THE LAW OF WAR

Robert W. Tucker

Any realistic discussion of the present status of the law of war must begin by taking note of the skepticism with which this law is generally regarded today. In view of the experience of the two great wars of this century there are many who doubt the possibility that future wars can be subject to effective legal restraints. Even more, there are many who question the continued validity today of the rules which have governed the conduct of hostilities heretofore. In the remarks to follow, I would like to examine some of the reasons for this present attitude of skepticism; to indicate some of the effects upon the traditional laws of war of what we have come to call "total war." In so doing it may appear that I, too, am skeptical of the continued utility of a law regulating the conduct of warfare. In order to avoid possible misunderstanding, I should like to make quite clear that I consider the traditional law of war one of the most worthwhile achievements of the 18th and 19th centuries, and am convinced that the recent trend of belligerents in abandoning the traditional restraints upon war has led—directly or indirectly—to many of the seemingly intractable problems of contemporary world politics. At the same time, I do not believe that it would serve a useful purpose if we failed to recognize the very dangerous situation we face in the methods and practices of total war. However necessary a change from the present trend may be—and I consider such a change to be an urgent necessity—the fact remains that we must begin with as clear a view as is possible of where we are today and where we will most likely go if this present trend is not altered in some way.

On first consideration, it is rather curious that the present attitude of disbelief in the utility of the law of war has not been substantially dissipated either by the war crimes trials that followed World War II or by the conclusion of the 1949 Geneva Conventions For The Protection of War Victims. Still, the war crimes trials were an unparalleled event in the modern period of international relations. The jurisprudence resulting from the trials has been considerable. In addition, it is no exaggeration to say that the 1949 Geneva Conventions constitute the most ambitious endeavor in international legislation on the regulation of war since the 1907 Hague Conventions.

Despite these recent events, the conviction persists that in a future war, especially one characterized by deep ideological schisms, even the most elementary prohibitions of the law of war will be abandoned. One reason for this would appear to stem from the fact that the vast majority of the war crimes trials dealt primarily with charges of mistreat-

ment of prisoners of war and of civilians in occupied territory. The trials provide little guidance on the legitimate weapons and methods for the actual conduct of hostilities. For example, there is not a single significant judgment dealing with the present legal limitations, if any, on aerial bombardment. Hence, there is the feeling that the war crimes trials and the 1949 Geneva Conventions, while clarifying and contributing to the rules of war governing the treatment of individuals who fall under the control of a belligerent, have contributed very little to the law governing the actions a belligerent may take against individuals—whether combatants or noncombatants—who have not fallen under his control. And, considering recent developments in weapons of mass destruction, some have questioned the relevance of further effort directed only toward the better protection of war victims. The rather facetious suggestion has been made that the real problem remaining to be solved concerns the possible means of becoming a war victim.

More serious, however, is the suggestion that the effectiveness of rules whose purpose is to restrain belligerents in their treatment of war victims may be dependent in large measure upon the possibility of retaining some restraints upon the actual conduct of hostilities. It is argued that where these latter restraints are absent, the likelihood that belligerents will abide by the law governing the treatment of war victims is accordingly diminished. Whether and to what extent this argument is sound is difficult to say, though I am of the opinion that it should not be ignored. It is indeed difficult to believe that, on the one hand, belligerents will continue to cast off all remaining restraints on the actual conduct of hostilities and, on the other hand, scrupulously meet their obligations to provide humane treatment to the victims of war.

In any event, it is certainly true that at present there is a marked discrepancy between efforts to insure protection to victims of war and the virtual abandonment of any further effort to regulate the actual conduct of hostilities. While not minimizing the importance of the former rules, our principal concern in this lecture is with the latter rules; i.e., the rules that traditionally have regulated the actual conduct of hostilities between belligerents, as well as with the traditional rules regulating the relations between belligerents and neutrals.[1]

The first problem that arises in the attempt to assess the present status of this law concerns the effects of the two world wars. Although exaggerated accounts of the lawlessness of the belligerents frequently have been given, there is no denying the fact that both wars witnessed the widespread violation of many of the traditional rules. It is important to observe that reference is not made here to occasional violations of the rules of war, since such occasional violations do not substantially affect the binding force of law. However, the continuous violation of certain rules is clearly a different matter. Do rules of war, whether customary or conventional, cease to be valid (binding) for the reason that over a given period of time they are neither obeyed nor applied by belligerents?

As a general, and rather theoretical, proposition it is easy enough to say that the validity, or binding quality, of law must depend upon a minimum degree of effectiveness. The difficulty occurs when one descends from the abstract proposition to the concrete case and asks: has this specific rule of warfare ceased to be valid for the reason that over a certain period of time it has been ineffective, on the whole, in regulating belligerent behavior? I am afraid that I am unable to concur with the attitude of some writers who consider the traditional law, despite the experience of two World Wars, either as unchanged in content or as in a temporary state of

suspension—awaiting the end of what is considered to be the present period of lawlessness. In particular, it does not seem possible to consider the laws of naval warfare valid prior to World War I as remaining unchanged today, in view of the practice of the naval belligerents during the two World Wars. Unfortunately, however, there is no easy and reliable method of determining the extent to which the traditional law of naval warfare has been invalidated by recent practices, if for no other reason than the fact that in international law there is no one competent agency, no superior organ standing above the various states, to which we may turn for an authoritative answer. Instead, we must usually undertake the laborious task of examining the actual practices of states, the occasional opinions expressed by governments, the scattered—and perhaps not always enlightening—decisions of military courts and tribunals, and the opinions—for what they may be worth —of international jurists.

Even after painstaking search, no clear and reliable answer may emerge. Who can say today with any real assurance that the rule forbidding the destruction of enemy merchant vessels without first placing passengers and crew in a place of safety remains binding upon belligerents? Throughout World War II, Germany in the Atlantic and the United States in the Pacific resorted to unrestricted submarine warfare against enemy merchant vessels; the latter were attacked and destroyed without warning and without prior attempt to place passengers and crew in a place of safety. Great Britain also resorted to the practice of destroying enemy merchant shipping on sight, though it made the effort to limit this practice as far as possible. Although the attempt was made by most belligerents to base the measures taken against enemy merchant shipping upon the right of reprisal, research has failed to indicate any effort on the part of the United States to provide legal justification for waging unrestricted submarine warfare in the Pacific.

A survey of the war crimes trials fails to turn up any cases in which defendants were charged with waging unrestricted submarine warfare against enemy merchant shipping, the one exception being the charge brought against Admiral Doenitz before the International Military Tribunal at Nuremberg. Admiral Doenitz was acquitted by the Tribunal of giving the order to wage unrestricted submarine warfare against British merchant vessels, for the reasons that shortly after the outbreak of war the British Admiralty "armed its merchant vessels, in many cases convoyed them with armed escort, gave orders to send position reports upon sighting submarines, thus integrating merchant vessels into the warning network of naval intelligence. On 1 October, the British Admiralty announced that British merchant ships had been ordered to ram U-boats if possible."[2] It should be noted, however, that the Tribunal *did not* state that the prohibition against sinking enemy merchant vessels without warning and without having first placed passengers and crew in a place of safety was no longer valid. On the contrary, the most reasonable inference is that the Tribunal did regard the prohibition as remaining binding upon belligerents, though it acquitted Doenitz of the charge in view of the circumstances already noted.

If we turn to the opinions of writers, we find that a majority still appear to assume that the law forbids unrestricted warfare against enemy merchant shipping. H.A. Smith is representative of these international jurists when he writes that "Notwithstanding the experience of the Second World War, it must be emphasized that the principle thus laid down (i.e., forbidding unrestricted warfare against enemy merchant shipping) is a binding rule of the law of nations."[3] However, a minority

of writers seriously questions the continued validity of the prohibition under discussion.[4]

This uncertainty over the present status of much of the traditional law of naval warfare is increased when we consider that during both World Wars the major naval belligerents deemed it necessary, almost from the opening stages of hostilities, to resort to measures whose legal justification—as judged by the traditional law—could rest only upon the belligerent right of reprisal. The declaration of operational (war) zones within which enemy and neutral shipping alike were either banned entirely or were subject to special hazards, the abolition—in fact—of the traditional law of blockade and contraband, the indiscriminate laying of mines—these and many other measures were based for the most part on the right of reprisal. We are not so much concerned here with the question as to whether in a specific instance, the resort to reprisals was justified, particularly when such reprisals operated in the main against neutral shipping. Nor are we concerned in this context with the question of ultimate responsibility for the initiation of this endless series of reprisals—a difficult and controversial matter. We are concerned with the fact that the constant resort to reprisals in naval warfare provided a method for evading the restrictions imposed by the traditional law, and, perhaps, for effecting changes in this law.

The explanation of this frequent disregard of the law, either openly or—more often—under the guise of reprisals, is to be found in the far-reaching transformation of the environment in which the traditional law operated and from which it derived much of its meaning and significance. For the traditional rules of warfare, and particularly the rules regulating warfare at sea, were largely a product of the nineteenth century. This traditional law presupposed a certain type of state and a certain type of war. The conception of the state was not necessarily democratic, but it was a state with limited powers. It presupposed economic liberalism, with a clear distinction to be drawn between the activities of the state and the activities of the private individual. The nineteenth century conception of war was that of a limited war, limited not only in terms of the number of belligerents involved in any conflict, but also limited in terms of the fraction of each belligerent's population which participated in and closely identified itself with the war effort. Finally, and most important, this conception of war presupposed limited war aims on the part of the belligerents. These limited war aims allowed, in turn, the introduction of restraints upon the methods by which these aims might be pursued.

The general nature of the transformation from the nineteenth century environment to the contemporary environment has been too frequently, and too thoroughly, analyzed to warrant any detailed comment here. It is sufficient for our purposes simply to note that almost all of the conditions presupposed by the traditional law have either been swept away or have been placed in serious question. The effects of this radically changed environment on the traditional law should be examined not only in relation to the numerous specific rules regulating war's conduct but, first and foremost, in relation to the *general principles* of the law of war; that is, in relation to those general principles that have always been considered as forming the bases of, and as giving meaning to, the more specific and detailed rules.

Perhaps the most important of these general principles is that principle which distinguishes between combatants and noncombatants. That the noncombatant population is not to be made the object of direct attack and—so far as military necessity permits—is to be spared in person and property during

hostilities, has long been considered the outstanding achievement and the vital principle of the law of war. In 1923, the American proposals relating to the legitimate limits to aerial bombardment were introduced by the following statement:

> Among the elementary principles which the development of modern rules of warfare, running through several centuries, has been designed to establish and confirm, the principle most fundamental in character, the observance of which the detailed regulations have largely been designed to assure, is the distinction between combatants and noncombatants, and the protection of noncombatants against injuries not incidental to military operations against combatants.[5]

In the preceding year, 1922, the General Board of the U.S. Navy had laid strong emphasis upon the same principle in concluding that the use of gases in warfare was illegal.[6] The chairman of this General Board was Admiral W.L. Rodgers, previously a President of the Naval War College. Yet it is indicative of the growing skepticism in the possibility of maintaining this distinction between combatants and noncombatants during hostilities that sixteen years later, on the eve of the Second World War, Admiral Rodgers asserted that "if belligerents in the future think that success will be brought about by attack upon the hostile people in general, instead of on military forces only, the plea for immunity of noncombatants in the name of humanity will be secondary.... Our cry for humanity merely betrays an instinctive revulsion from the accompaniments of war which amounts to little after hostilities have begun and passions have been aroused."[7]

Admiral Rodgers went on to prophesy the use of gas, and although future events proved him wrong in this respect, his basic contention proved very nearly accurate. At sea, the total character of warfare led to the relative ineffectiveness of the principle distinguishing between combatants and noncombatants. As a result many of the traditional rules, which presupposed and were based upon this distinction, were rendered inoperative. In varying degree, belligerent merchant shipping was placed under control of the state. The arming of belligerent merchant vessels, sailing under convoy, and the incorporation of merchant vessels into the intelligence system of the belligerent, were common practices. Under these circumstances it became increasingly difficult to distinguish between combatants and noncombatants in warfare at sea. Given this difficulty, the rule forbidding the attack and destruction of enemy merchant vessels was made equally difficult to observe.

In addition, the stringent control exercised by belligerents over imports, coupled with the achievements of modern science which have rendered the most unlikely articles of possible use in war, led to the abandonment of the traditional law of contraband. Belligerents came to treat as conditional contraband almost all goods formerly regarded as free; i.e., as immune from seizure by a belligerent. More important, the distinction between absolute and conditional contraband, although formally adhered to by most of the belligerents, came to have little, if any, real significance. The possibility of distinguishing between absolute and conditional contraband is closely related to the possibility of distinguishing between combatants and noncombatants. Goods constituting absolute contraband are always liable to capture by a belligerent if destined to territory belonging to or occupied by an enemy. The nature of absolute contraband makes it highly probable that a belligerent will appropriate such goods as long as they are anywhere within his jurisdiction. In the case of conditional contraband, capture

has been considered justified only if the goods were shown to be destined for the use of an enemy government or its armed forces. The ambiguous character of conditional contraband, which is equally susceptible for peaceful or warlike purposes, is resolved when it is established that such goods are intended for military use by an enemy. But the controls exercised by belligerents over imports during both World Wars did not allow, in practice, a clear distinction to be made between goods destined to an enemy government, or its armed forces, and goods destined to the civilian population. The test of enemy distinction, formerly applied only to a restricted number of articles constituting absolute contraband, came to be applied to all goods susceptible of use in war. In effect, this development led to the belligerent claim to have the right to seize all goods ultimately destined for an enemy state.

In the final analysis, though, it is aerial warfare that most seriously threatens the distinction between combatants and noncombatants, so far as this distinction relates to the actual conduct of hostilities. It would serve little purpose to review the many attempts to establish some practical and effective limitations upon aerial bombardment. As matters now stand, the generally admitted test for determining the legality of aerial bombardment is the criterion of the "legitimate military objective." The only difficulty with this test is that there is no general agreement today upon what may constitute a legitimate military objective. The only statement that may be safely made on this point is that, given the character of modern warfare, the concept of a legitimate military objective has constantly expanded.

Perhaps some semblance of the principle of distinguishing between combatants and noncombatants may be preserved in relation to aerial bombardment by applying to this method of warfare certain restrictions which have been held to apply to hostilities wherever conducted. These restrictions are that noncombatants must never be made the object of *direct attack*, if such attack is unrelated to a military objective, and that attack for the sole purpose of terrorizing the civilian population is forbidden. These restrictions assume, of course, that the noncombatant population *as such* cannot constitute a legitimate military objective. They further assume that not even the practices of total war have rendered legitimate the terrorization and disorganization of the civilian population. It must be admitted that these assumptions are being seriously questioned today, although many who do question them are unwilling to see that if they are finally—and openly—abandoned we will have given up even the pretense that war can be subject to some regulation.

On the other hand, realism requires that the practical significance of these restrictions, as they apply to aerial bombardment, not be overestimated. Whereas in land warfare it is frequently possible to determine when the civilian population is made the object of a direct attack, unrelated to military objectives, in aerial warfare the difficulties involved in reaching a similar determination are very great. 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 destroy these objectives without indirectly causing injury to the lives and destruction of the property of noncombatants. Even under the traditional law the immunity of noncombatants from the effects of hostilities was never considered to be absolute. In land warfare, the measures permitted against a besieged locality, or the bombardment permitted in a zone of military operations, afforded little protection to the civilian population situated within these areas. Nevertheless, these areas were

considered as legitimate military objectives, simply because of the presence of noncombatants. The same reasoning, when applied to the circumstances of aerial warfare, and given a sufficiently elastic definition of legitimate military objective, transforms an exceptional situation into a normal condition. The result is that in practice it has proven next to impossible to determine in aerial warfare when noncombatants have been made the objects of direct attack unrelated to a military objective.

In the absence, therefore, of any rules of customary or conventional law which specifically regulate the limits of aerial bombardment, and given the difficulties in applying to this method of warfare the principle which distinguishes between combatants and noncombatants, we are forced to fall back upon the general principles of military necessity and humanity. The principle of military necessity may be defined as permitting a belligerent to apply only that kind and degree of force necessary for the purpose(s) of war, and which is not otherwise expressly prohibited by the customary or conventional law of war. The principle of humanity forbids the employment of any kind or degree of force not actually necessary for the purpose(s) of war; that is, force which needlessly or unnecessarily causes or aggravates human suffering or physical destruction. As applied to aerial bombardment, these principles forbid the wanton destruction of cities, towns, or villages, or any devastation not justified by military necessity.

The opinion is frequently expressed that these principles of necessity and humanity contradict one another, that they serve opposing purposes, and that it is the task of a military commander in a concrete situation to endeavor to balance considerations of necessity against the demands of humanity. However, this opinion would seem misplaced. The principle of humanity, in forbidding the employment of force unnecessary or superfluous to the purposes of war, implies the principle of necessity. The principle of necessity, in permitting only that kind or degree of force necessary for the purposes of war, clearly implies the principle of humanity.

In addition, the principle of military necessity should not be interpreted as being superior to, and thereby restricting the operation of, other rules of warfare, either conventional or customary. On the contrary, it is the principle of military necessity that may be, and occasionally is, restricted by certain rules established by custom and convention. Not everything necessary to the purpose of war is allowed by the law of war. It has been the opinion of military tribunals, having occasion to pass upon this question, that where the prohibition contained by a positive rule of the law of war is absolute, military necessity cannot be used as a plea. Thus, military necessity has not been considered as justifying the killing of prisoners of war. The latter prohibition is regarded as absolute, and tribunals have held that it cannot be deviated from even for reasons of self-preservation. Military necessity may serve to justify deviation from a given prohibition only where the rule in question itself provides, in the event of necessity, for such deviation. In these latter instances, tribunals have held that it is not essential to establish that the conditions required for invoking the plea of military necessity—i.e., self-preservation or the success of a military operation—were objectively present in a given situation. It has been considered sufficient to establish only that the individual putting forth the plea of military necessity honestly believed these conditions to be present at the time of action.[8]

The principles of military necessity and humanity are not to be considered only in their relation to existing rules of warfare. It is equally important to

consider them in their application to weapons and methods not already expressly regulated by law. Indeed, the primary purpose of these principles has generally been considered to be their usefulness in providing general criteria for determining the legality or illegality of novel weapons and methods for conducting warfare. It is largely from this latter point of view that we must judge the usefulness of the principles of necessity and humanity. What is their application to aerial bombardment, to nuclear weapons, to bacteriological warfare, et cetera?

The obvious difficulty involved in the attempt to apply the principles of humanity and necessity to novel methods and weapons for conducting war is that these principles depend for their effective operation upon standards that are neither self-evident nor immutable. The legality of any new weapon or method must be judged in terms of its necessity; and the necessity must be determined by the purpose—or purposes—of war. Even assuming that the purposes of war remain constant, it has never been easy in practice to determine whether a specific weapon or method does cause unnecessary destruction or human suffering. The provision of the Hague Regulations (No. IV, 1907), that forbids belligerents to employ "arms, projectiles, or material calculated to cause unnecessary suffering," has been largely without any real effect, and for the simple reason that it does not specify the weapons calculated to cause unnecessary suffering—hence, forbidden. It is sometimes said that in order to determine the application of the principle of humanity to specific weapons we must look to the practice of states, and that it is from this practice that we may determine whether a particular weapon has the effect of causing unnecessary suffering or destruction. Undoubtedly it is true that the practice of states may determine the illegality of a specific weapon, particularly if we identify practice with custom. But then the source of the prohibition is the customary practice of states, and it is merely superfluous to cite the principle of humanity.

In short, rules which depend upon vague criteria can have only a limited utility; and this is especially true when such rules must be applied in a legal system in which the principal subjects of the law (states) themselves apply this law. The criterion of "necessity," hence the principle of humanity, has always suffered from the fact that its application to novel weapons and methods depended upon the possibility that states would agree upon its meaning in specific instances. Such agreement has always been relatively limited. This is especially so in a period marked by rapid and important developments in the methods and weapons of war.

These difficulties are increased by the fact that the purpose of war has not remained constant. A war fought for the limited purpose of obtaining a more defensible frontier is something quite different from a war whose purpose is the total defeat and unconditional surrender of the enemy. But if the purposes of war are varied, then the measures necessary to achieve these purposes are equally varied. The truth is, it would seem, that as long as men considered the purposes of war limited in character, the application of the principles of humanity and necessity was at least a possibility, however restricted. In a war that is total, both in its conduct and in its aims, the application of these principles to novel weapons and methods has either a radically changed meaning or—perhaps—no meaning at all.

In view of the preceding remarks, a brief comment may be made at this point concerning the legal position of nuclear weapons. Although there are no specific rules of conventional international law regulating the use of nuclear weapons, it has been suggested that the use of these weapons must nevertheless

be considered as subject to certain restrictions that already regulate war's conduct. These restrictions are: Article 23a of the 1907 Hague Regulations forbidding the use of poison or poisoned weapons; the provisions of the 1925 Protocol of Geneva forbidding the use of poisonous or other gases and of "analogous liquids, materials or devices"; Article 23c of the 1907 Hague Regulations prohibiting the use of weapons calculated to cause unnecessary suffering; and, finally, the rule distinguishing between combatants and noncombatants and forbidding direct attacks upon noncombatants, such attacks being unrelated to military objectives.

Undoubtedly the last two principles constitute the more general, and more significant, grounds for questioning the legality of using nuclear weapons in war; and there is a substantial number of authorities who do so question the legality of nuclear weapons on these grounds. I find it difficult to share their opinion. The objection that the use of nuclear weapons must cause unnecessary suffering (and destruction) is gravely handicapped in view of the very vagueness of the criteria to be applied. As already pointed out, the question of whether or not a particular weapon is to be considered as causing unnecessary suffering, hence inhumane, is one that can be answered only by examining the practice of states. In the case of poisonous gases, for example, it would appear that the practice of states does point to the existence of a rule of universal validity forbidding the use of poisonous gases as an inhumane weapon. (Even here, however, the United States recently has expressed strong doubt as to the existence of any universal rule forbidding the use of poisonous gases). In the case of nuclear weapons the matter is otherwise. The present attitude of most of the major powers is clearly not that of considering the suffering caused by nuclear weapons as unnecessary, when judged by the military purposes these weapons are designed to serve.

It is equally difficult to accept the objection that nuclear weapons are necessarily illegal for the reason that their use must lead to the complete obliteration of the rule distinguishing between combatants and noncombatants. In the first place, this objection is not necessarily relevant to a consideration of the legality *per se* of nuclear weapons. To the extent that nuclear weapons are used exclusively against military forces in the field or naval forces at sea, they escape this objection. It is only when such weapons are used against military objectives in the proximity of the noncombatant population that this argument warrants serious consideration. There should be little doubt that, as judged by the traditional meaning given to the principle distinguishing combatants from noncombatants, the use of nuclear weapons against cities containing military objectives must be deemed illegal. However, the same judgment would have to be made in considering the practices of aerial bombardment followed by belligerents during World War II, though very few writers have condemned these recent practices as illegal and no records of war crimes trials are known in which allegations were made of illegal conduct in aerial warfare. Nuclear weapons have hastened a development that has been readily apparent for some time, and, if used against cities of an enemy, will provide the final blow to the once fundamental distinction made between combatants and noncombatants. Yet it is not easy to refute Professor Lauterpacht's opinion that "the total elimination or limitation, as a matter of law, of the use of the atomic weapon cannot be accomplished by way of a restatement of an existing rule of law. Such a restatement denying the legality of the use of the atomic weapon must, of necessity, be based on con-

troversial deductions from supposedly fundamental principles established in conditions vastly different from those obtaining in modern—total and scientific—warfare.[9]

In considering the present status of the law regulating the actual conduct of hostilities between belligerents, we have had occasion to touch upon certain problems that involve neutral-belligerent relations as well. However, neutral-belligerent relations have been considered largely from the viewpoint of inter-belligerent relations. This presupposes the predominance of belligerent interests over neutral interests. So far as naval warfare is concerned the method followed in this lecture is a reversal of the customary procedure, which considered inter-belligerent relations from the standpoint of neutral-belligerent relations. In fact, the rules regulating inter-belligerent relations during warfare at sea traditionally have been considered as a kind of by-product of neutral-belligerent relations. The customary procedure assumed that neutral interests were to be considered, at the very least, as equal to belligerent interests. This assumption of students accurately reflected the assumption underlying the traditional law. H.A. Smith has observed that "the assumption underlying the traditional law (of naval warfare) is that the greater part of the world is at peace, that war is a temporary and local disturbance of the general order, and that the chief function of law is to keep war from spreading, and to minimize its impact upon the normal life of the world." He continues by stating "All the states which are directly engaged (in nineteenth century wars) were most anxious to secure the sympathy of neutrals, and the danger of provoking neutral intervention on the enemy side provided a very real sanction for the observance of the laws of war at sea.[10]

After what has already been said in earlier comments it need hardly be pointed out that these traditional assumptions did not correspond to the conditions under which the two World Wars were fought. The equality of neutral interests and belligerent interests depends, in the first instance, upon an equality of power; where neutrals do not possess this equality of power their interests, and hence their legal rights, will suffer accordingly. This has always been true, even in the nineteenth century. It is especially true when war is conducted for unlimited aims and when the emotional fervor evoked by total war leads belligerents to equate neutrality with immorality.

During the nineteenth century a rough balance between the conflicting claims and interests of neutrals and belligerents was largely achieved. If anything, the traditional law as it stood at the outbreak of World War I inclined in favor of neutral interests. It soon became clear that if there is always a latent conflict between belligerent and neutral interests, even in a war fought for limited aims, the conflict between these interests in total warfare becomes almost irreconcilable. On the one hand, a primary aim of maritime warfare in both World Wars was the complete shutting off of enemy trade, the destruction or capture of all imports to and exports from enemy territory, without regard to whether this trade was carried in enemy or neutral bottoms. On the other hand, the effect of the traditional law was to insure that the maritime measures a belligerent could bring to bear against an enemy's economy would play only a limited role in the final decision of the war.[11]

Given these circumstances, the outcome was hardly unexpected. On the German side, the measures resorted to are well known. Lacking adequate surface naval power even to attempt to exercise the controls over neutral shipping allowed to belligerents by the traditional law, Germany resorted to indiscriminate minelaying and unrestricted submarine and aerial warfare. Immense tracts of the high seas were

declared "operational" or "barred" zones, and in these areas neutral shipping was forbidden to enter upon pain of destruction.

The measures taken by Great Britain were varied and complex, and far less destructive in terms of neutral lives and shipping. The contraband list was expanded to include almost all articles. New meanings of enemy destination were adopted, which had the effect of wiping out the traditional distinction between absolute and conditional contraband. The traditional rule of prize law that obligated the captor to prove the enemy ownership or destination of captured cargoes was abandoned. Instead, neutrals had to establish the genuinely neutral ownership or destination of vessels and cargoes in order to avoid their condemnation. Since the belligerent right of interception at sea proved insufficient to shut off the enemy's trade, Great Britain resorted to novel methods of contraband control. The two major techniques of contraband control were *navicerting* and *rationing*. The important feature of the navicert system is that it permitted cargo examinations to be conducted in neutral ports, instead of at sea or in the ports of the belligerent. In fact, one of the principal purposes of the new techniques of contraband control devised by Great Britain was to control contraband at its source. In the end, however, the measures resorted to against the enemy's trade were based upon the right of reprisal. The most far-reaching of these reprisal orders, the British "blockade" announcement of 30 July 1940, decreed that any vessel sailing for a European port was required to obtain navicerts for all items of cargo and, in addition, a ship navicert at the last loading. Any consignment not navicerted and any shipment without a ship navicert was liable to seizure. The same rules applied to outgoing trade. All vessels sailing from European ports had to have certificates of non-enemy origin for all items of their cargoes. Any vessel whose cargo was not fully certificated was liable to seizure. Although these measures of reprisal have been termed "blockades," they neither resembled in their operation, nor did they conform in certain respects to the rules governing, the traditional blockade.

It has been suggested that as far as neutral-belligerent relations are concerned a distinction should be made between great wars and small wars. In great wars neutral rights, particularly at sea, will probably suffer the same fate that they did in the two World Wars. In small wars we may expect some degree of adherence to the traditional law.

It is rather difficult to judge the merit of this distinction between great and small wars. Many will contend that the possibility of limited wars is so small, that any speculation as to how these wars may be fought represents wasted effort. There are further considerations which serve to suggest the limited operation of the traditional law of neutrality, even if it is assumed that future conflicts may be limited in their scope and in their number of participants (and the experience of Korea does suggest this possibility). The traditional rules of neutrality were based not only upon the nonparticipation of many states in any given conflict but also upon the principle of strict impartiality of the nonparticipating states toward the belligerents. In addition, the traditional law assumes throughout that a clear distinction can and will be made between the neutral state and the private neutral citizen—the neutral trader. Hence, the performance of acts of partiality on the part of the neutral citizen —carrying contraband, breaking blockade, performing "unneutral services"— does not affect the impartiality of the neutral state.

These assumptions of the traditional law of neutrality must be seriously questioned today. The control belligerents now exercise over their merchant

shipping differs only in degree from the control neutrals exercise over their merchant shipping. In practice, the distinction between neutral state and neutral trader has become increasingly difficult to make. More important, perhaps, is the obvious incompatibility between the principle of strict impartiality and the obligations states incur within a system of collective security. The Charter of the United Nations obliges the member states to assist the organization in the event of a threat to or breach of the peace. Such assistance may not necessarily involve actual participation in hostilities but it does obligate member states to abandon the position of strict impartiality toward the belligerents. The conclusion of regional and collective self-defense arrangements operates to place similar restrictions upon the contracting parties, and to limit further the future application of the traditional law of neutrality. Finally, mention must be made of the recent tendency of states to distinguish between a neutral status which implies strict impartiality and a status of qualified neutrality. The essential feature of a status of qualified neutrality is that it does not preclude a certain measure of discrimination in favor of one belligerent or group of belligerents, short of actual participation in hostilities. But what the rules which govern this status of qualified or discriminating neutrality are, if there are any rules, is impossible to determine at present. Still, it would be premature to conclude that neutrality, in its traditional form, is a thing of the past. We must consider the possibility that in a future conflict there will be states that will seek to ensure their nonparticipation in hostilities. Despite the difficulties involved in applying today the traditional rules of neutrality, characterized by the rule of strict impartiality, these rules still provide the only *established* legal regime for states to follow who desire to abstain from becoming involved in war. For these reasons, we must continue to study the traditional rules of neutrality in warfare at sea.

At the beginning of this lecture, reference was made to the widespread skepticism with which the law of war is regarded today. Enough has been said to indicate that there is a sound basis for this disbelief that future wars can be subject to effective restraints in the conduct of hostilities. Unless the trend of the last forty years is reversed, we must consider the prospect of hostilities conducted with even less restraint than was the case in World War II. However, despite the practices of belligerents in recent wars, and the very perilous situation to which these practices have led, there is strong opposition to any suggestion of a revision of the law of war—particularly a revision of the rules governing the actual conduct of hostilities.

Perhaps the most influential of these arguments centers in the contention that the phenomenon of total war is merely a consequence of scientific and technological developments, against which it is useless to devise rules intended to control the purposes these developments should serve and the use to which they may be put. However, total war is not a technological or scientific necessity, but primarily a social and political phenomenon. It is not even altogether correct to say that it is technological developments which now make total war a possibility, since this possibility has always existed. Total war is no innovation of the twentieth century. It is rather a revival of a very ancient method of waging war. Hence, the recurrence of total war in our time is not due primarily to these developments, though advances in science and technology no doubt contribute a great deal to the ease by which total war may be waged. Fundamentally, it is the willingness of men to use these innovations for unlimited destruction that has once again given rise to total war.

There is considerably more truth in the related argument that restraints

upon the conduct of war can only be effective to the degree that they reflect the common interests of the belligerents. In part, of course, this latter argument is a rather laborious attempt to state the obvious. Nevertheless, it does have the merit of recognizing that the conduct of war depends upon interests, upon human desires, and is not merely a reflection of some necessity imposed upon men by the instruments of war. Its objectionable feature consists in considering these common interests of belligerents somehow foreordained and immutable. More often than not, it serves to justify any given situation. The truth would seem, however, that the interests, even the common interests of belligerents are far from fixed, that they are in fact subject to considerable variation.

Opposition to any further consideration of the law of war is frequently offered for the reason that it is illogical to endeavor to eliminate war and, at the same time, to attempt to regulate the conduct of war if it does occur. Yet there is nothing illogical or contradictory about this. It is not true that in view of the Charter of the United Nations "war" as such has been abolished, and therefore the law of war has suffered the same fate. The Charter of the United Nations, even assuming its effective operation, certainly does not rule out the possibility of international armed conflict. Whether or not we call this conflict war is of little importance in this connection, since it does not substantially affect the question of the applicability of rules whose purpose is to regulate the conduct of hostilities. Nor has the general legal transformation in the status of war affected the applicability of the law of war between belligerents, despite recent suggestions to the contrary. The growing conviction that the resort to armed force must be considered as unlawful, except when undertaken as a measure of defense, has led many to conclude that a law equally applicable to the aggressor as well as to the victim is somehow incongruous and even immoral. This view assumes that the law of war is a product of the period in which war—i.e., the resort to war—was looked upon with indifference, and that the law of war was also a product of the same indifference toward war. It must be emphasized that the rules of warfare did not have their origin and justification simply in a cynically indifferent attitude toward the legal and moral character of war itself. The final justification for a law of war has always been, and must remain, the conviction that whatever the interpretation given to war itself there *should be* rules for the regulation, and mitigation, of war's conduct.

In this task of improving the methods by which wars are to be conducted, the military commander must play a leading role. Some 60 years ago a great scholar observed, in considering the possible improvement of the laws of war, that "the best hope for the further mitigation of war lies in a high standard of character being maintained among soldiers. In peace considerations of law and justice may be acted on by nations, and the action taken on such grounds will in its turn help to mould the character. In war the stress is such that no considerations can be relied on for determining action but those which are already incorporated in the character. The determination of action in war lies practically with two classes, commanders by land and sea and statesmen: the people, once excited enough for war to have broken out, will approve of any measures which their commanders and statesmen recommend for carrying it on, and of these two classes the commanders are much more the important for our present purpose, because their opinion of what necessity requires will influence the statesmen. . . ."[12]

The foregoing observation is as true today as when first written. The

military commander cannot avoid the fact that during a period of war he must bear a special responsibility for the decisions made concerning the methods by which war will be waged. If we are to hope for a reversal of the trends of two World Wars, if we are to return to the sound concept of subordinating the methods of warfare to the requirements of a more stable and durable peace, one of the first steps must be a clear realization by military commanders that they must play a decisive role in this process.

NOTES

1. The term "traditional rules" refers, in the main, to the customary and conventional law as it stood at the outbreak of World War I. The customary law of war, particularly the customary law of naval warfare, is largely the result of nineteenth and early twentieth century practice. The conventional law refers, on the whole, to the rules established by the Hague Conventions of 1899 and 1907.

2. U.S. Naval War College, *International Law Documents*, v946-47, (1948), p. 229.

3. H.A. Smith, *Toward Custom of the Sea* (2d. ed., 1950), p. 164.

4. For example, Julius Stone writes: "The immediate task is to regulate the future of naval warfare in which submarines and aircraft will join in the attack on enemy commerce; for it is regrettably clear that no rule purporting to exclude them from this role, however well-grounded in humanity, will be brooked." *Legal Controls of International Conflict* (1954), p. 607.

5. The statement was made by John Bassett Moore. See: John Bassett Moore, *International Law and Some Current Illusions* (1924), p. 200.

6. The report of the General Board was submitted to the Washington Conference on the Limitations on Armaments, by the American delegation. See: U.S. Naval War College, *International Law Situation,1935* (1936), pp. 99-100.

7. W.L. Rodgers, "Future International Laws of War," *American Journal of International Law*, Vol. 33 (1939), p. 442.

8. See: The Hostages Trial *(Trial of Wilhelm List and Others). Law Reports of Trial of War Criminals*, Vol. 8 (1948), pp. 66-69; The German High Command Trial *(Trial of Wilhelm von Leeb and Thirteen Others), Law Reports....* Vol. 12 (1949), pp. 85, 93-94, 123-127; *Trial of Gunther Thiele and Georg Steinert, Law Reports....* Vol. 3 (1948), pp. 56-59; and *Trial of Helmuth von Ruchtschell, Law Reports....* Vol. 9 (1949), p. 89.

9. H. Lauterpacht, *The Revision of the Law of War*, p. 371.

10. H.A. Smith, *Law and Custom of the Sea* (2d ed., 1950), p. 75.

11. "... assuming that neutral power is sufficient to enforce observance of the rules, the probability is that economic pressure at sea will only play a relatively minor part in the decision of the war." Smith, *Law and Custom of the Sea*, p. 139. By "the rules," Smith refers to the traditional rules.

12. John Westlake, *Collected Papers* (1914), pp. 277-278.