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Chapter III

The Naval Practices of Belligerents in World War II: Legal Criteria and Developments

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There was a continuity manifested between naval practices during the First World War and the second one. The continuity may appear to be surprising because the period 1914-1918 was governed almost exclusively by customary law, while the period 1939-1945 was also governed by treaty law. Before considering the naval practices of belligerents in World War II, it is essential to examine the international law concerning such practices, including naval targeting, which was developed between the World Wars. The subsequent war crimes trials further developed the law applicable to those practices.

I. A Summary of Naval Practices in the First World War

Enemy warships remained lawful objects of attack without warning during the period 1914-1918 as they have always been historically up to the present time. Because of the functional equivalency with warships of those merchant ships which participated in the naval war effort of a belligerent by, *inter alia*, sailing in naval convoys or operating under orders to attack submarines, it would appear to be logically required that they also be lawful objects of attack without warning. This view was advanced by Germany as the preeminent submarine naval power. From the German perspective, the proclamation of large submarine operational areas in the Atlantic Ocean where "unrestricted submarine warfare" was conducted provided adequate notice to neutrals to keep their merchant ships out of the proscribed areas. In a functional sense, Germany was conducting a similar comprehensive method of economic warfare to the "long-distance blockade" conducted by the Allied naval powers except that the German technique was enforced by submarines rather than by surface warships.[1] There is no reason to believe that gunfire by surface warships, the ultimate sanction of the long-distance blockade, was more humanitarian than torpedoes fired by submarines.

The views just summarized, however logical, were decisively rejected by Great Britain and the United States which claimed that the traditional procedures of visit and search were still required of submarines. International conferences between the World Wars provided the opportunity for them to advance their claims in international law.

II. Legal Developments Between the World Wars

During the Washington Naval Conference (1921-1922) Great Britain proposed the abolition of the submarine and Lord Lee made it clear at the outset that in doing so "the British Empire had no unworthy or selfish motives."[2] He continued in reference to the submarine:

> It was a weapon of murder and piracy, involving the drowning of non-combatants. It had been used to sink passenger ships, cargo ships, and even hospital ships. Technically the submarine was so constructed that it could not be utilized to rescue even women and children from sinking ships. That was why he hoped that the conference would not give it a new lease of life.[3]

The French, Italian, Japanese, and United States delegations joined with the British in deploring the claimed inhumane and illegal use of submarines by Germany but favored their retention.[4] Secretary of State Charles Evans Hughes, the chairman of the conference, read into the record the full report on submarines which was prepared by the Advisory Committee of the United States delegation. It contained the following:

> The United States would never desire its navy to undertake unlimited submarine warfare. In fact, the spirit of fair play of the people would bring about the downfall of the administration which attempted to sanction its use.[5]

During the drafting of the proposed submarine treaty, Senator Schanzer, the head of the Italian delegation, thought that it would "be useful to give a clear definition of merchant craft."[6] Senator Elihu Root, a distinguished former Secretary of State of the United States and a senior member of the U.S. delegation, responded:

> Throughout all the long history of international law no term had been better understood than the term "a merchant ship." It could not be made clearer by the addition of definitions which would only serve to weaken and confuse it.[7]

No clarification was provided and the ambiguity remained.

Senator Root proposed in Article I of the draft treaty concerning submarines certain rules of naval warfare, which were stated to be "an established part of international law." These rules provided visit and search of merchant vessels by submarines as well as by surface warships. Article I further provided:

> Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from capture and to permit the merchant vessel to proceed unmolested.[8]

Article III stated the necessity for enforcement of the above rules and provided that:

> any person in the service of any . . . [Power] who shall violate any of . . . [these rules], whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war, and shall be liable to trial and punishment as if for an act of piracy.[9]

The quoted provisions never became effective in spite of the support of the other participants in the Washington Conference because initially France and then the others refused to ratify the draft treaty.

Another attempt to draft rules concerning naval targeting was made in 1930. Article 22 of the London Naval Treaty[10] of that year specified the law applicable to both surface and submarine warships. This treaty was terminated in 1936 except for Article 22 which was continued in effect "without limitation of time" as the *Proces-Verbal* Relating to the Rules of Submarine Warfare (1936).[11] It provides:

> The following are accepted as established rules of International Law:
>
> (1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.
>
> (2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.[12]

The interpretation and application of these binding rules of law was left to the belligerent practices of the Second World War and its juridical aftermath including the war crimes trials "and the teachings of the most highly qualified" scholars and publicists, to use the wording of the Statute of the International Court of Justice.[13]

III. Continuation of Naval Practices in the Second World War

Writing at the beginning of the Second World War, Professor H. A. Smith, a frequent lecturer at the Royal Naval College, Greenwich, pointed out the dramatic differences between trading practices at the time of the Declaration of

Paris[14] (the first multilateral convention on the law of naval warfare) in 1856 and those in 1939:

> If we are again confronted with the facts for which the Declaration laid down the law, then that law must be applied to those facts. That is to say, if we can discover a genuine enemy private merchant carrying on his own trade in his own way for his own profit, then we must admit that his non-contraband goods carried in neutral ships are immune from capture at sea. Under the conditions of the modern socialistic world, such a person is not easily to be found. . . . Today he has become a disciplined individual mobilised in the vast military organization of the totalitarian state.[15]

At the start of the Second World War, the naval belligerents on both sides continued the practices which had been started in the First World War and made every effort to improve upon them. Great Britain had such complete control of the surface of the oceans that it was able to force neutral merchant ships to participate in the Allied war effort. Ms. Behrens, writing in the official British history of the Merchant Navy, described the intensification of the system in 1940:

> In the summer of 1940, the ship warrant scheme was launched, both to further the purposes of economic warfare and in order to force neutral ships into British service or into trades elsewhere that were held to be essential. No ship, it was ordained . . . was to be allowed any facilities in any port of the British Commonwealth unless the British had furnished her with a warrant.[16]

Throughout the Second World War the United States, first as a neutral and then as a belligerent, cooperated fully with the British methods.[17] As a matter of theory, neutral states did not have to cooperate with the Allied naval powers, but they realized that failure to cooperate would result in the application of much more stringent economic warfare measures against them. The result of this integration of neutral merchant ships into the Allied war effort is that they became lawful objects of attack like similarly employed belligerent merchant ships. Only those few neutral merchant ships engaged in genuine inter-neutral trade were immune from attack.

The British *Defense of Merchant Shipping Handbook* (1938) was distributed to the masters of the Merchant Navy in 1938. On the subject of "conditions under which fire may be opened," it stated that if the enemy adopts a policy of sinking merchant ships without warning:

> It will then be permissible to open fire on an enemy surface vessel, submarine or aircraft, even before she has attacked or demanded surrender, if to do so will tend to prevent her gaining a favourable position for attacking.[18]

Subsequent instructions stated that the enemy had adopted the policy of sinking without warning.

At the outset of the Second World War, the German Navy incorporated the *Proces-Verbal* Relating to the Rules of Submarine Warfare, also known as the Protocol of 1936, into the German Prize Code which was distributed to submarine commanders.[19] By October 17, 1939, Germany issued the order to attack all enemy merchant ships without warning.[20] Thus, early in the conflict submarines and merchant ships incorporated in the naval war effort were attacking one another without warning. Germany declared that vast areas of the North Atlantic Ocean were a submarine operational zone in which Germany could assume no responsibility for either damage to ships or injury to personnel.[21]

On December 7, 1941, immediately following the attack on Pearl Harbor, the U.S. Chief of Naval Operations sent a secret message to the Commander-in-Chief, Pacific Fleet which stated: "EXECUTE AGAINST JAPAN UNRESTRICTED AIR AND SUBMARINE WARFARE."[22] Even though the "unrestricted" warfare was directed against Japan, it could nevertheless present a possible danger to neutral shipping in the vast Pacific Ocean areas. Because the message was secret, it could not have provided notification to neutral states. However, the almost complete absence of neutral shipping in the Pacific made this problem more theoretical than real. The only significant shipping which the Japanese treated as neutral consisted of Russian ships sailing across the North Pacific between Siberian ports and Canadian and United States ports in the Pacific Northwest. While the Soviet Union was a belligerent in the European war, it remained technically neutral in the Pacific war until a few days before the Japanese surrender.

Throughout the Pacific War, as in the Atlantic War, the merchant ships of the naval belligerents and participating neutral merchant ships were fully integrated into the naval war efforts. As a practical matter, such ships were indistinguishable from formally commissioned naval auxiliary warships,[23] and, like warships, were lawfully subject to attack without warning. The United States reversed its prior position advanced in the First World War and, along with Japan and the other naval belligerents, recognized that such merchant ships were functional warships and were subject to the same rules of international law. The United States has also reversed its position in domestic law by the enactment of legislation which results in according to U.S. merchant mariners who served in active theaters of war the benefits of veterans' status.[24]

IV. Post World War II War Crimes Trials

A. The Trial of Admiral Doenitz

The only war crimes trials conducted by international tribunals were those before the International Military Tribunal at Nuremberg and the International

Military Tribunal for the Far East at Tokyo. The International Military Tribunal at Nuremberg conducted the trial of the principal leaders of the former German Government who were accused of war crimes or crimes against humanity. The important case in which the Tribunal directly addressed the law of naval warfare was that of Admidral Doenitz who initially commanded the German submarine force and was subsequently commander-in-chief of the navy. Admiral Doenitz was charged with planning aggressive war (count one), conducting aggressive war (count two), and with war crimes (count three) by "waging unrestricted submarine warfare contrary to the Naval Protocol of 1936."[25] Sir Hartley Shawcross, the chief British prosecutor, stated to the Tribunal:

> Nor need we take time to examine the astonishing proposition that the sinking of neutral shipping was legalized by the process of making a paper order excluding such neutral ships not from some definite war zone over which Germany exercised control but from vast areas of the seas.[26]

The judgment of the Tribunal, after stating that it "is not prepared to hold Doenitz guilty for his conduct of submarine warfare against British armed merchant ships," continued:

> However, the proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the war of 1914-1918 by Germany and adopted in retaliation by Great Britain. The Washington Conference of 1922, the London Naval Agreement of 1930, and the Protocol of 1936 were entered into with full kowledge that such zones had been employed in the First World War. Yet the Protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.[27]

The failure to mention operational zones in the Protocol of 1936 could, of course, be equally consistent with the conclusion of their lawfulness. The unreasonable and unworkable result of the holding is that the Tribunal accepts the legality of German operational or exclusion zones as applied to belligerent merchant vessels but regards the same zones as unlawful when applied to neutral merchant vessels. In doing this, the Tribunal ignored the fact that in the Second World War many neutral merchant vessels were sailing in the same naval convoys with belligerent merchant vessels and the two were functionally indistinguishable from one another.

The term "neutral merchant vessels" used by the Tribunal is more precise than the wording concerning merchant vessels in the Protocol, but it remains ambiguous and comprises at least two distinct categories: those engaged in genuine inter-neutral trade which does not contribute to the economic warfare resources of a belligerent, and those neutral vessels which, through acquiescence

or coercion, participate in the naval war effort of a belligerent. The factual reality was that there were no immune neutral merchant vessels in the Atlantic Ocean proscribed areas. The Tribunal's invocation of the broad term, "neutral merchant vessels," enabled it to avoid facing the facts concerning the integration of neutral shipping into the Allied naval war effort. The Tribunal applied the Protocol to Doenitz as if it were a criminal statute. He was found innocent on count one (planning aggressive war), guilty on count two (conducting aggressive war), and guilty on count three (war crimes). However, the ten year sentence imposed upon Doenitz was stated to not be based upon count three because the United States also conducted "unrestricted submarine warfare" in the Pacific. The result of this is that the sentence was based only on count two, according to the Tribunal, which involved nothing more than Doenitz carrying out his regularly assigned duties as a line officer. The principal criticism concerning the Doenitz case, however, is properly directed at Sir Hartley Shawcross and the other British prosecution lawyers. They either knew, or should have known in the exercise of at least minimum standards of professional responsibility, the factual reality of the integration of almost all neutral shipping into the Allied naval war effort.[28] As it was, they permitted the Tribunal to make a determination of guilt based on an erroneous factual assumption even though the Tribunal stated that the sentence was not based on Doenitz carrying out unrestricted submarine warfare.

In the Doenitz case the Tribunal also referred to the "*Laconia* order" and this portion of the case is considered in the ensuing subsection because the order is more directly involved in other cases.

B. Other War Crimes Trials

The war crimes trials other than the major trials at Nuremberg and Tokyo took place before national military tribunals which applied the international law of armed conflict. In addition to the trial of Admiral Doenitz, two other cases were stated to involve the "*Laconia* order" issued by him on September 17, 1942 while he was serving as the commander of the German submarine force. This order provided in English translation:

> (1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in life boats, righting capsized life boats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
>
> (2) Orders for bringing in captains and chief engineers still apply.
>
> (3) Rescue the shipwrecked only if their statements would be of importance for your boat.

> (4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities.[29]

The *Laconia* order immediately followed Admiral Doenitz' attempt to establish a rescue zone of immunity during the period September 12-16, 1942. Captain Roskill has described the facts:

> In September, 1942, a group of [four] U-boats and a "milch cow" (as the Germans called their supply submarines) arrived south of the equator, and there on the 12th U.156 sank the homeward-bound troop ship *Laconia*, which had 1,800 Italian prisoners on board. On learning from survivors what he had done, Hartenstein, the U-boat's captain, sent a series of messages *en clair* calling for help in the rescue work and promising immunity to ships sent to the scene, provided that he himself was not attacked.[30]

Admiral Doenitz ordered other U-boats to the rescue and the Vichy French Government was asked to send help from Dakar. The U-boats then took the principal role in the rescue operations which included towing lifeboats toward the African coast. This, of course, diverted the submarines from their regular wartime missions. Captain Roskill's account continues:

> All went well until the next afternoon [September 16] when an American Army aircraft from the newly established base on Ascension Island arrived, flew around the surfaced U-boats for about an hour, and then attacked U.156 with bombs. It is as impossible to justify that act as it is difficult to explain why it was committed.[31]

In 1960 the Historical Division of the U.S. Air Force stated concerning this incident:

> A summary of operations from Ascension Island states that on the morning of 16 September 1942 a B-24 of the US Army Air Forces sighted a submarine at 5 degrees South, 11 degrees 40 minutes West. The sub, which was towing two lifeboats and was in the process of picking up two more, was displaying a white flag with a red cross. The sub did not show any national flag when challenged by the B-24. The plane left the scene and contacted Ascension. Since no friendly subs were known to be in the area, the plane was instructed to attack.[32]

The officer who issued the order to attack and the aircraft commander who carried it out were each *prima facie* guilty of a war crime. The conduct of the aircraft commander is entirely inexcusable since he must have observed the rescue operation. During the time that they are engaged in such an operation, enemy ships are no longer lawful objects of attack. The fact that the U.S. Army Air Forces took no action to investigate this incident and that no trials took place under the then-effective domestic military code, the Articles of War, is a serious reflection on the entire chain of military command. The attempt by Doenitz

and Hartenstein to establish a rescue zone of immunity would have been effective had it not been for the bombing. As it was, many of the personnel of the *Laconia*, including Italian prisoners of war and British military dependents, were rescued in an attempt which exemplifies the highest humanitarian traditions. The rescue attempt was entirely consistent with the central objective of the law of armed conflict to avoid unnecessary destruction of human values. In addition to the destruction involved in frustrating the rescue attempt, the action of the U.S. Army Air Forces resulted in the issuance of the *Laconia* order and the ensuing uncounted deaths of Allied seamen. Admiral Doenitz was charged with violating the rescue provisions of the Protocol of 1936 by issuing the order. There is, unfortunately, no evidence that the International Military Tribunal gave appropriate consideration to the rescue zone of immunity as indispensable context for the *Laconia* order. The Tribunal did not find him guilty on this charge, but it stated that the ambiguous terms of the order deserve the strongest censure.[33]

The second case, the *Trial of Moehle*[34] before a British military tribunal, involved a German U-boat flotilla commander who was charged with a war crime in reading the *Laconia* order to captains of U-boats in his flotilla and of resolving the ambiguity in the order by providing examples in which the killing of survivors was approved. In convicting the defendant, the Tribunal accepted the contention of the prosecution that the examples used amounted to an order to kill.

Although the third case, the *Trial of Eck* ("The Peleus Trial")[35] is widely regarded as an implementation of the *Laconia* order, it is significant that the defense did not invoke it as a superior order which mandated the killing of survivors. In this case, also before a British military tribunal, the captain, two officers and a rating of the German submarine U-852 were charged with:

> Committing a war crime in that you in the Atlantic Ocean on the night of 13/14th March, 1944, when captain and members of the crew of Unterseeboot 852 which had sunk the steamship *Peleus* in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them.[36]

The prosecution resolved the ambiguity in the charge by stating that the defendants were not accused of sinking a merchant ship without warning, but of killing its survivors. The *Peleus* was of Greek registration and under charter to the British Ministry of War Transport. Following the sinking, the defendants spent approximately five hours attacking the survivors and the floating wreckage with machine gun fire and hand grenades. All of the survivors except three were either killed or subsequently died of wounds. The three were rescued about a month later and recounted the grim events. The evidence indicated that the captain, Eck, ordered the shooting and that the others carried out his orders. The principal defense claim was that the actions were necessary to eliminate all

traces of the sinking. An experienced U-boat commander, who was called on behalf of the defense, testified that the approved method of evading Allied anti-submarine attack following a sinking was to leave the scene at high speed. All of the accused were found guilty and Eck and the other two officers were condemned to death.[37]

The Judgment of the International Military Tribunal for the Far East states:

> Inhumane, illegal warfare at sea was waged by the Japanese Navy in 1943 and 1944. Survivors of passengers and crews of torpedoed ships were murdered.[38]

The commander of the Japanese First Submarine Force at Truk issued an order on March 20, 1943 which is translated and quoted by the Far East Tribunal:

> All submarines shall act together in order to concentrate their attacks against enemy convoys and shall totally destroy them. Do not stop with the sinking of enemy ships and cargoes; at the same time, you will carry out the complete destruction of the crews of the enemy's ships; if possible, seize part of the crew and endeavor to secure information about the enemy.[39]

Several examples of the carrying out of this flagrantly unlawful order are referred to in the judgment of the Tribunal.[40] One which is described in detail involved the sinking of the United States flag Liberty-type merchant ship *Jean Nicolet*, which had an armament manned by a U.S. Navy armed guard, and the brutal murder of most of the survivors of the sinking.[41] The Tribunal stated, *inter alia*, that the ship's boats were smashed by gunfire and that some of the crew members, with their hands tied behind their backs, had to run a gauntlet on the deck of the submarine before being forced into the water. The remainder of the crew was left on the deck of the submarine when it submerged. Twenty-two crew members who survived these grim events were rescued the next day and provided the testimony upon which the Tribunal's findings of fact were based.

In summary, the *Moehle* case involved an order to kill survivors and the *Eck* case involved the killing of survivors. The judgment and proceedings of the International Military Tribunal for the Far East set forth facts which demonstrated both the order to kill survivors and the execution of that order.

During the Second World War, aircraft attacked merchant vessels engaged in a belligerent's war effort. No trials took place involving aircraft attacks. If such trials had taken place, they should have been conducted under the same legal criteria which would be properly applied in the trials concerning surface and submarine warfare.

Captain Roskill, the official British Historian of the Naval War 1939-1945, has written:

> It is fair to mention here that, with one conspicuous exception, the captains of the German disguised raiders conducted their operations, which were a perfectly legitimate form of warfare, with due regard to international law.[42]

The exception referred to by Captain Roskill was the commander of a surface raider charged in the *Trial of Von Ruchteschell*[43] before a British military tribunal with failure to give quarter during an attack on a British merchant ship. The facts involved a daylight attack against the ship in which its wireless aerial was destroyed with the raider's first salvo. The raider maintained heavy fire and signaled that the ship attacked was not to use its radio. The case report states: "The captain of the *Davisian* stopped his engines, hoisted an answering penant and acknowledged the signal." The raider's gunfire continued, however, for another fifteen minutes and wounded several crew members while they were trying to abandon ship. Captain Von Ruchteschell was convicted on the apparent basis that the ship attacked had given an unequivocal indication of surrender. After this manifestation of surrender, the *Davisian* was no longer a lawful object of attack.

V. The Killings Following the Battle of the Bismark Sea

Unfortunately, it is not possible to state that only Germans and Japanese murdered survivors of ships which had been attacked and sunk. In March, 1943 the Japanese attempted to move about seven thousand soldiers by ship from Rabaul, New Britain where their military situation was increasingly precarious, to reinforce the Japanese Army in Lae, New Guinea.[44] This involved the transit of the Bismark Sea by a convoy of eight transports escorted by eight destroyers.

The U.S. Army Air Forces in the Pacific had had a poor record for accurately targeting small islands, much less targeting moving ships, up to this time. The new commander of the Fifth Air Force under General Douglas MacArthur, the Commander-in-Chief Southwest Pacific, was Lieutenant General George C. Kenney, who changed the situation by having his medium bombers practice low-level attacks so that this capacity was added to the existing capability of heavy bombers in high-level bombing. The result was apparent in the Battle of the Bismark Sea where the B-25 and other medium bombers sank every transport in the convoy (except one sunk by high-level heavy bombers) and half of the destroyers. Once the ships were sunk, the U.S. Armed Forces followed practices, much criticized when the offenders were German or Japanese, of killing as many of the helpless survivors in the water as possible. Professor Samuel Eliot Morison, the official historian of the U.S. Navy during the Second World War, provides the following account:

> Meanwhile planes and PTs went about the sickening business of killing survivors in boats, rafts or wreckage. Fighters mercilessly strafed anything on the surface.

> On 5 March the two PTs which had sunk Oigawa Maru put out to rescue a downed pilot and came on an enemy submarine receiving survivors from three large landing craft. Torpedoes missed as the I-boat crash-dived. The PTs turned their guns on, and hurled depth charges at the three boats—which, with over a hundred men on board, sunk. It was a grisly task, but a military necessity since Japanese soldiers do not surrender and, within swimming distance of shore, they could not be allowed to land and join the Lae garrison.
>
> Japanese submarines and destroyers saved 2,734 men from the convoy, but over 3,000 were missing.[45]

It is difficult to accept Professor Morison's facile statement that Japanese soldiers do not surrender and his conclusion that a legitimate military necessity was involved. Even if such a military necessity had existed, it would not change the substantive provision of the law of armed conflict which prohibits the killing of survivors because considerations of military necessity, along with those of humanity, have been taken into account in writing the law. Some members of the Japanese armed forces, including the highly motivated Kamikaze pilots who participated in the Phillipine and Okinawa operations, did surrender. It is not credible that Japanese soldiers who, it is assumed, could have made it to the New Guinea shore would have become a military asset to the Japanese Army there. The greater probability concerning a then-unknown future is that they would have become an additional burden upon the supply and medical resources of that army.[46] Another historian, Professor Ronald H. Spector, has provided a substantially similar factual account of the events following the Battle of the Bismark Sea but has indicated skepticism concerning the claim of military necessity.[47]

If the same legal standards applied to Germans and Japanese who killed helpless survivors are followed in evaluating the actions of the U.S. Army Air Forces and the U.S. Navy following the Battle of the Bismark Sea, there is no way they can be described as other than in flagrant violation of customary and treaty law. It is a serious reflection on the entire chain of command that there was no investigation and no charges were brought against those who issued the orders and carried them out. Justice Robert H. Jackson, the chief United States prosecutor before the International Military Tribunal at Nuremberg, set forth the basic legal principle in 1945:

> If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.[48]

Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (1907),[49] a treaty of the United States, is

applicable to the events following the Battle of the Bismark Sea and provides in relevant part:

> After each engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.[50]

The limitation in the treaty concerning "military interests" refers to legitimate military interests which are recognized as including lawful objects of attack and therefore prohibiting attacks on survivors.

VI. The Protocol of 1936 in Context

The principal juridical basis on which the factual events of naval armed conflict have been appraised is the *Proces-Verbal* Relating to the Rules of Submarine Warfare,[51] also known as the Protocol of 1936. There are inconsistent analyses concerning its interpretation and application to the events of the Second World War. Professor Robert Tucker, writing in a Naval War College "Blue Book", has stated concerning the Atlantic War:

> Despite this reaffirmation of the traditional law in the 1936 London Protocol, the record of belligerent measures with respect to enemy merchant vessels during World War II fell far below the standards set in the preceding conflict. In the Atlantic, Germany resorted to unrestricted submarine and aerial warfare against British merchant vessels almost from the very start of hostilities. . . .[52]

> In the final stages of the conflict, the measures taken by Great Britain against enemy shipping wherever encountered were only barely distinguishable from a policy of unrestricted submarine warfare.[53]

Professor Tucker has also commented on the legal situation in the Pacific War:

> In the Pacific War no attempt was made by either of the naval belligerents to observe the obligations laid down by the 1936 London Protocol. Immediately upon the outbreak of war the United States initiated a policy of unrestricted aerial and submarine warfare against Japanese merchant vessels, and consistently pursued this policy throughout the course of hostilities. Japan, in turn, furnished no evidence of a willingness to abide by the provisions of the Protocol . . . .[54]

His interpretation of the Protocol provides adequate illustration of the fallacies of the so-called "plain meaning" interpretation of a "normatively ambiguous" legal text. "Normatively ambiguous" refers to a legal term which purports to establish a norm or category but is in fact so unclear that it requires interpretation in relevant context rather than according to "plain meaning". The "plain meaning" method involves these three sequential fallacies: (1) the "plain meaning" exists;

(2) it is ascertainable; and (3) it controls interpretation without regard to relevant contextual factors. Professor Tucker has apparently interpreted "merchant ships" and "a merchant vessel" as stated in the 1936 Protocol as referring by "plain meaning" to all such ships without regard to the integration of these ships into the naval war effort. The result of the so-called "plain meaning" interpretation here is to actually change the text so that the term "all merchant ships" is inserted in lieu of "merchant ships." If insertions are to be made in the text, it would be more in keeping with the purposes of the Protocol to insert "genuine merchant ships" or "merchant ships not participating in the armed conflict."

Professor Myres McDougal has emphasized the importance of contextual interpretation and set forth its major features.[55] Applying this methodology to the Protocol, it is necessary to consider the following: the pre-existing customary law; the intention, if any, to change it; the preparatory work including statements of the drafters; the final text; the working interpretation given to the text by the state-parties; and the principle of effectiveness.

The long-established customary law applicable to land, sea and air warfare is that the exercise of belligerent functions always carries with it susceptibility to being attacked. Application of this common-sense principle results in merchant ships which perform belligerent functions being liable to the same treatment as warships. This was established long before the World Wars in the era of sailing ships. There is no indication in the records of the working papers leading to Article 22 of the London Naval Treaty of 1930 and in the reaffirmation of that agreement in the *Proces-Verbal* of 1936 of any intention to change the customary law. The most significant statement recorded in the preparatory work is contained in the Report of the Committee of Jurists of April 3, 1930 written by the lawyers who drafted the text.

> The Committee wish to place it on record that the expression "merchant vessel", where it is employed in the Declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.[56]

This stated criteria is significant in that it demonstrates a clear purpose to make a distinction between merchant ships based upon participation in the armed conflict.

It is now crystal-clear that the terms "merchant vessel" or "merchant ships" does not include all such ships. None of the state-parties to the treaty have suggested any dissent from the criteria of the Committee of Jurists. Consequently, the normatively ambiguous references to merchant ships which appear in the final text are clarified by the undisputed statement of the drafters of the treaty.[57] It is highly significant in providing accurate interpretation that the naval belligerents, the Germans and Japanese on one side and Great Britain and the United States on the other, gave identical working interpretations to the treaty in spite of their

highly divergent interpretations of most other major issues. The working interpretation of the state-parties is of great importance, and this is particularly true where it produces complete uniformity in interpreting the treaty.

Finally, the cardinal interpretative principle of effectiveness must be considered. This requires that any treaty must be given a practical meaning so that it is succeptible of application in the real world. In the present situation, this means that the agreement must be effective in actual naval armed conflict. It is by applying its protections to only merchant vessels which are not participating in the armed conflict that it is given a practical meaning. The contrary interpretation based upon a supposed "plain meaning" would result in the treaty becoming a nullity rather than effectuating its purpose of providing humanitarian protections. A conclusion written several years ago is equally applicable now.

> In summary, the juridical criteria to determine whether or not a merchant vessel is participating in the war or hostilities in a way which results in losing "the immunities of a merchant vessel" should be determined by the fact of such participation and not by the particular method of participation.[58]

Hospital ships,[59] cartel ships,[60] coastal fishing boats and small boats engaged in coastal trade[61] are also immunized under international law from attack.

As reflected in the decisions of the war crimes trials which have been examined, the central humanitarian purpose of the law is to protect human values. Although it is clear under the Protocol of 1936 that merchant ships participating in the naval armed conflict may be sunk without warning, an absolute standard of immunity from attack for the survivors of sunken ships is required by international law. The ships that were sunk in the Battle of the Bismark Sea were combatant warships (destroyers) and auxiliary warships (transports) and the identical protection for survivors is applicable.

One of the post-World War II treaties, Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)[62] specifies affirmative protections for survivors of armed forces at sea including merchant marine seamen and the crews of civil aircraft of the parties to the conflict.[63] Article 18(1) provides:

> 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 and to ensure their adequate care, and to search for the dead and prevent their being despoiled.

The significance of this provision is that it imposes affirmative duties in terms of the protection of "shipwrecked, wounded and sick" and their care on a non-discriminatory basis. Thus the post World War II treaty law enhances the

legal standards of the customary law and treaty law developed by the post World War II war crimes trials.

Notes

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1. For a more comprehensive analysis of belligerent naval practices during World War I, see William T. Mallison, Jr., Studies in the Law of Naval Warfare: Submarines in General and Limited Wars, *passim* (1966) [hereinafter Mallison].
2. International Law Documents: Conference on the Limitation of Armaments 49 (1921).
3. *Id.* at 53.
4. *Id. passim.*
5. *Id.* at 61.
6. *Id.* at 122.
7. *Id.* at 124.
8. *Id.* at 116.
9. *Id.*
10. 46 Stat. 2858, 2881-82 (1930); Dietrich Schindler & Jiri Toman, The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents 793 (1981) [hereinafter Schindler & Toman].
11. Schindler & Toman, *id.* at 795-96.
12. *Id.*
13. Art. 38 (1)(d).
14. Schindler & Toman, *supra* note 10, at 699-700.
15. *The Declaration of Paris in Modern War*, 55 L.O.Rev. 237, 249 (1939).
16. Merchant Shipping and the Demands of War, History of the Second World War 96 (1955).
17. *See* Steven W. Roskill, *Capros not Convoy: Counter-Attack and Destroy!*, 82 U.S. Nav. Inst. Proc. 1047 (October 1956). CAPROS = Counter-Attack Protection and Routing of Shipping.
18. Portions of the *Handbook* are reprinted in 40 Proceedings of the International Military Tribunal at Nuremberg 88-89 (1947-1949) [hereinafter IMT].
19. *See* note 12 and accompanying text. Art. 74 of the German Prize Code, which reproduces the 1936 Protocol, appears in 7 Hackworth, Digest of International Law 248 (1944).
20. This was stated by Fleet Judge Advocate Kranzbuhler in his argument in behalf of Admiral Doenitz, 18 IMT 312, 323.
21. Mallison, *Supra* note 1, at 75-84.
22. The text is taken from a photographic copy of the original which was declassified on December 2, 1960.
23. Mallison, *Supra* note 1, at 121-22.
24. The G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, 91 Stat. 1433 (1977). Title 38 of the U.S. Code entitled Veterans Benefits is amended in scattered sections by the 1977 statute. *See* Charles Dana Gibson (the attorney who successfully advanced the claims of U.S. merchant mariners), Merchantman? Or Ship of War (1986).
25. 1 IMT 311.
26. 19 IMT 469.
27. 1 IMT 312-13.
28. Merchant Shipping and the Demands of War, *supra* note 16 and accompanying text.
29. The text of the order is in Trial of Moehle, 9 Reps. U.N.Comm. 75 (1946).
30. Trial of Moehle, *Supra* note 29 at 224.
31. *Id.* at 224-25.
32. Excerpt of letter from Historical Divison, U.S. Air Force to Mr. David D. Lewis (April 12, 1960). The excerpted letter appears as an enclosure to letter from Director, Research Studies Institute, Air University, Maxwell Air Force Base to President, Naval War College (April 19, 1961).
33. 1 IMT 313.
34. 9 Reps. U.N. Comm. 75 (1946).

35. 1 Reps. U.N. Comm. 1 (1945); also reported in the entire volume one of War Crimes Trials (Maxwell-Fyfe ed., 1948) which contains the entire record of proceedings of the trial.

36. *id.* at 2 (1945).

37. *id.* at 13.

38. Judgment and Proceedings of the International Military Tribunal for the Far East (April 29, 1946-April 16, 1948 with sequential numbering of typewritten pages and separate volume for each day of the trial) [hereinafter FEIMT Judg. or FEIMT Proc.]. The textual quotation is from FEIMT Judg. at 1,072.

39. FEIMT Judg., *supra* note 38, at 1,073.

40. *Id.* at 1,073-74.

41. The textual account is based upon FEIMT Proc. 15,095 148 and FEIMT Judg. 1,074-75, *supra* note 38.

42. Steven W. Roskill, White Ensign: The British Navy at War 1939-1945, at 97 (1960).

43. 9 U.N. War Crimes Comm., Reports of Trials of War Criminals 82 (1947) [hereinafter Reps. U.N.Comm.].

44. The factual account is based upon 6 Samuel Eliot Morison, History of the United States Naval Operations in World War II 62 *et seq.* (1950) (This volume is sub-titled Breaking the Bismark Barrier) [hereinafter Morison], and upon Ronald H. Spector, Eagle Against the Sun 226-28 (1985) [hereinafter Spector]. Professor Spector served as the Director of Naval History, Dept. of the Navy, 1986-1989.

45. Morison, *supra* note 44, at 62.

46. Professor Spector has reported the actual event: "by spring [1943] about 40 percent of Japanese front-line troops in New Guinea were suffering from disease or malnutrition." Spector, *supra* note 44, at 228.

47. *Id.*

48. Report of Justice Robert H. Hackson, U.S. Representative to the International Spector, Conference on Military Trials, Document XLIV, Minutes of Conference session of July 23, 1945, 330 (1945).

49. 36 Stat. 2371 (1909).

50. *Id.* at art. 16(1).

51. Schindler & Toman, *supra* note 10.

52. Robert W. Tucker, *The Law of War and Neutrality at Sea*, 1955 Naval War College International Law Studies 64 (1957).

53. *Id.* at 66.

54. *Id.*

55. Mynes S. McDougal & Associates, *Studies in World Public Order* 723-32, and *passim* (1960). *See* James W. Garner, *Harvard Research Draft on Treaties*, 29 Am. J. Int'l L. Supp. 947 (1935) and Myres S. McDougal, Harold D. Lasswell & James C. Miller, The Interpretation of Agreements in World Public Order, *passim* (1967).

56. Proceedings of the London Naval Conference of 1930 and Supplementary Documents 189 (1931).

57. *See id. passim*; *see also* International Law Situations 1-65 (1930) and particularly the section entitled *Classes of ships* at 41-44.

58. Mallison, *supra* note 1, at 120.

59. Mallison, *supra* note 1, at 124-25.

60. *Id.* at 126.

61. *Id.* at 126-28.

62. 6 U.S.T. 3217; Schindler & Toman, *supra* note 10, at 333.

63. *Id.* at art. 13(5).