

104 Targeting Enemy Merchant Shipping

**Comments on Sally V. and W. Thomas Mallison's Paper:
The Naval Practices of Belligerents in World War II:
Legal Criteria and Developments**

by
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**The London Protocol and the Judgment at Nuremberg:
A Commentary on Mallison**

It is with some trepidation that I venture to comment on Sally and Tom Mallison's "The Naval Practices of Belligerents in World War II: Legal Criteria and Developments."¹ I have known Sally and Tom since the early 1970's when I was a very junior naval officer on study leave here at the Naval War College from my teaching post at the Naval Postgraduate School in Monterey. I have the greatest respect for their fine book, *Studies in the Law of Naval Warfare: Submarines in General and Limited War*, which is one of the volumes in the distinguished "Blue Book" series published by the Naval War College.² That book and today's paper by the Mallisons raise some of the same fundamental questions, questions at the very heart of the relationship between international law and military activities.

In the essay on "Neutrality" that I wrote for Admiral Robertson for his Commentary on *The Commander's Handbook on the Law of Naval Operations*³, I discuss my belief that international law is not a single system of legal rules and legal procedure, but really constitutes many such systems: some "harder" and some "softer."⁴ In that essay I argue that it is a mistake to think about the laws of neutrality as a form of hard law, rather "the rules respecting neutrality . . . will be rules tailor-made to fit particular conflicts and will neither be norms of general specificity nor will they be enforced by a coercive apparatus comparable to that available for "harder" forms of international law."⁵ In general, it is, I think, unrealistic to assume that all international law is of the same certainty or of the same legally binding effect.

It was John Austin, the English legal positivist, who wrote in 1832:

[T]hat the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . . [T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.⁶

As early as 1836, Henry Wheaton, the American author of the first English language textbook on international law, was already having to cope with Austin's critique of international law as being merely a form of morality.⁷ Although some are satisfied as to the law-like quality of international law, others are doubtful. The English legal philosopher, H.L.A. Hart, for example, in a modern reformulation of legal positivism, argues that international law is more like primitive law than like municipal law because international law lacks "the formal structure of . . . a legislature, courts with compulsory jurisdiction and officially organized sanctions."⁸

However, neither Austin's nor Hart's nor most other general jurisprudential characterizations of international law pay particular attention to the diversity of international law. That is, most discussions of the problems of the certainty and efficacy of international law assume that there is *a* system, uncertain and ineffective though it may be, of international law and suppose that there is something like a single general integrated, if not hierarchical, international legal process. Reality is otherwise.

Different sorts of international law vary along what might be called a "structural spectrum," there being "a great variety of international legal systems, some more structured than others."⁹ In some of its forms, for example, the system regulating nuclear weapons, international law may be so unstructured in terms of both rule-specificity and rule-enforcement as to be, at best, a kind of Hart's so-called "primitive law."¹⁰ In some other of its manifestations, for example, the systems of European Economic Law Community and of European Human Rights Law, international law may be so well-structured in terms of rule-specificity and rule-enforcement as to be virtually as "hard" as any ordinary domestic law.¹¹

Given the diversity of international legal systems, we should assume that there will be differences in the certainty of their rules and the efficacy of their enforcement processes. In analyzing the relationships between law and society, Max Weber, at the turn of the century, defined "law" as "an order system endowed with certain specific guaranties of the probability of its empirical validity."¹² Weber's necessary "guarantees" for law are more sophisticated than Austin's necessary "sovereigns" for law. Weber wrote of a "coercive apparatus, i.e., that there are one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement." The coercive apparatus "may use psychological as well as physical means of coercion and may operate directly or indirectly against the participants in the system."¹³ Weber's conceptual framework is, I submit, a more useful and realistic way to understand the nature and diversity of international law than the theories provided by Austin and Hart.

In general, I feel that the law relating to naval attacks on merchant shipping in World War II was, at best, a sort of very "soft" international law. As a focus

for my comments on the Mallisons' paper, let me mostly discuss their treatment of the Nuremberg Tribunal. Let me begin by noting an oversight in their original paper, i.e., the assertion that "there was only one case before the Tribunal directly involving law of naval warfare, i.e., the individual case of Admiral Doenitz."¹⁴ In reality, the Tribunal judged not only Karl Doenitz for violations of the laws of naval warfare,¹⁵ but also, on like charges, Admiral Eric Raeder, the commander of the German Navy between 1928 and 1943.¹⁶ The charges and the findings of the Court were not dissimilar between the two.¹⁷

The trial of the two German admirals raised in a specific context two jurisprudential questions that had and still have broad public appeal. The first is how definite were and are the rules of international law relating to submarine attacks on merchant shipping? The second is how should such rules have been and be enforced? At the time of their trial, Doenitz and Raeder received considerable support in Western public opinion for their position that the crimes of which they were accused were neither properly defined nor were they properly prosecuted. Airey Neave, the brilliant English lawyer who followed a distinguished war service with service on the British legal team at Nuremberg and who, so many years later, was tragically assassinated while trying to sort out the troubles in Northern Ireland, wrote in his insightful account of Nuremberg how he believed that it was the sympathy of Western public opinion that saved Doenitz and Raeder from the gallows to which the German generals, Keitel and Jodl, were condemned.¹⁸ Even as late as 1976, two Americans edited a book filled with more than one hundred testimonials, mostly by Western military officers, protesting the Nuremberg trial of Doenitz.¹⁹ Neave himself, knowing both the men and their war records in great detail, surmised that "[a]llied naval officers, accustomed to the traditions of their service, may not have known the true Karl Doenitz. . . . They did not see him as a political admiral but that is what he was."²⁰

The Mallisons are critical of the Nuremberg judgment, too, especially with the way in which the Court defined the term "merchant vessels" in the applicable international convention, the 1936 London Protocol.²¹ In the context of their critique of the interpretation of the London Protocol, the Mallisons are especially critical of Robert W. Tucker's analysis of the Protocol in another of the fine Blue Books, *The Law of War and Neutrality at Sea*.²² The Mallisons feel that Tucker was wrong when he wrote that belligerents in the Pacific War did not "observe the obligations laid down by the 1936 London Protocol."²³ The Mallisons argue that Tucker committed a "plain meaning" fallacy and that Tucker should have understood that the text of the Protocol was "normatively ambiguous."²⁴ Although I am sympathetic with what I would perceive to be the Mallison's "bottom line," I must say that I think they are wrong and Tucker right about whether or not the Protocol was violated.

As I see it, the Mallisons' "bottom line" is the worthy goal of preserving some validity for an international law norm even when the efficacy of that norm has been called into serious question by considerable contrary state practice. As an international lawyer, I applaud their mission. Furthermore, I understand its relevance given the relationship between the 1936 Protocol and the 1939-1945 War. I think that the Mallisons err, however, in attempting to save the norm about submariners' duty to merchant vessels by their restrictive definition of "merchant ships."²⁵ The principal proof in their argument is a paragraph from the Report of the Committee of Jurists of April 3, 1930, a paragraph that I think is circular and unhelpful if it means what the Mallisons use it to say.²⁶ If "participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel" leaves out merchant ships participating in the armed struggle and if in practice virtually every possible merchant ship is a participant in the armed struggle, then the Protocol is saved from the challenge of inefficacy only by being robbed of its substance.

Theirs is an argument and a result propounded as long ago as March 5, 1946, by the able counsel for Admiral Doenitz, the German naval lawyer, Otto Kranzbuehler. In the proceedings before the Nuremberg Court, Kranzbuehler submitted, and submitted successfully, that he should be permitted to put interrogatories to Admiral Nimitz about U.S. submarine operations in the Pacific:

I in no way wish to prove or even to maintain that the American Admiralty in its U-boat warfare against Japan broke international law. On the contrary, I am of the opinion that it acted strictly in accordance with international law. . . .

My point is that, because of the order to merchant vessels to offer resistance, the London Agreement is no longer applicable to such merchant men; further, that it was not applicable in declared operational zones in which a general warning had been given to all vessels, thus making an individual warning unnecessary before the attack.²⁷

While I understand the nature of the Mallisons' argument about limiting the definitional reach of the term "merchant shipping," I cannot myself see why the argument is necessary or even particularly useful. What is wrong with saying, as Tucker did, that the London Protocol of 1936 established rules and that the belligerents in World War II violated those rules? From my perspective this is the statement that is honestly reflective of the realities of the "soft" international law then regulating activities like submarine attacks on merchant shipping. And what is wrong with deciding, as the Nuremberg judges did, that Doenitz and Raeder were guilty of violating the 1936 London Protocol, but then choosing not to punish them for it.²⁸

The judgment distinguished between attacks on British merchant vessels and those on neutrals.²⁹ The judges rejected the notion about operational zones saying that "the Protocol made no exception" for them.³⁰ Though this is a holding that the Mallisons call "unreasonable and unworkable,"³¹ it seems to me to be consistent with the Protocol. Frankly, I see none of the ambiguity that the Mallisons see. To me it is simply a case of "soft" international law, an aspirational law that has trouble being effectively applied.

I, too, am much more sympathetic than the Mallisons with the sentence of the Court. The Mallisons seem to imply that they feel that, despite its protestations, the Court did take Doenitz' submarine activities into account when it sentenced him to ten years of prison.³² Looking at the sentences for others, including Raeder, the Doenitz sentence does not seem to me to be extreme. I think it likely that the submarine program did not finally weigh against Doenitz.

Furthermore, the reasons why the Court did not punish Doenitz for his violations of the 1936 London Protocol make sense, especially in light of the strategy adopted by Doenitz's lawyer. Kranzbuehler, after all, had argued that U.S. Pacific submarine operations were so similar to German Atlantic operations that neither the U.S. nor Germany were violating international law. The answer preferred by the Court was that the London Protocol was violated but that the violation was not reason enough to punish the Admiral.

Notes

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1. Sally V. Mallison & William T. Mallison, *The Naval Practices of Belligerents in World War II: Legal Criteria and Developments* [hereinafter *The Paper*].

2. William T. Mallison, *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars*, 58 U.S. Naval War College International Law Studies 1966 (1968).

3. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (NWP 9) 1987.

4. Mark W. Janis, *Neutrality, The Law of Naval Operations*, at 148 (Horace B. Robertson, Jr. ed., 1991).

5. *Id.* at 153.

6. J. Austin, *The Province of Jurisprudence Determined* 208 (1st ed. 1832).

7. Henry Wheaton, *Elements of International Law with a Sketch of History of the Science* 47 (1st ed. 1836).

8. H.L.A. Hart, *The Concept of Law* 209, 226 (1961).

9. Janis, *Do Laws Regulate Nuclear Weapons?*, *Nuclear Weapons and International Law* 53, 60 (1987).

10. *Id.* at 53-54, 59-61.

11. Mark W. Janis, *An Introduction to International Law* 229-230 (1988); Janis, *International Courts and the Efficacy of International Law*, 2 Conn. J. Int'l. L. 261 (1987).

12. Max Weber, *Law in Economy and Society* 13 (Max Rheinstein & Edward Shils trans., 1954).

13. *Id.* at 13.

14. *The Paper*, *supra* note 1, at 92.

15. *The Nuremberg Trial*, 6 F.R.D. 69, 167-70 (1946) [hereinafter *The Judgment*].

16. *Id.* at 170-72.

17. *Id.* at 171-72.

18. Airey Neave, *On Trial at Nuremberg* 200-213 (1978) [hereinafter cited as Neave].

19. Harold K. Thompson, Jr., & Henry Strutz, *Doenitz at Nuremberg: A Reappraisal: War Crimes and the Military Professional* (1976).

20. Neave, *supra* note 18, at 200.
21. The Paper, *supra* note 1, at 96-98.
22. Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 International Law Studies 1955, at 66 (1957).
23. The Paper, *supra* note 1, at 99.
24. *Id.* at 99-100.
25. *Id.* at 99-102.
26. *Id.* at 100.
27. Trial of the Major War Criminals Before the International Military Tribunal, 8 Proceedings 549 (14 November 1945 - 1 October 1946)(1947).
28. *The Judgment*, *supra* note 15, at 169, 171-72.
29. *Id.* at 168-169.
30. *Id.* at 169.
31. The Paper, *supra* note 1, at 92.
32. *Id.* at 93.