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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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Some Reflections on History and Law

One of the primary purposes of the law of armed conflict is to minimize net human suffering. The law must be both relevant and usable. A body of law which sets irrelevant or impossible standards may allow lawyers and diplomats to indulge in mutual self congratulation but it will be of little use to those very practical men, the commanders of naval forces engaged in combat. It is not essential that international law, to be valid, should always be compatible with state practice. If, however, the law of naval warfare is to have an impact on the conduct of warfare, there should be a crude congruence between law and practice so that it is marginal, extreme conduct which is condemned, not activities which are routine operations of war.

In this area of law, history compels agreement with the remarks of Julius Stone:

> It is idle to seek to reduce this matter to a *cri de coeur* of humanity. War law, even at its most merciful, is no expression of sheer humanity, save as adjusted to the exigencies of military success, a truth as bitter (but no less true) about attacks on merchant ships, as about target area saturation bombing. And it is also quite idle for Powers whose naval supremacy in surface craft enable them to pursue the aim of annihilating the enemy's seaborne commerce without "sink at sight" warfare, to expect that States which cannot aspire to such supremacy will refrain from seeking to annihilate that commerce by such naval means available to them as submarines, aircraft and mines. To refuse to face this will save neither life nor ship in any future war; and it will also forestall the growth of real rules for the mitigation of suffering under modern conditions.[1]

Up until the Second World War, it appears to have been in fashion for international lawyers to write books reviewing state practice and compliance with international law in particular conflicts. For example, an American professor, Amos Hershey, published *The International Law and Diplomacy of the Russo Japanese War* in 1906, and James Wilford Garner, another American professor, published his two volume study, *International Law and the World War* in 1920. Such books appear to have gone out of fashion since the Second World War. J. M. Spaight, a British civil servant, published the third edition of his *Air Power*

and War Rights in 1947 and this book provides a usable, albeit not comprehensive, survey of state practice in air warfare. The apparent demise of the genre is unfortunate as the authors of these books at least identified the legal issues although their legal reasoning was often somewhat partisan.

One, but hopefully not the only, indicator of the relevance of law to state practice in naval warfare during the Second World War is the body of work published by naval historians. The practice of law requires lawyers to develop reasonably thick skins. This is fortunate because the references of naval historians to the law of naval warfare and to the 1936 London Protocol in particular are less than flattering. Theodore Roscoe, for example, in his semi-official 1949 book, *United States Submarine Operations in World War II*, indicates that all United States Navy submarines were supplied with a small volume entitled "Instructions for the Navy of the United States Governing Maritime and Aerial Warfare" which required compliance with the London Protocol. After Pearl Harbor, however, submarines were ordered to wage unrestricted warfare as a reprisal. Roscoe goes on to say:

> In any event, realistic thinking demanded recognition of the fact that a nation's economic forces and its fighting forces bear the inseparable relationship of Siamese twins. Any reduction of a nation's economic resources weakens its war potential. Sever the commercial arteries of a maritime nation and its industrial heart must fail, while the war effort expires with it. Therefore, it was not reprisal so much as military imperative that caused Washington to reverse its opinion on the already abrogated naval laws.
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> Webster defines a merchant vessel as "a ship employed in commerce." There were to be no merchant ships in the Pacific for the duration of the war - cargo carriers were merchantmen by genesis only. The U.S. Navy was to consider all Japanese shipping as engaged in prosecution of the war effort - either carrying men, munitions, and equipment to areas under attack or occupation, or freighting home the plundered raw materials from conquered territory.
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> Armed or not, these merchantmen were in effect combatant ships. "Transports," "freighters," "tankers" were hollow titles for auxiliaries of war, and it was the realistic duty of the submarine forces to reduce these ships to hulls as hollow as their titles. The polite little law book went overboard. Converted by a directive into commerce raiders, American submarines in the Pacific went to war to sink everything that floated under a Japanese flag.[2]

Roscoe's somewhat cavalier approach to the law of armed conflict is more common among naval historians than most lawyers would like to think. Historians do, however, on occasion raise issues which international lawyers must advert to if they wish to assess the law in something other than a legal vacuum. Professor Talbott's thoughtful study, *Weapons Development, War Planning and Policy: the US Navy and the Submarine, 1917-41*, argues that the United

States Navy had in fact made the decision to wage unrestricted submarine warfare in the Pacific if war occurred some time before the attack on Pearl Harbor. In his view, technology drove policy. The actual decision of the United States to wage unrestricted submarine warfare after Pearl Harbor was less significant than:

> the decision to build a long-range submarine, the resolution of the technical problems that such a project raised, and the decision to pursue a strategy of economic warfare. The history of submarine development also affirms that when the responsible authorities find in their hands a weapon that promises to make the waging of war more efficient, they will use it.[3]

Perhaps the impressionistic observations of the late D. P. O'Connell concerning the role of law in naval warfare, albeit somewhat modest, are as accurate as any:

> The only prediction that can be made with assurance is that the lower the level of conflict, the more localized the situation and the more restricted the objectives, the more predominant will be the element of law in the governing of naval conduct; and that the law will assume a diminished role – as it did in the Second World War – when the conflict becomes global, when the neutrals have been mostly drawn into it or their sympathies engaged, and when an element of desperation has entered into operational planning.[4]

It would appear that no nation had a monopoly on atrocities during the Second World War although, depending on national perspectives, some atrocities might be referred to as regrettable incidents. In addition to the somewhat questionable "*Laconia* incident"[5] and the Battle of the Bismark Sea killings referred to by Professor Mallison, there is some indication that the crew of the US submarine Wahoo massacred thousands of survivors of a Japanese troop transport in early 1943 and the Wahoo's commanding officer, who reported the incident, was decorated for it.[6] Although the German and Japanese appear to have provided all of the accused in naval war crimes trials, there is also some indication that on a few occasions the British deliberately attacked the shipwrecked, particularly during unsuccessful efforts to defend against the German invasion of Crete.[7] These occasional tragic incidents notwithstanding, there has been no suggestion that attacks on the shipwrecked should be legally permissible.

There is also little doubt that those belligerents with the capability and requirement to do so engaged in substantially similar anti-commerce campaigns with both submarines and aircraft. As the Mallison paper has indicated, the belligerents applied essentially similar operational definitions of the term "merchant ship" as used in the London Protocol. The legitimacy of that operational definition was appraised, perhaps inadequately, by the International Military Tribunal at Nuremberg. It is suggested that, in some respects, the analysis of the

London Protocol and of the legitimacy of state practice by Admiral Doenitz's lawyer, Flottenrichter Otto Kranzbuhler, is superior to the analysis in the IMT judgment itself.

Concerning belligerent vessels, Kranzbuhler focused on the ambiguity of the concept "merchant ship" and the uncertainty connected with the words "active resistance" in the London Protocol. Bearing in mind that ships sailing in enemy convoy are usually deemed to be engaged in "active resistance," he argued that all armed merchantmen should also be deemed to be engaged in active resistance as arming served the same purpose as a naval escort and as it was not possible to distinguish between defensive and offensive weapons.

> And this very same common sense demands also that the armed merchantman be held just as guilty of forcible resistance as the convoyed ship. Let us take an extreme instance in order to make the matter quite clear. An unarmed merchant ship of 20,000 tons and a speed of 20 knots, which is convoyed by a trawler with, let us say, 2 guns and a speed of 15 knots, may be sunk without warning, because it has placed itself under the protection of the trawler and thereby made itself guilty of active resistance. If, however, this same merchant ship does not have the protection of the trawler and instead the 2 guns, or even 4 or 6 of them, are placed on its decks, thus enabling it to use its full speed, should it in this case not be deemed just as guilty of offering active resistance as before? Such a deduction really seems to me against all common sense. In the opinion of the Prosecution the submarine would first have to give the merchant ship, which is far superior to it in fighting power, the order to stop and then wait until the merchant ship fires its first broadside at the submarine. Only then would it have the right to use its own weapons. Since, however a single artillery hit is nearly always fatal to a submarine but as a rule does very little harm to a merchant ship, the result would be the almost certain destruction of the submarine.[8]

He goes on to argue:

> However, another factor of greater general importance, and also of greater danger to the submarines, was the order to report every enemy ship in sight, giving its type and location. This report was destined, so said the order, to facilitate taking advantage of an opportunity which might never recur, to destroy the enemy by naval or air forces. This is an unequivocal utilization of all merchant vessels for military intelligence service with intent directly to injure the enemy. If one considers the fact that according to the hospital ship agreement even the immunity of hospital ships ceases if they relay military information of this type, then one need have no doubts about the consequences of such behavior on the part of a commercial vessel. Any craft putting out to sea with the order and intention of using every opportunity that occurs to send military reports about the enemy to its own naval and air forces is taking part in hostilities during the entire course of its voyage and, according to the aforementioned report of 1930 of the committee of jurists, has no right to be considered a merchant vessel. Any different conception would not do justice to the immediate danger which a wireless report involves

> for the vessel reported and which subjects it often within a few minutes, to attack by enemy aircraft.[9]

Concerning enemy merchant vessels, he concludes:

> All of the Admiralty's directives, taken together, show that British merchant vessels, from the very first day of the war, closely cooperated with the British navy in combating the enemy's naval forces. They were part of the military communications network of the British naval and air forces and their armament of guns and depth charges, the practical training in manipulation of the weapons, and the orders relative to their use, were actions taken by the British Navy.
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> We consider it out of the question that a merchant fleet in this manner destined and utilized for combat should count among the vessels entitled to the protection of the London Protocol against sinking without warning. On the basis of this conception and in connection with the arming of all enemy merchant vessels, which was rapidly being completed, an order was issued on 17 October, 1939 to attack all enemy merchant ships without warning.[10]

The IMT did, of course, accept Kranzbuhler's argument concerning belligerent merchant vessels and, although it held Doenitz not guilty for his conduct of submarine warfare against "British armed merchant ships," considered in context, the judgment actually exonerated Doenitz from responsibility for attacks on all belligerent merchant vessels because of the general belligerent practice of incorporating all such vessels into the war effort.

Kranzbuhler's arguments were less successful where neutral vessels were concerned. His first argument was that all vessels, including neutral vessels, which sailed blacked-out in the "war area," an undefined term, were subject to attack.

Examining the question of blacked-out vessels from the legal standpoint, Vanselow, the well-known expert on the law governing naval warfare, makes the following remark:

> In war a blacked-out vessel must in case of doubt be considered as an enemy warship. A neutral as well as an enemy merchant vessel navigating without light voluntarily renounces during the hours of darkness all claim to immunity from attack without being stopped.
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> I furthermore refer to Churchill's declaration, made in the House of Commons, on 8 May 1940, concerning the action of British submarines in the Jutland area. Since the beginning of April they had orders to attack all German vessels without warning during the daytime, and all vessels, and thus all neutrals, as well, at night. This amounts to recognition of the legal standpoint as presented. It even goes beyond the German order, insofar as neutral merchant vessels navigating with all lights on were sunk without warning in these waters. In view of the clear legal aspect it would hardly have been necessary to give an express warning to neutral

shipping against suspicious or hostile conduct. Nevertheless, the Naval Operations Staff saw to it that this was done.[11]

The second danger to neutral shipping was what Kranzbuhler referred to as "zones of operations" and what have since been referred to as "exclusion zones." He argued that the fact that such zones were not referred to in the London Protocol did not mean they were not permissible. Such zones constituted a normal part of state practice and it was open to the tribunal to find that they were legally permissible subject to certain criteria of reasonableness. Technology compelled changes in the 19th century law.

It is a well-known fact that operational areas were originally proclaimed in the first World War. The first declaration of this kind came from the British Government on 2 November 1914, and designated the entire area of the North Sea as a military area. This declaration was intended as a reprisal against alleged German violations of international law. Since this justification naturally was not recognized, the Imperial Government replied on 4 February 1915 by designating the waters around England as a military area. On both sides certain extensions were made subsequently. I do not wish to go into the individual formulations of these declarations and into the judicial legal deductions which were made from their wording for or against the admissibility of these declarations. Whether these areas are designated as military area, barred zone, operational area, or danger zone, the point always remained that the naval forces in the area determined had permission to destroy any ship encountered there. After the World War the general conviction of naval officers and experts on international law alike was that the operational area would be maintained as a means of naval warfare. A development, typical for the rules of naval warfare, was confirmed here, namely, that the modern technique of war forcibly leads to the use of war methods which at first are introduced in the guise of reprisals, but which gradually come to be employed without such a justification and recognized as legitimate.

The technical reasons for such a development are obvious: [t]he improvement of mines made it possible to render large sea areas dangerous. But if it was admissible to destroy by mines every ship sailing, despite warning, in a designated sea area, one could see no reason why other means of naval warfare should not be used in this area in the same way. Besides, the traditional institution of the blockade directly off enemy ports and coasts by mines, submarines, and aircraft was made practically impossible, so that the sea powers had to look for new ways to bar the approach to enemy coasts. Consequently it was these necessities which were the compelling factors in bringing about the recognition of the operational area.

It is true that there was by no means a uniform interpretation concerning the particular prerequisites under which the declaration of such areas would be considered admissible, just as there was none with regard to the designation which the belligerent power must choose. The conferences of 1922 and 1930 did not change anything either in that respect, as can be seen, for instance, from the efforts made after 1930, especially by American politicians and experts in international law, for a solution of this question.

> Unfortunately, there is no time at my disposal to discuss these questions in detail and therefore it must suffice for the purposes of the defense to state that during the conferences in Washington in 1922 and in London in 1930 the operational area was an arrangement or system known to all powers concerned, which operated in a way determined by both sides in the first World War: that is, that all ships encountered in it would be subject to immediate destruction. If the operational area were to have been abolished in the aforementioned conferences, especially in the treaty of 1930, an accord should have been reached on this question, if not in the text of the agreement than at least in the negotiations. The minutes show nothing of the kind. The relationship between operational area and the London Agreement remained unsettled.[12]

As is well known, the IMT did not accept Kranzbuhler's arguments concerning operational or exclusion zones and found Doenitz's orders to sink neutral ships without warning in these zones a violation of the Protocol. It then went on to announce that no sentence would be assessed on the ground of his breaches of the Protocol because of similar practices by the Allied Powers,[13] the only known successful use of the *tu quoque* plea in a war crimes trial. The IMT's condemnation of exclusion zones notwithstanding, such zones have been used in a number of recent conflicts.[14]

Assessing the impact of the IMT judgment on the scope and applicability of the London Protocol is not a simple task. Professor O'Connell has attempted to "cut the Gordian knot" by arguing:

> The truth is that the requirements of the London Protocol are to be observed only in the situation where the submarine can act with minimal risk on the surface. Since that situation is now an ideal hardly ever in practice to be realized, one is compelled to draw from the Doenitz trial the conclusion that submarine operations in time of war are today governed by no legal text, and that no more than lipservice is being paid in naval documents to the London Protocol.[15]

There is some basis for arguing that the London Protocol was drafted in favor of surface naval powers, particularly Great Britain, as a fall back position after efforts to outlaw the employment of submarines in a commerce destruction role had failed and as an attempt to neutralize the effectiveness of the submarine in such a role. The Protocol, if it is given a literal interpretation, is virtually unworkable in a general war between naval powers where one side has a substantial preponderance in surface naval strength because it does not confer substantially equal benefits to both sides. The practical effectiveness of the law of war in a particular conflict is conditional upon, among other factors, a crude reciprocity and rough equivalence of benefits.

The key to a workable interpretation of the London Protocol lies in determining the proper meaning of the undefined term "merchant vessel" in that document. In a general war, the true merchant vessel is rarely to be found because the belligerent states normally assume such a degree of control over their

own vessels and neutral vessels engaged in trading with them as to convert them into *de facto* naval auxiliaries. As *de facto* naval auxiliaries they should be subject to the same treatment as *de jure* naval auxiliaries, that is, they may be sunk on sight outside of neutral waters. Even in a general war, however, there may be genuine neutral traffic which is entitled to proceed unmolested. For example, in World War II, before the USSR declared war on Japan in 1945, there was a significant neutral merchant traffic to and from the Pacific coast of the USSR which passed through the US declared Pacific War Zone and was not molested by U.S. Navy submarines. In a war more limited than that of World War II, for example Korea or the Falklands, many merchant vessels, even those of the contending parties, will be engaged in normal trade quite unconnected with the war effort. Such merchant vessels are clearly not *de facto* naval auxiliaries. As such they are entitled to all of the benefits of the London Protocol. In other words, this writer finds the analysis of the London Protocol in the Mallison paper quite persuasive.

Considered in conjunction, the London Protocol, the state practice of the Second World War, and the Nuremberg response indicate that cargo carrying vessels may, under the law of naval warfare, constitute legitimate military objectives in some circumstances when they are not sailing under convoy or actively resisting visit and search. An interpretation of the London Protocol which suggested that all cargo carrying vessels are merchant vessels and therefore exempt from attack would appear to be unduly simplistic. The problem is, however, where do we go from there? Do we assume that World War II was *sui generis*? Do we assume that cargo carrying vessels do not constitute legitimate military objectives unless they are operated under a system which meets all of the Nuremberg indicia? The system approach is one we in Canada have been thinking about for our Canadian Forces Law of Armed Conflict Manual. Our current draft indicates that enemy merchant vessels may be attacked and destroyed if they are incorporated into the belligerent war effort. A decision concerning whether or not enemy merchant vessels may be generally deemed to be incorporated into the belligerent war effort will be made at the governmental level. Indicators that all enemy merchant shipping is incorporated into the belligerent war effort include:

a) state control over merchant shipping to ensure that only items essential to the war effort are imported or exported;

b) general use of convoys;

c) general integration of merchant vessels into intelligence networks by, for example, requiring reports of sighting of all enemy vessels or aircraft;

d) standing instructions to resist submarines by ramming; and

e) arming of merchant vessels.

This approach is probably broad enough to encompass the main categories of enemy merchant ships attacked during the unrestricted submarine warfare campaigns of the two World Wars. It should be noted that the approach in our Draft Manual may be too restrictive, however, as it does not include neutral merchant ships incorporated in the belligerent war effort as military objectives. One might suggest that the unconvoyed neutral tankers which transported the oil essential to the Iranian war economy and were attacked by Iraq constituted legitimate military objectives. Is there a valid legal reason for distinguishing between neutral and enemy merchant ships on the basis of flag alone when they are functionally indistinguishable?

As every naval lawyer knows, it is extremely difficult to provide accurate, simple bright line legal rules concerning the targeting of merchant shipping. Although the task is difficult, we still have a professional obligation to provide as accurate an assessment of the law as we are capable of, and to make that assessment as clear as possible for our clients. We must also ensure that we do not merely indulge in a creative labeling approach whereby "our side has merchant vessels which are exempt from attack while theirs has naval auxiliaries which we can sink on sight." The task of developing a usable word picture to describe when the merchant ship becomes a legitimate military objective has merely been begun. We in Canada have tended to use the expression "incorporation into the belligerent war effort." The Mallison paper uses expressions such as "performing belligerent functions" or "participation in the armed conflict." NWP 9 uses expressions such as "acting in any capacity as a naval or military auxiliary" and "integrated into the war-fighting/war sustaining effort." The Bochum Conference on the Military Objective in the Law of Naval Warfare used the expression "making an effective contribution to military effort." All of these expressions are useful starting points. It is essential, however, that we now begin to fill in the details of our word picture.

Notes

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1. Julius Stone, Legal Controls of International Conflict 606-7 (1954).
2. Theodore Roscoe, United States Submarine Operations in World War II 19 (1949).
3. J. E. Talbott, *Weapons Development, War Planning and Policy: The US Navy and the Submarine* May-June 1984, 37 N.W.C.R. 53, 68.
4. Daniel P. O'Connell, The Influence of Law on Sea Power 3 (Manchester, 1975).
5. M. Maurer & L. J. Paszek, *Origin of the Laconia Order*, R.U.S.I. Journal 338-44 (November 1964).
6. 1 Clay Blair, Silent Victory 352-60 (1975).
7. S. O'Dwyer-Russell, *Was Royal Navy VC Submariner A War Criminal*, The Sunday Telegraph, Feb. 5, 1989, at 1; A. De Zayas, The Wehrmacht War Crimes Bureau 1939-45, at 245-68 (1989).

8. 18 Trial of the Major War Criminals Before the International Military Tribunal Nuremberg, 14 November 1945 - 1 October 1946, at 319 (1948) [hereinafter IMT].
9. *Id.* at 323.
10. *Id.* at 323.
11. *Id.* at 327.
12. *Id.* at 329-30
13. *Id.* at 557-60
14. W. J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 Can. Y. B. Int'l. L. 91-126 (1986).
15. Daniel P. O'Connell, *International Law and Contemporary Naval Operations*, 1970 44 Brit. Y. B. Int'l. L. 52.