

Comments on Howard S. Levie's Paper: Submarine Warfare: With Emphasis on the 1936 London Protocol

By
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The 1936 London Protocol in Today's Perspective

Professor Levie's study¹ offers an impressive historical review of a development that finally has led to the present state of complex arguments, controversial opinions and uncertain results. I agree with his statement that for the conduct of submarine operations such important issues as the arming of merchantmen and their sailing under military convoy, the use of false colors, the establishment of "war zones," the sinking of merchantmen without warning, and failure to assure the safety of passengers and crews are relevant.² While it is certainly true that only the latter two issues were expressly addressed in the 1936 London Protocol, a present-day interpretation of this instrument must be based on a wider spectrum of aspects relevant in this context.

Let me try to formulate a European opinion on the question as to what extent the 1936 London Protocol is still valid today. This includes the question of which existing rules should be reaffirmed or further developed in international cooperation. I do not attempt to give definite answers since the topic has rightly been described as one of the least developed areas of the law of armed conflict.³ I consider it a pioneer achievement that this subject has been taken up in the NWP 9 – the first time in a modern military manual – and I believe that the comments and, indeed, also dissenting opinions should be discussed in detail to strengthen international cooperation.

I. Actions Against Enemy Merchantmen

A systematic evaluation of existing rules for "action with regard to merchant ships", to use the language of the 1936 London Protocol, has to start with a definition. What do we mean by "merchant ships"? What are the conditions under which such ships would lose their status as civilian objects protected under international law? Merchant ships may only be attacked if they comply with the definition of a military objective, i.e. if by their nature, location, purpose or use such ships make an effective contribution to military action and their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁴

The key problem posed by this definition is how to define an “effective contribution to military action” and how such a contribution can be concluded from the nature, location, purpose or use of the particular object. It has correctly been argued that “no basis will be found until the whole matter is conscientiously viewed in the context of the full emergence of the economic arm of warfare, with the annihilation of enemy maritime commerce as a major naval objective.”⁵ But legal criteria to be developed for this purpose can hardly be different in land, sea, and air warfare: The standards are uniform, even if their implementation poses specific problems in the different theatres.

A list of activities liable to render enemy merchant vessels military objectives was recently discussed in detail at the Bochum Round Table of Experts, convened by the International Institute of Humanitarian Law (San Remo) under its 1988 Madrid plan of action.⁶ The results go far beyond a simple reference to ships that are armed or are sailing under enemy military convoy. Also, certain qualifications were formulated that could deserve consideration by all who implement or interpret existing national bright line rules. The Bochum Round Table has defined eight categories in which enemy merchant vessels are to be considered as military objectives:

- (1) engaging in acts of war on behalf of the enemy, e.g. laying mines, minesweeping, cutting undersea cables and pipelines, visiting neutral merchant ships for the purpose of search, or attacking other merchant ships;
- (2) acting as auxiliaries to the enemy’s armed forces; e.g. troop carrying or replenishing warships;
- (3) being incorporated into, or assisting the enemy’s intelligence system;
- (4) sailing under convoy of enemy warships or military aircraft;
- (5) refusing an order to stop or actively resisting visit, search or capture;
- (6) being armed to an extent that they could inflict considerable damage on a warship (this excludes small arms for the defense of personnel, e.g. against pirates, and purely deflective systems);
- (7) being engaged in the enemy’s war-fighting effort, e.g. carrying military materials; or
- (8) being engaged in any other activity bringing them within the definition of a military objective.

In some aspects these categories are more specific than the NWP 9. The latter is phrased in general terms as far as military objectives are concerned.⁷ It uses a very similar list of categories to define the circumstances under which enemy merchant vessels may be attacked and destroyed by surface warships. The authors suggest that these categories were modifications of the 1936 London Protocol “in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice

of belligerents that evolved during and following World War II.⁸ Is such complex argumentation necessary? The London Protocol did not establish rules for surface warships but reaffirmed the applicability of existing rules to submarine warfare. Such rules did not and do not include a special protection for military objectives. Merchant ships which fall under one of the eight categories described earlier are military objectives and cannot, therefore, be expected to be safe against attacks. Indeed, the London Protocol could not extend to “warshiplike merchantment”.⁹ The prohibition of the effective use of submarines against such ships was not part of the London Protocol.¹⁰ Attacks must, however, be confined to military objectives and they must comply with the principles of proportionality and necessity.

As far as submarine warfare is concerned, NWP 9 states that the London Protocol, coupled with the customary practice of belligerents, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship’s papers before destroying an enemy merchant vessel, unless:

- (1) the enemy merchant vessel refuses to stop when summoned to do so or otherwise resists capture;
- (2) the enemy merchant vessel is sailing under armed convoy or is itself armed;
- (3) the enemy merchant vessel is assisting in any way the enemy’s military intelligence system or is acting in any capacity as a naval auxiliary to the enemy’s armed forces;
- (4) the enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.¹¹

But should attacks on certain merchant ships be made dependent upon a decision that the enemy has integrated its merchant shipping in general under its war-fighting or war-sustaining effort? Should such attacks on the other hand be considered lawful in all situations where they may be deemed necessary for mission accomplishment? A thorough assessment shows that the definition of military objectives in the specific situation offers the best possible criterion for drawing the line between legal and illegal attacks at sea. Mission accomplishment in my opinion is too vague a notion to allow for clear legal qualifications.

The implementation of the described categories of military objectives is still difficult enough in practice. Identification of arms may pose problems, even if we no longer insist on the impossible investigation of whether a certain armament has been used, or is intended for use, offensively against an enemy.¹² Merchant ships involved in armed conflicts since 1945 have wisely avoided armament. Effective contribution to military action is a legal term of art which

requires policy decisions to be taken in practice. Such decisions are dependent upon the threat imposed and the military advantage anticipated. Armed forces which adhere to the principle of damage limitation will be rather restrictive in this respect. In all circumstances the rule of proportionality requires responsible commanders to abstain from attack when seizure or capture are possible by other means.

II. Actions Against Merchant Vessels of Non-Belligerents

A slightly different approach for action with regard to vessels of non-belligerents should be considered in this context. It was discussed at the Bochum Round Table that such vessels may not be attacked unless:

- (1) after prior warning, they intentionally and clearly refuse to stop after being summoned to do so;
- (2) after prior warning, they intentionally and clearly resist visit, search or capture;
- (3) they engage in acts of war on behalf of the enemy;
- (4) they act as auxiliaries to the enemy's armed forces;
- (5) they are incorporated into, or assist, the enemy's intelligence system;
- (6) they sail under convoy of enemy warships or military aircraft; or
- (7) they make an effective contribution to military action (e.g. carrying military materials) and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless the circumstances do not permit they are to be given a warning, so that they can reroute or take other precautions.

Quite obviously, the decision to attack a merchant vessel flying the flag of a non-belligerent state could not be based on the simple fact of it being armed. Action against such ships is based on the principle of law enforcement, enforcement of control, rather than self-defense. This requires additional considerations in balancing the rule of proportionality. It is for this reason that prior warning is felt essential in case a non-belligerent merchant vessel which refuses to stop or resists visit, search or capture should be made the object of attack.

III. Special Situation in War Zones

Particular considerations are required for merchantmen sailing in a zone of restriction. The establishment of danger zones is widely accepted as being within reasonable limits of the freedom of the high seas. The proclamation of exclusion zones, however, which implies a sink-on-sight policy, remains controversial. The purpose of such exclusion zones should be directed to assist in identifying

hostile targets and putting up a defense against hostile acts rather than to campaign against the enemy's war economy. All restrictions have to be limited with severe requirements accordingly, so that the size, location and duration of a maritime exclusion zone reflect the principles of proportionality and necessity.¹³

But I have difficulties in sharing Professor Levie's assumption that the application of the 1936 London Protocol would largely, though not entirely, be nullified if the establishment of maritime exclusion zones were determined a legal method of naval warfare. If exclusion zones were established in accordance with the principles I have described, the zone regime may be implemented by submarines as well as surface warships.

IV. False Flags

Legal experts are relatively silent on the use of deceptions by merchant ships. But feigning civilian or neutral status may not only serve the purpose of fulfilling a specific military mission but also that of simply escaping attack. Merchant ships have, indeed, often used false flags for better protection. While this is prohibited under the terms of various national laws, international law is not clear in this respect.¹⁴ There is not only the question of whether or not such feigning is prohibited, but also, and even more important, the question exists of possible consequences for the relations between merchant vessels and warships at sea. The transfer of enemy vessels to a neutral flag is void under the conditions set up in Articles 55 and 56 of the 1909 London Declaration. Enemy merchant ships resorting to such practice are in any event subject to lawful capture by belligerent warships.¹⁵

Using false flags may no longer be a desirable practice in naval warfare. At least the feigning of signals and flags for long distance identification, however, requires a distinct solution.

V. Prior Warning

The question of prior warning is one element of the rule of proportionality in the exercise of self-defense. Article 57 (2c) of Protocol I Additional to the Geneva Conventions reaffirms an existing rule which is applicable also in naval warfare.¹⁶ It provides that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit." Flexibility in the implementation of this rule remains essential: the offensive use of weapons can create a danger for enemy submarines. In that case the latter are entitled to launch appropriate preemptive strikes, including sinking without warning.¹⁷

VI. Safety for Passengers and Crew

The 1936 London Protocol reaffirmed that merchant ships, "except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search," may not be sunk or rendered incapable of navigation without the safety of the passengers, crew and ship's papers having first been ensured. This clearly describes a situation where there is time for consideration and appropriate action to arrange for safety. The merchant ship must not persistently refuse to stop and must not actively resist a visit or search if such protection is to be claimed. Submarines engaged in such situations are by definition well in a position to arrange for the safety of passengers and crew since there is no immediate threat from the latter that excludes such action.

On the other hand the London Protocol does not address the question of rescuing personnel after the sinking of a ship.¹⁸ The search for and rescue of survivors after each naval engagement is a legal requirement which stems from the prohibition of unnecessary suffering. Article 18 of the Second Geneva Convention of 1949 provides that after each engagement parties to the conflict shall, "without delay take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled." As Pictet put it in his commentary,¹⁹ the obligation to act without delay is strict; but only measures within the possibilities of the parties are to be taken, for one cannot lay down an absolute rule that the commander of a warship must engage in rescue operations if, by so doing he would expose his vessel to attack. In this regard Protocol I Additional to the Geneva Conventions has added important clarifications to existing conventional law: shipwrecked persons shall continue to be considered shipwrecked during their rescue, "provided that they continue to refrain from any act of hostility."²⁰ Protection and care are to be rendered "to the fullest extent practicable."²¹

Conclusion

Is it true to say that the 1936 London Protocol is of legal relevance only in a situation where the submarine can act with minimal risk on the surface, a situation which is hardly ever likely to occur?²² A careful evaluation of history and text of this instrument certainly supports the conclusion that it has only reaffirmed rules for situations where minimal risk for submarines was involved. The rules so interpreted have not been derogated by subsequent state practice and are still worth maintaining. A continuous reaffirmation of these rules is of political and practical importance.²³

While I support Professor Levie's general statement that the 1936 London Protocol continues to be valid, I believe one should not draw too quick a

conclusion by arguing that compliance with its rules can be expected in limited conflicts only. If this argument held true there would still remain the problem of how to define the difference between general and limited armed conflicts, for though even recent wars may have been limited in terms of participation, theatre, and weapons employed, they have not necessarily been limited from the point of view of the belligerents.²⁴ The remaining task in my opinion is, therefore, not only to maintain and properly implement the 1936 London Protocol in all types of armed conflict, but also to supplement its provisions with rules that would guarantee both sufficient self-defense against attacks and cooperative action by the belligerents for the humanitarian protection of civilians and civilian objects.

Notes

*Director, International Legal Affairs, Federal Ministry of Defense, Bonn. The views expressed in this paper are those of the author and do not necessarily reflect either the policy or the opinion of the German Government.

1. Howard S. Levie, *Submarine Warfare: With Emphasis on the 1936 London Protocol*.
2. *Id.* at 12.
3. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations (NWP 9)* (1987), at para. 8.3.1. [hereinafter *Commander's Handbook*].
4. This definition of military objectives may be considered customary law. It is applicable also in armed conflicts at sea though reaffirmation of this rule by Art. 52 (2) of Protocol I Additional to the Geneva Conventions is confined "to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land" as well as to "attacks from the sea or from the air against objectives on land." *Cf.* Art. 49 (3).
5. Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law 606* (1954).
6. See Wolff Heintschel von Heinegg (Ed.), *The Military Objective and the Principle of distinction in the Law of Naval Warfare, Report, Commentaries and Proceedings of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Ruhr-Universität Bochum November 10-14, 1989, Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht, Band 7, 1991*.
7. U.S. Department of the Navy, Office of the Judge Advocate General, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 9)(Rev. A)* (1989), at para. 8.1.1 [hereinafter *Annotated Supplement*].
8. *Id.* at para. 8.2.2.2.
9. Frits Kalshoven, *Belligerent Reprisals* 128 (1971).
10. William T. Mallison, Jr., *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars* 119 (1968) [hereinafter *Mallison*].
11. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations (NWP 9)* (Rev. A), FMFM 1-10 (1989), at para. 8.3.1.
12. Art. 503 (b) (3) (4) of the 1955 Law of Naval Warfare; Robert W. Tucker, 50 *International Law Studies* (1957), which established this requirement, has been very convincingly criticized already by Mallison, *supra* note 10, at 120-22.
13. W. J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 *Can. Y.B. Int'l L.* 91-126 (1986).
14. Dieter Fleck, *Ruses of War and Prohibition of Perfidy*, *Revue de Droit Pinal Militaire et de Droit de la Guerre*, 269, 292-95 (1974).
15. *Commander's Handbook*, *supra* note 3, at para. 7.9.
16. Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, at 367-68 (1982).
17. Karl Zemanek, *Submarine Warfare*, 4 *Encyclopedia of Public International Law* 233-35 (R. Bernhardt ed., 1982).

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18. Louise Doswald-Beck, *The International Law of Naval Armed Conflicts: The Need for Reform*, 7 *It. Y. B. Int'l L.* 251, 257 (1986-1987).
19. 2 The Geneva Conventions of 12 August 1949, Commentary 130-31 (J. Pictet ed., 1960).
20. Article 8 lit. b.
21. Article 10 para. 2.
22. Daniel P. O'Connell, *The Influence of Law on Sea Power* 78 (1975).
23. Edwin I. Nwogugu, *Commentary on the 1922 Washington Treaty, the 1930 London Treaty (Part IV), and the 1936 London Protocol*, *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 353, 364 (N. Ronzitti ed., 1988).
24. Louise Doswald-Beck, *supra* note 18, at 271.