

**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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As usual, Professor Robertson has challenged us all. I will limit my comments to addressing some of his suggestions for improving NWP 9A and its annotations, and conclude with some observations of my own.

Professor Robertson correctly notes the conundrum of our topic. While civilians and civilian objects are normally not legitimate objects of attack — and we are dealing with civilian merchant ships with civilian crews — many of these merchant ships contribute in a major way to the prosecution of the war effort of their country.

It is my sense that there has been a shift in the balance of interests since 1920; merchant ships were smaller and in greater numbers then; hence a larger number of civilians were at risk, particularly in an age when search and rescue at sea was primitive at best. Today's merchant fleets are generally made up of fewer yet larger ships with smaller crews, ships which are more easily tracked and which can have on board vastly better survival equipment (I refer here to the kind of equipment kept on off-shore drilling platforms). Certainly the military importance of the cargo carried on board, whether it be revenue-raising exports or imports of war materiel, is no less than before.

In the land warfare context, we know that noncombatants may not be used to shield military objectives from enemy attack and that the presence of noncombatants within or adjacent to a legitimate target does not preclude its attack. Indeed, a party to the conflict has an affirmative duty to remove noncombatants (over which he has control) from the vicinity of targets of likely enemy attack. (NWP 9A, para. 11.2). We also know that civilian objects become legitimate military objectives — and thus subject to attack — when, by their nature, location, purpose or use they effectively contribute to the enemy's war-fighting or war-sustaining capability and when their total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. (NWP 9A, para. 8.1) Anti-shipping operations are undertaken against that kind of maritime commerce for the very reasons stated in the rule. So it must be unquestioned that you can attack merchant shipping — fitting that criteria — since they lose their protection as civilian objects and the civilians on board must be considered to have assumed the risks associated with attack, such as becoming shipwrecked.

I suggest therefore that the protections due civilian crew on board enemy merchant ships are too rigidly stated in the 1936 Protocol.

Let me now respond to a few of Admiral Robertson's comments.

First, the decision to treat attacks on enemy merchant ships by category of warfare specialty was driven in part by the audience for whom NWP 9 is intended: the line officer who has one of three distinct warfare specialties: surface warfare, aviation, or submarine. We also felt it necessary to take into account the military differences between their platforms of attack, and the necessity to accommodate the legitimate need to provide protection to civilians consistent with the legitimate military objective of sinking enemy merchant shipping that was supporting the enemy's war effort. We will consider very carefully Admiral Robertson's suggestions as to the implications — intended or not — of the differences in the formulation of the rules applicable to surface, air and submarine warfare.

Second, regarding the effect of arming a merchant ship on its immunities from attack, I took the view that, while the crew may view its weapons as "defensive," the enemy is not likely to be able to make that distinction if it sees weapons on board that can cause it harm. Light individual weapons such as the hand gun and the shotgun — permitted medical personnel and chaplains for self protection and for protection from marauders (see NWP 9, para. 11.5) — would not in my view constitute arming the ship, unless of course they were aimed at the overflying aircraft or submarine. The real concern is necessarily with larger caliber weapons, including crew-served weapons, and weapons mounted topside that are intended for non-human targets. If the merchant ship is a legitimate military target by virtue of its cargo, it certainly may be armed with such weapons. But if its cargo does not make it a legitimate enemy target, the ship ought not be armed lest the enemy think otherwise. That is the military reality, and our formulation of the rule reflects that view.

Third, Admiral Robertson rightly points out that NWP 9 does not identify what levels of command may determine whether the conditions exist that would authorize destruction of an enemy merchant ship. He suggests that some may be best made by the on-scene commander, while others involve policy decisions best made at higher levels of government and "implemented by a service-wide directive." I agree with the former, but would note that the latter would be promulgated down the operational chain of command, not the administrative chain. The existing system for making those decisions, and where I would expect to find them reflected, is in the rules of engagement promulgated for the operation or campaign. As is well known to many of you, rules of engagement are the implementation of the interaction of the relevant factors: the applicable law, the military/operational considerations, and the policy goals established by the civilian leadership.

I do believe Admiral Robertson has overstated the effect of the formulation of the rules in paragraph 8.2.2.2 (pp. 347-348). I have already pointed out what I think are the legitimate exceptions to the arming criterion, and I believe the principle of proportionality reflected in the stated definition of a military objective is not nearly so open-ended as “no clear military advantage to the attacker” as stated by Admiral Robertson. I think there is a reasonable and realistic balance reflected in Chapter 8.

While Admiral Robertson questions how a submarine might itself signal a merchant ship to stop, I suggest that integrated operations may see the torpedoes come from beneath the waves toward the ship which does not stop when radioed to do so by the P-3 or the frigate, or by the submarine who transmits the order by satellite relay.

Finally, I take a different view of the modern viability of the Protocol. As a nation we have not renounced very many treaties — it is very hard to do. But if the Protocol continues to reflect accepted values, and I believe it still does, then we have to apply its concepts to the modern maritime world and cannot usefully say its a dead letter while refusing to abrogate it or claim desuetude. I think it is misleading — and mischievous — to suggest that the Protocol exists but is ignored in practice. It has not lapsed into desuetude, but must be understood to be not applicable across the board as some would have it. We cannot afford to have law which is ignored all the time. That leads to disrespect for the rules. Rather, we need law which will be followed most of the time.

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