

**Comments on H. B. Robertson's Paper:
U.S. Policy on Targeting Enemy Merchant Shipping:
Bridging the Gap Between Conventional Law
and State Practice**

By
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Enemy Merchant Vessels as Legitimate Military Objectives

Introduction

Professor Horace Robertson's paper on "U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap between Conventional Law and State Practice" provides a most helpful analysis of the problems U.S. policy makers have to face in dealing with this particular aspect of warfare at sea. In discussing the most recent product of their efforts in this area, viz., the *Commander's Handbook*, (NWP-9, 1987) he has not spared the drafters his criticism, thus providing a fertile basis for today's debate. In order to save time and paper, I may just state at the outset that I entirely agree with his critical remarks.

The publication, in 1987, of the U.S. *Commander's Handbook* was a welcome event. It was evidence that a major naval power was prepared to take a fresh look at the many aspects of the display and use of naval power, in situations both of peace and war. The U.S. is not the only one to show such a renewed interest: a similar tendency may be noted in several other countries. In particular where naval warfare is concerned, this development was long overdue: as Prof. Robertson rightly notes, the last effort at international law-making dates back to 1936, and both the 1974-1977 Diplomatic Conference and the UN Conference on the Law of the Sea had wisely avoided (or miserably failed according to one's preferences) to take up the subject, with the many delicate problems inherent in it.

To some extent, the first-mentioned Conference may nonetheless have provided the source of inspiration for the recent efforts. With the adoption of the Additional Protocols, the gap between the thoroughly updated law of land warfare (including sea-land and air-land warfare) and the venerable, if not superannuated, law of war at sea had become so glaringly obvious that it could not be ignored any longer. At all events, the very text of the *Commander's Handbook* betrays the efforts the drafters made to remain close to the language of Protocol I, the non-ratification by the United States notwithstanding.

For another reason too, the 1974-1977 Conference and its results may be relevant to the present discussions. I for one am firmly convinced that the law

of warfare at sea, no matter how distinct from other areas of the law of war, does not exist in isolation. It is not just the text of a recent instrument like Protocol I that should be taken into account in any attempt at rewriting the law of naval warfare, but the motives behind the text as well.

The recent Round Table on "The Military Objective and the Principle of Distinction in the Law of Naval Warfare," (November 1989) at Bochum, Federal Republic of Germany, had the benefit of an introductory report by Commander William Fenrick (Canada) covering the whole spectrum of targeting in naval warfare. The comments I presented on that occasion focused mainly on the criteria determining whether an (enemy or neutral) merchant ship may be regarded as a legitimate military objective and attacked as such. The text below stems in part from these sources.

Law and practice

My first comment concerns the question of law in relation to practice. Prof. Robertson regards the interdiction of merchant shipping as an activity that "fits neatly with the general principles of war." The first such "generally accepted" principle requires, in his definition, that "every military undertaking must have a clearly defined objective and all activity must contribute to that goal." Applying this and other principles of war, "interdicting the enemy merchant supply effort can easily be seen to contribute to the general prosecution of a war effort." At the same time, and in contrast with this military logic, he states that "traditional law regards merchant ships as civilian objects and merchant seamen as civilians and thus not legitimate targets of direct attack" (p. 338). Further down, he concludes that the *Commander's Handbook* "seems to accept the continued viability of the [1936] Protocol but assumes that, just as in World War II, the practices of states in future conflicts will be such as to make it inapplicable in most circumstances" (p. 353).

Leaving for the moment on one side whether "traditional law" really regards merchant ships and their crews in the manner he describes (in terms strongly reminiscent of Protocol I), the point is that the rapporteur appears to accept a situation where state practice deviates so completely from the law that the latter is "inapplicable in most circumstances", or in other words, has for all practical purposes become a dead letter. In this respect, it may be of interest to quote Commander Fenrick, who notes in his report (p. 37) that,

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.

Repeating my earlier comment, this may sound plausible enough from a military point of view, and the second sentence may even be read to apply to customary international law in general, as, for obvious reasons, customary law tends to keep fairly close to practice. On the other hand, it may just be an instance of begging the question: over time, “routine operations of war” and the military thinking on which they rest may have come to deviate so completely from what can be tolerated even in war as an unavoidable encroachment on human values that a correction is urgently required.

These remarks were originally made in a discussion about the status of neutral merchant shipping. They may be even more relevant in the present context of the targeting of enemy merchant shipping: as between opposing parties to the conflict, the possibility of non-protest in the face of conduct that cannot “be tolerated even in war as an unavoidable encroachment of human values” and, with that, of an ostensible acceptance of practice setting aside law, is all that much greater.

Rather than accepting the gap between law and practice as unbridgeable, I would therefore favour a re-examination of the situation, with a view to determining whether perhaps not only the law but practice as well stands in need of some adjustment.

Principle of Distinction

In Prof. Robertson’s quoted statement, “traditional law regards merchant ships as civilian objects and merchant seamen as civilians and thus not legitimate targets of direct attack,” I wonder whether this may not be an overstatement of the law as it stands, especially where enemy merchant ships are concerned.

With Commander Fenrick in his report to the Bochum meeting, I find my point of departure in “[t]he principle of distinction [as] a fundamental aspect of the law of naval warfare.” Even though it is not “explicitly addressed in any treaty text applicable to naval warfare,” it is as implicit in the law of naval warfare as it is in all other parts of the law of war, as the basis for the protection of the civilian population and civilian objects. Resolution XXVIII of the XXth International Conference of the Red Cross (Vienna, 1965) reaffirmed it in no uncertain terms as one of the four “general principles of the Law of War” to be observed by “all Governments and other authorities responsible for action in armed conflicts.” The UN General Assembly subsequently lent it the weight of its authority when it unanimously adopted Resolution 2444 (XXIII) of 19 December 1968.

No state has since denied the validity of the principle, nor is it suggested anywhere that as a principle of law it would apply only to certain theatres of war, to the exclusion of other ones. As reaffirmed in 1977, and paraphrasing Art. 48, Protocol I, it requires parties to the conflict to distinguish at all times between

civilians and combatants and between civilian objects and military objectives, and to direct their operations only against combatants and military objectives.

Another matter is the manner in which the principle is elaborated for the different theatres of war. It is fairly evident that the particular set of rules embodied in the 1977 Additional Protocols, with its strong focus on land operations and protection of individual persons, cannot simply be transplanted to the theatre of naval operations.

The High Seas: A Different Theatre of War?

In the past, land and sea warfare may have been very different affairs in that land warfare was first and foremost a struggle for territory, whereas war at sea usually had strong economic warfare overtones. The distinction lost much of its edge, though, with the introduction of the submarine and the air arm. As for the latter, the possibility of attacks from the air on objects situated deep in the enemy hinterland allowed economic warfare to henceforth be conducted against the enemy's land-based industrial capacity and infrastructure.

Aerial attacks on ground targets are by definition destructive. Economic warfare at sea, on the other hand, does not necessarily entail the destruction of ships: there exist other, less destructive and economically more profitable ways of dealing with ships, such as visit and search followed by capture as prize, rerouting, etc. The fact, however, that especially submarines in their attacks on targets at sea behaved much like the air arm did in its actions against targets on land, largely removed the distinction. In effect, the actions of submarines were not only destructive: they rapidly turned indiscriminate as well.

In this respect too, the air arm behaved little better, with their attacks on ground targets also becoming increasingly indiscriminate – intolerably so, in effect. When the law was finally brought up for revision, the international community was no longer prepared to tolerate this extreme behavior as a militarily unavoidable encroachment of human values, and the practice was outlawed by the rules on the protection of the civilian population embodied in the 1977 Additional Protocols. It may be noted in passing that these rules have never been intended to outlaw all air-land operations: in conformity with the general principle of distinction, they basically permit all those attacks that are directed against a specific military objective, as defined in the Protocol.

The Merchant Ship as a Military Objective

Any object may in given circumstances come to be regarded as a military objective, i.e., a legitimate object of attack. Whether this is the case depends on the characteristics of object and situation in correlation with the accepted definition of “military objective.” It should be noted that “acceptance,” in this

context, cannot simply signify the views of one single state, no matter how powerful. What is meant is the definition as accepted by the international community; and acceptance can come about in the shape of express agreement to a treaty text (as in Protocol I) or by any other process in accordance with international law.

These considerations apply without reserve to all theatres of war. Only when it comes to elaborating the principle into more detailed rules, account must be taken of relevant differences between the various theatres. For our purposes, the main feature distinguishing sea warfare from land operations may be that at sea, human beings are not primarily encountered as individuals (and then, specifically, as combatants or civilians) but as the crew or passengers on board a ship (i.e., an object). Hence, the first question to be answered is not so much the status of given persons but, rather, whether a ship constitutes a military objective and may be attacked as such. Here as in other areas of the law of armed conflict, the answer to this question depends on the characteristics of the situation set against the applicable definition of military objective.

One thing is beyond doubt: in the context of naval warfare, the notion of military objective, no matter how defined, includes the warships and naval auxiliaries of the adverse party, as military objectives "by their nature" (as in Art. 52(2) of Protocol I). As the rapporteur notes (p. 339): "Warships are instruments of war and subject to attack and destruction without warning." He goes on to state that according to traditional international law, "[m]erchant ships, even those sailing under the flag of the enemy, are considered as civilian objects and manned by civilian crews, and *so long as they maintain their proper role*, are subject only to seizure as prize and subsequent condemnation in prize courts of the capturing belligerent." The italicized words already suggest that when it comes to an enemy merchant ship, the question of whether it constitutes a military objective has no straightforward answer. It may be noted in passing that the quoted phrase qualifies to some degree the rapporteur's earlier statement that "traditional law regards merchant ships as civilian objects and merchant seamen as civilians and thus not legitimate targets of direct attack."

As with land warfare, two steps are required to determine the status of a merchant ship: its characteristics must be determined, and these must be set against the rule of international law defining the "military objective" in the context of naval warfare. Obviously, here one does not find the definition in a recent treaty or similar authoritative text. It must therefore be derived from other sources.

Any number of characteristics may make a merchant ship a significant element in the conduct of the war. *E.g.*, activities carried out on board (guns being fired, information being transmitted, etc.); the way it is sailing (under enemy convoy, or on a ram course with an investigating warship); the cargo it carries (troops, young people destined to enter the enemy armed forces, military supplies, raw

materials indispensable for the production of weapons of war); or, indeed, the mere fact that it sails under enemy flag, or imports or exports merchandise (say, bales of cotton) in which the adverse party has some financial interest, so that the ship may be deemed to contribute to the enemy war effort. However, whether any such factor also turns the merchant ship into a military objective depends, once again, on the definition of “military objective” as applicable in the context of naval warfare.

“Contribution to the War Effort” Not Sufficient Ground

In this search for the applicable definition, the most important point to my mind concerns the claim that the mere fact that a merchant ship may be said to make a contribution to the war effort is sufficient to turn it into a military objective: a claim that is made nowhere with such insistence as in the *Commander's Handbook*.

This brings us back to Prof. Robertson's introductory chapter, where he states (on p. 338) that “[i]f it is true that merchant shipping can be critical to a nation's ability to prosecute a war effort, it is equally true that the opposing power will seek to interdict that supply effort.” Yes, but by what means? And specifically, by sinking all ships that are suspected of contributing to the enemy war effort?

Commander Fenrick in his report to the Bochum Round Table examines four recent manuals. Neither the Australian nor the French manuals list contribution to the war effort as a separate criterion. The Canadian draft manual does use the term, but only with respect to enemy merchant ships and as part of the requirement that they are “*incorporated into the belligerent war effort*” (italics added). Whether or not enemy merchant shipping is deemed to be so incorporated will be decided at the governmental level. The list of “indicators that all enemy merchant shipping is incorporated into the belligerent war effort” shows clearly that the Canadian draft manual envisages a situation where the enemy completely and effectively controls all merchant shipping under its flag. The first indicator mentioned requires “state control over merchant shipping to ensure that only items essential to the war effort are imported or exported.” The fourth manual, the *Commander's Handbook*, appears to be the most permissive in that (except for one further condition to be mentioned below) it merely requires integration of the enemy merchant ship into “the enemy's war fighting/war sustaining effort” – an ostensibly somewhat more refined, but essentially more elaborate way of saying “war effort”. Prof. Robertson notes that this (seventh) condition did not figure in the previous U.S. naval manual, and that it:

was added, according to the Annotated Supplement, to cope with the deficiency in condition six, perceived by Professor Mallison, that a possible interpretation of this paragraph might prohibit destruction of an enemy merchant ship carrying

cargo of substantial military importance but is not a “military or naval auxiliary” because it is not owned or under the exclusive control of the armed forces.

It is worth noting that “contribution to the war effort” does not constitute an element peculiar to the present deliberations about naval warfare: it was likewise of major importance in the recent discussions about war on land and from the air. It is, in effect, an age-old problem, witness the cotton bales of the American Civil War. And the assertion, for instance, that “interdicting the enemy industrial or agricultural output, or eliminating the enemy labour force, can easily be seen to contribute to the general prosecution of a war effort,” sounds as reasonable as Prof. Robertson’s earlier quoted comment on “interdicting the enemy merchant supply effort.”

It was in particular the increased recourse to aerial bombardment of industrial and other targets in the enemy hinterland that made the question of the role of the civilian population as a contributor to the “war effort” acute. In this regard, it may be recalled that in 1969, at the very first meeting of experts organized by the ICRC after the adoption of U.N. General Assembly Resolution 2444:

the experts generally (agreed that) persons not taking a direct part in hostilities, even if they were indirectly contributing to the war effort, could not be attacked as quasi combatants. As an expert rightly pointed out, this would open the door to every abuse and would take any sense from the prohibition formulated in Resolution 2444. . . . But if civilians are on the site of a military objective or in its immediate proximity, they expose themselves to the particular risks resulting from an attack directed against that objective. (*Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts*, report submitted by the ICRC to the XXIst Int. Conf. of the Red Cross, Istanbul, Sept. 1969; Geneva: May 1969, p. 69).

In the framework of land and air-land warfare these views have since been vindicated with the adoption of the rules in Protocol I elaborating the distinction between civilians and combatants, and civilian objects and military objectives, and the protection of the former. It is submitted that in naval warfare too, “contribution to the war effort” is too broad and vague a notion to serve as a determinant for the decision that even an enemy merchant ship may be attacked as a military objective. I regard it as a significant fact that of the four recent manuals Commander Fenrick quotes in his report, two do not include contribution to the war effort as a separate criterion. As for the Canadian manual, I for one would accept the quoted first indicator with two slight changes: delete the reference to export, and read instead of “items essential to the war effort,” “items necessary for the military effort.”

The *Commander’s Handbook* adds to the “war effort” criterion the further requirement that “compliance with the rules of the 1936 London Protocol would, under the circumstances of specific encounter, subject the surface

warship [the submarine] to imminent danger or would otherwise preclude mission accomplishment.” In my submission, this amounts to hardly any restriction at all but rather encourages giving prevalence to the security of the attacking ship and mission accomplishment over humanitarian considerations. Arguments such as the security of a party’s forces or “mission accomplishment” appear to have become popular as recent, very vague and very broad versions of the age-old argument of military necessity. As such, they are valid considerations as long as they are thrown into the balance with the other values involved; not when they are simply used as an argument overriding all other considerations. They should not, in other words, degenerate into a “license to kill.”

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