, 51-55.

locked. Consequently, unless the rules of procedure of such a conference provided for all decisions, particularly on matters of substance, to be taken by consensus, or unless the conference could be limited to significant naval powers, those states without significant interests at stake would probably have the votes to decide matters of vital importance to naval powers without their consent.

On the other hand, as I have suggested tonight (and elsewhere) development and improvement of the law of naval warfare have occurred more rapidly and progressively through the active creation and revision of manuals reflecting the acceptable practice of states in war at sea.

History reveals that law of war treaties are written in light of, and to correct, the abuses of past wars. The universality of their acceptance is always chancy. Reliance on practice limits those seeking to impact the development of the law of naval warfare to those with significant interests at stake. That process should continue.<sup>70</sup>

---

<sup>70</sup> The author previously expressed these views in his article "The Law of Naval Warfare at the Turn of Two Centuries", *AJIL* 94 (2000), 64 et seq., (77).