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Chapter VII

U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice

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I. Introduction

Throughout the history of warfare it has been clear that the ability of a nation at war to obtain logistic support from overseas sources has been a major factor—sometimes the dominant factor—in its ability to continue the war effort. Few nations have the economic independence to prosecute a war without outside resources, or, at least, without the ability to move their implements of war, provisions, men and material where they are needed. For most nations this requires an ability to operate their merchant fleets in a hostile maritime environment.

During the Napoleonic era, both France and England utilized their differing strengths in an attempt to curtail the other's logistic and commercial capabilities. In the American Civil War, the blockade of the Confederacy was a principal component of the Union's war strategy. The indispensable condition for victory by Japan in its 1905 war with Russia was control of the seas. Without this advantage, Russia could have resupplied its superior land armies from the sea. During the progress of both World Wars, success of the maritime resupply effort of the Allied Powers, particularly Great Britain, was the *sine qua non* of victory. More recently, the conduct of both Iran and Iraq in the Persian/Arabian Gulf Tanker War confirmed the importance to the warring parties of interdicting merchant shipping, even for a localized war effort. If 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. Tactics, weapons systems and geography are variables that will affect any interdiction effort but the interdiction effort fits neatly with the general principles of war.[1] The conundrum of this situation is that while merchant shipping contributes in a major way to the prosecution of a nation's war effort, traditional law regards merchant ships as civilian objects and merchant seamen as civilians and thus not legitimate targets of direct attack.

The experience of World War I demonstrated that a belligerent whose war effort required it to cut off seaborne logistic support for its enemy would nevertheless target enemy merchant ships. In an effort to protect civilian

passengers from the ravages of war, particularly from the threat posed by the submarine, the London Protocol of 1936 sought to codify a requirement that subjected submarines to the same rules that were applicable to surface warships in their actions against enemy merchant ships. As we are all aware, the practices of the Second World War diverged substantially from those laid down in that Protocol, as did the realities of modern weapons systems, naval platforms and naval tactics. The result is an apparent gap between putative conventional law and state practice. The naval targeting policies of the United States, as reflected in the two naval manuals that have been published by the Navy since World War II—the *Law of Naval Warfare* (NWIP 10-2, 1955) and *The Commander's Handbook on the Law of Naval Operations* (NWP-9, 1987)—have wrestled with this gap between the putative conventional law and state practice. It is the purpose of this paper to examine the nature of this apparent gap and appraise the success of the most recent publication (*The Commander's Handbook*) in bridging it.

II. Conventional Law

Traditional international law distinguishes between enemy warships and enemy merchant ships. Warships are instruments of war and subject to attack and destruction without warning. Merchant 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. Only in special circumstances[2] is the capturing power allowed to destroy the prize, and then only after removing the passengers, crew and ship's papers to a place of safety.[3]

Since the turn of the century, both nations and international law publicists have been concerned with how to reconcile these principles with the realities of the means and methods of naval warfare—particularly the submarine, but also including military aircraft—that have developed since that time. The 1899 Hague Peace Conference wrestled with the issue of submarine warfare but focused more on the unchivalrous methodology of destruction than on its target.[4] The cruelties of the commerce war at sea sharpened that focus and no doubt contributed to the eventual agreement embodied in the 1936 Protocol. Yet the 1936 Protocol has a broader genesis than submarine warfare, and it is important to review some of the origins of customary and conventional law relevant to targeting merchant vessels.

Four Conventions adopted at the Hague in 1907, Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities,[5] Convention (VII) Relating to the Conversion of Merchant Ships into Warships,[6] Convention (XI) Relative to Certain Restrictions with Regard to the Exercise

of the Right of Capture in Naval War,[7] and Convention (XIII) Concerning the Rights and Duties of Neutrals in Naval War,[8] dealt in some manner with the status of merchant ships, but none in any way modified the traditional law outlined in the preceding paragraph. The conferees' concern for protecting merchant ships from attack is no better illustrated than in Hague Convention VI, which provided for a grace period for merchant ships that might find themselves in an enemy port at the outbreak of hostilities to exit and make their way to a friendly port without being subjected to attack. For enemy vessels at sea but ignorant of the outbreak of hostilities, the Convention allowed destruction in some cases but only against payment of compensation and provision for the safety of the persons on board and security of the ship's papers.

The London Naval Conference of 1909, which was called by the British Government for the purpose of codifying the Prize Court rules for the International Prize Court contemplated by Hague XII, produced a "Declaration Concerning the Laws of Naval Warfare."[9] Its only provision respecting destruction of merchant vessels is contained in Chapter IV and deals only with the destruction of *neutral* merchant ships. It authorized their destruction only as an exception to the duty of condemnation as prize in cases in which taking the captured vessel into port "would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time."[10]

Following World War I, the 1921-1922 Washington Naval Conference, under the sponsorship of the United States, and with the participation of Great Britain, France, Italy and Japan, made a further attempt to codify the customary law governing attacks on merchant vessels at sea. The resulting draft Treaty,[11] in addition to codifying the traditional rule that enemy merchant ships could not be attacked unless they refused to submit to visit and search, contained an absolute prohibition on the use of the submarine in a commerce-destroying mode. Article 4 provided:

> The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations, they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto.[12]

This Treaty never entered into force because of the non-ratification by France, but some commentators seem to view the Treaty as an expression of customary law.

The same group of powers that had signed the abortive 1922 Washington Treaty assembled again in London in 1930. At that Conference they signed a

Treaty for the Limitation and Reduction of Naval Armaments,[13] which contained Article 22 again asserting the applicability to submarines of the traditional rules prohibiting the sinking of merchant ships without having first placed passengers, crew and ship's papers in a place of safety.[14] Although the Treaty was to expire by its own terms in 1936, this article was to remain in force without limit of time[15] and contained an invitation to all other powers to express their assent to the rules. When the signatories of the 1930 Treaty reconvened in 1936, they converted Article 22 into a formal *proces-verbal*, which we know today as the London Protocol of 1936.[16] In addition to 11 signatories, 37 states, including all of the belligerents in World War II except Romania, had become parties to the Protocol before the outbreak of hostilities in 1939. The operative part of the text, in its entirety, reads as follows:

Rules

(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.

Is the 1936 Protocol still alive? In 1971 and 1973 Tonga and Fiji respectively filed documents of continuity for the Protocol, but they are the only nations to have formally become parties to it since January 1939, when Iran became the last previous accession. It is worth noting that each of the Twentieth Century attempts to reduce to treaty form the law applicable to destruction of enemy merchant ships in naval warfare has proceeded from an attempt to codify customary law. Bearing in mind that other papers in this symposium address practice in more detail,[17] it is nevertheless indispensable to review, at least briefly, the practices of nations since the Protocol was adopted.

III. State Practice

It is axiomatic that the actual practice of states is a key element in the creation of international norms. When consistent, long-continued, and acquiesced-in by other states, and when combined with the element of *opinio juris*, such practice may be said to *be* international law. This is true of the international law of armed conflict as well as the law of peace. But in trying to draw inferences from state

practice in the area of the law of armed conflict, it is important to be cautious not to draw sweeping conclusions from incomplete or ambiguous evidence.

The first post-Protocol test of the rules established by the Protocol occurred almost immediately in the Spanish Civil War. In that conflict, neutral merchant ships were sunk without warning. The world's reaction was predictably one of outrage. The leading European powers (less Italy and Germany, which were actively supporting the Franco regime) adopted the Nyon Agreement, which provided that submarines which attacked neutral ships contrary to the rules of the Protocol should be "counter-attacked and, if possible, destroyed."[18] The Council of the League of Nations condemned the attacks as "in violation of the most elementary dictates of humanity underlying the established rules of international law [as set forth in the 1930 London declaration] . . ." and declared "that all attacks of this kind against any merchant vessels are repugnant to the conscience of the civilized nations which now find expression through the Council."[19] Obviously, the parties to the Nyon Agreement and the members of the Council of the League who voted for the Council resolution considered the Protocol to express the governing rule of law.

The Protocol was put to its severest test in World War II. The practices of states in this conflict are dealt with in detail in other papers presented at this symposium[20] and will not be discussed extensively herein except as necessary to serve as a predicate for examining the rules stated in the two post-World War II manuals published by the U.S. Navy. Suffice it to say that in that War the surface ships, aircraft and submarines of both Allied and Axis powers attacked enemy merchant ships (and in some cases neutrals) without warning and without making any effort (in most cases) to make provisions for the safety of the passengers, crews, or ships' papers as required by the Protocol. Both sides justified these practices either on the basis of reprisal (which in itself is an admission that absent the first violation by the other side, the practice is illegal under international law) or on assertions that the other side had incorporated its merchant fleet into the combatant force by mounting offensive weapons on the ships, convoying them, requiring them to report enemy submarine sightings, and ordering them to take offensive action against surfaced submarines (*e.g.*, ramming), thus taking away their character as "merchant" ships within the meaning of the Protocol. These justifications imply that the parties to that conflict regarded the 1936 Protocol as continuing in effect, although not applicable to the circumstances then existing.

But the most significant World War II and post-World War II indication of an international consensus concerning the continuing validity *vel non* of the Protocol is found in the Nuremberg Tribunal's judgement in the case of Admiral Doenitz, who was charged with waging unrestricted submarine warfare in violation of the Protocol. The Tribunal found Doenitz not guilty of conducting unrestricted submarine warfare against *enemy* armed merchant ships but guilty

of sinking *neutral* ships and of failure to carry out the warning and rescue provisions of the Protocol. The Tribunal stated its reason for its not guilty finding as follows:

> Shortly after the outbreak of war the British Admiralty . . . armed its merchant vessels, in many cases convoyed them with armed escort, gave orders to send position reports upon sighting submarines, thus integrating merchant vessels into the warning network of naval intelligence. On 1 October 1939, the British Admiralty announced that British merchant ships had been ordered to ram U-boats if possible.[21]

Even as to its guilty findings, however, the Tribunal declined to assess sentence against Admiral Doenitz "on the ground of his breaches of the international law of submarine warfare" in view of

> all of the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at sight [night?] in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war.[22]

The latter statement by the Tribunal has been interpreted in differing ways with respect to whether the 1936 Protocol remains in effect. One of my Navy colleagues, Alex Kerr, in an article in the *Naval Institute Proceedings* in 1955 stated, "the Protocol is no longer law; its provisions are obsolete; it is defunct."[23] In 1956, in a lecture celebrating the publication of the predecessor to the current *Commander's Handbook*, I took a contrary view. I stated:

> The Court was merely exercising its power to mitigate the sentence in view of its interpretation of the extenuating evidence produced before it. . . . That the court condemned the action of the defendant is made absolutely clear by its findings of guilt. On the other hand, the Court's interpretation of the actions of the British (and American actions under what the Court supposed were similar circumstances in the Pacific) were factors which could be considered by the court in determining a sentence appropriate to the offenses committed by Doenitz. Viewed in this light, therefore, the failure of the court to sentence Doenitz with regard to his breaches of the law of submarine warfare does not in any way detract from the previous findings [of guilty] of the court.[24]

Which of these views is correct? Is the humanitarian law of armed conflict served by continuing statements giving lip service to an aging treaty that remains on the books but has been almost totally ineffective in bringing about the practices it was intended to ensure?

We have no contemporary practice of states with respect to submarine warfare, since submarines have not been used as commerce raiders in any of the

conflicts since World War II. We do have, however, some suggestions from the recent Iraq-Iran Tanker War that states will use whatever means they have available to disrupt an enemy's ocean commerce and will, to a large extent, ignore the rules laid down in the 1936 Protocol.

Both Iran and Iraq depended on the oil trade for economic sustenance during the conflict. Both had a strong desire to curtail the other's ability to sell oil and thus finance the war effort. But the military capabilities and vulnerabilities of the two warring states were different.

From the outset, Iraq had no surface or subsurface warfare capability but did have a capable, if small, air force. Iran had a strong surface warfare capability but a weak air force. Iraq's oil exports were primarily through pipelines, largely inaccessible to Iranian military targeting. Iran's oil exports were carried by merchant tankers through the Persian Gulf, but to all intents and purposes they were immune from any surface threat because Iraq had no viable naval surface forces.

Iraq, early in the war, commenced an air-interdiction campaign against tankers of any nationality carrying Iranian oil. Because of the great distances involved, Iraq used its air force frugally, flying one or two aircraft at a time, low-level, down the western side of the Gulf before turning eastward to attack merchant tankers plying the oil trade with Iran. At a predetermined point, the aircraft would come to altitude, acquire radar contact with a "large naval target" on the Iranian side of Iran's declared exclusion zone and fire missiles. The distance from base and the lack of supporting surface forces, coupled with the inability to loiter, made it impossible for Iraq to follow the 1936 Protocol, if, indeed, the Protocol is applicable to aircraft attacks. In addition, it is arguable that these attacks were indiscriminate, violating one of the most fundamental of the humanitarian rules of armed conflict.

Iranian attacks on merchant shipping on the western side of the Gulf were clearly indiscriminate. Iran frequently attacked merchantmen known to be carrying cargoes neither destined for nor containing exports from Iraq. It seems clear that these attacks were not undertaken as a means of attacking Iraqi merchant vessels, or merchant vessels destined for or leaving Iraq, since there were no Iraqi vessels operating in the Gulf and all sea access to Iraqi ports had been totally curtailed, but rather as a means indirectly to coerce the Gulf states to stop supporting Iraq and through them to pressure Iraq to cease its attacks on tankers serving Iran.

When diplomatic efforts by a number of states failed to stop attacks on neutral vessels by Iran, some "neutral" states, including the United States, resorted to escorting their merchant vessels through the Gulf to and from ports in uninvolved Gulf states. The charges and counter-charges between warring and "neutral" states during this conflict make it difficult, at this early date, to assess

whether the practices that were followed will have any effect in shaping the law of targeting of merchant vessels.

IV. Bridging the Gap

A. The Importance of Manuals

In a paper published in the immediately preceding volume of the Naval War College Blue Book series, Professor Michael Reisman and William K. Lietzau, have stated that military manuals and handbooks on international law have two important functions:

> First, they are the indispensable modality for disseminating normative information to those whose behavior is the target of the norms in question. Second, they are an essential component in the international lawmaking process, often the litmus test of whether a putative prescriptive exercise has produced effective law.[25]

In other words, the *Commander's Handbook* serves not only as the United States government's means of telling naval personnel at all levels of command what rules they will follow in carrying out their military mission but also as a statement of the United States government's interpretation of what the law is or is becoming.

In his seminal book, *Legal Controls of International Conflict*,[26] Professor Julius Stone addressed at length the question of attacks on enemy commerce by submarines and aircraft. He concludes one section of his analysis with the following remarks:

> The immediate task is to regulate the future of naval warfare in which submarines and aircraft will join in the attack on enemy commerce; for it is regrettably clear that no rule purporting to exclude them from this role, however well grounded in humanity, will be brooked. And in any such regulation, the aptness of submarines, aircraft and mines for destroying enemy commerce, their need for surprise and secrecy for effective and safe operation, the importance in modern war of the industrial economy which such destruction undermines, all of these as well as the claims of neutral commerce to immunity, and the demands of humanity, are factors for consideration . . .
>
> 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 enables 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 the 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.

> The resort of British and American forces in the Second World War to "sink at sight" action against merchant ships only underlines the present view. And the consequent refusal of the International Military Tribunal to visit punishment upon Admiral Doenitz for breach of the treaty rules as to submarines, earnestly challenges the publicists of all nations to rethink their positions. *Only thus can some part of the humanity which now enters this sphere on paper only, reenter the field of war practice controlled by law.*[27]

Does the formulation for attacks on merchant vessel, both neutral and enemy, contained in the *Commander's Handbook* reflect this rethinking urged by Professor Stone, or does it merely perpetuate a "paper only" entry of humanity into this field of warfare?

B. The Predecessor Manual (NWIP 10-2)

Before looking in detail at the provisions of the 1987 *Handbook*, it might be appropriate to take a brief look at the *Handbook's* 1955 predecessor, *The Law of Naval Warfare* (NWIP 10-2).[28] This manual's provisions with respect to destruction of enemy merchant vessels prior to capture are contained in one succinct subsection as follows:

> Enemy merchant vessels may be attacked and destroyed, either with or without prior warning, in any of the following circumstances:
>
> 1. Actively resisting visit and search or capture.
>
> 2. Refusing to stop upon being duly summoned.
>
> 3. Sailing under convoy of enemy warships or enemy military aircraft.
>
> 4. If armed, and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy.
>
> 5. If incorporated into, or assisting in any way, the intelligence system of an enemy's armed forces.
>
> 6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces.[29]

It is to be noted that the stated rules make no distinction as to whether the attacking unit is a surface warship, military aircraft of submarine. In a note to this section, it is stated that the rules of the 1936 Protocol are deemed declaratory of customary international law and "have been interpreted as applicable to belligerent military aircraft in their action toward enemy merchant vessels."[30]

In a Naval War College Blue Book written contemporaneously with the publication of NWIP 10-2, which is essentially an exegesis of NWIP 10-2,

Professor Robert W. Tucker, the author of both publications, justifies the section 503b(3) formulation as follows:

> It is believed that this provision does not substantially depart from the requirements of the traditional law, although it does focus attention upon those recent practices of belligerents which serve, and have always served, to deprive belligerent merchant vessels of immunity from attack.[31]

In further explanation of "those recent practices" which serve to deprive belligerent merchant vessels of their immunity from attack, Tucker explains that they were not, as some contended, the arrival of the submarine and aircraft on the scene, with their effectiveness as commerce raiders and their inability to follow the traditional rules of visit, search and capture, but rather the integration of merchant vessels into the military effort of the enemy, thus destroying the assumption upon which the traditional rule was based—*i.e.*, that there was a clear distinction between enemy merchant vessels and enemy warships.[32]

In essence then, the 1955 U.S. naval manual affirmed the continuing validity of the 1936 Protocol but adapted its application to the conditions that might exist in a conflict in which the enemy incorporated its merchant vessels into the military effort, thus essentially converting them into naval auxiliaries. It did not, however, allow submarines any special exemptions based on their particular operational capabilities and limitations or their vulnerabilities when surfaced.

C. Rules Applicable to Surface Warships

The 1987 manual, *The Commander's Handbook*, appears to follow a pattern similar to that of NWIP 10-2, although with some interesting variations. Instead of treating all naval platforms in one section, it divides the rules between three sections, one applicable to surface ships, one to submarines, and one to military aircraft. The provisions applicable to surface ships are found in paragraph 8.2.2.2, entitled "Destruction," which provide in pertinent part:

> Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice of belligerents in World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:
>
> 1. Actively resisting visit and search or capture
>
> 2. Refusing to stop upon being summoned to do so
>
> 3. Sailing under convoy of enemy warships or enemy military aircraft

4. If armed

5. If incorporated into or assisting in any way, the intelligence system of the enemy's armed forces

6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces

7. If integrated into the enemy's warfighting/war sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

The first six of these conditions parallel the conditions set forth in NWIP 10-2. The only departure of substance is the omission in condition 4 of the statement, "and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy." The *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations* explains this departure from the NWIP 10-2 version as follows:

> In light of modern weapons it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively against an enemy or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination.[33]

The seventh condition is new and 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 by or under the exclusive control of the armed forces.[34]

Two comments concerning this statement of the rules applicable to surface warships are appropriate. The first is that the explanatory part of the paragraph justifies the departure from the strict rules of the 1936 Protocol in the first place by advances in technology ("including satellite communications, over-the-horizon weapons, and antiship missile systems") and only secondarily on the customary practice of belligerents that evolved during and following World War II. This justification was specifically eschewed by Tucker in framing the exceptions in the 1955 naval manual. The Annotation does not explain this departure, but it is consistent with Julius Stone's comment, quoted earlier, that the "aptness of submarines, aircraft and mines for destroying enemy commerce" is a factor for consideration in framing regulations for the future of naval warfare.[35]

The second comment is that nowhere in the *Commander's Handbook* is there a statement as to who has the authority to make the determinations required by conditions before destruction may take place. On this latter point, the first two conditions, which are stated in the 1936 Protocol itself, would appear appropriate for determinations by the on-scene commander, whether he is on the surface, in the air or in a submarine. Conditions three and four are capable of objective determination by the on-scene commander in most cases. But conditions five, six and seven are, and more appropriately should be, for determination at the policy level of government and implemented by a service-wide directive.

Finally it would appear that the ultimate effect of the formulation of the rules in paragraph 8.2.2.2 is to apply the London Protocol constraints only in those circumstances in which the enemy merchant vessel is totally defenseless and its destruction without warning offers no clear military advantage to the attacker.

D. Rules Applicable to Submarines

The *Commander's Handbook* treats submarines in paragraph 8.3.1, which states initially that, "[t]he conventional rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of armed conflict." This statement standing alone is perplexing. The real question facing those who must implement the rules is whether the "conventional" law has been so modified by desuetude or the development of superseding customary law that the "conventional" law has been rendered defunct.

The initial sentence does not, however, stand alone. The text goes on to acknowledge that the London Protocol "makes no distinction between submarines and surface warships with respect to the interdiction of enemy merchant shipping." It states further that, "[t]he impracticability of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping." It acknowledges, however, that these practices were justified as reprisals or because the enemy had integrated its merchant marine into its war-fighting/war-sustaining effort. Then, stating explicitly that the rules stated are a synthesis of those contained in the London Protocol of 1936 and "the customary practice of belligerents during and following World War II," the paragraph states that submarines must:

> provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel unless:
>
> 1. The enemy merchant vessel refuses to stop when summoned to do so or otherwise resists capture.

> 2. The enemy merchant vessel is sailing under armed convoy or is itself armed.
>
> 3. The enemy merchant vessel is assisting in any way the enemy's military intelligence system or is acting in any capacity as a naval auxiliary to the enemy's armed forces.
>
> 4. The enemy has integrated its merchant shipping into its war-fighting/war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

The *Annotated Supplement* to this section of the *Commander's Handbook* states that, "[t]hese exceptions are identical to those applicable to surface warfare."[36] If so, why are they listed separately? The *Annotated Supplement* does not explain. In fact, there are minor, but perhaps significant, differences.

The first is in the chapeau to the listing of circumstances authorizing destruction. In paragraph 8.2.2.2, which is applicable to surface warships, the chapeau reads in part that "enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances: . . . ." In paragraph 8.3.1, which is applicable to submarines, the corresponding language reads as follows: "[the applicable law] imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of any enemy merchant vessel unless: . . . ." In the case of surface ships, unless one of the circumstances applies, a surface ship may not attack and destroy. In case of submarines, the right to attack and destroy seems to be assumed, but not without first providing for the safety of crew, passengers and ship's papers. Further, there is no mention in this paragraph of what is meant by providing for the safety of crew, passengers and ship's papers. By referring back to paragraph 8.2.2.2, the commander can find a reference to the 1936 Protocol and its statement that the ship's lifeboats are generally not considered a place of safety, but the amalgamation in the discussion part of the two paragraphs of the rules of the 1936 Protocol and the practices of World War II may leave some doubt in the commander's mind—as it does in mine—as to whether the *Commander's Handbook* intends that the constraints stated in paragraph 8.2.2.2 are equally applicable to submarines.

The second difference between the statement of the rules applicable to submarines and those for surface warships is the omission of "actively resisting visit and search" in the listing of circumstances applicable to submarine attacks. This omission is apparently a tacit admission, not acknowledged in the 1955 Manual (NWIP 10-2), that it is impossible for submarines to carry out the traditional form of visit and search—a fact obvious to naval planners since the integration of the submarine into maritime commerce warfare prior to World

War I but papered over by negotiators who formulated the rules developed at each of the principal naval conferences of 1930 and 1936.[37] The *Commander's Handbook* thus accepts the fact that visit and search will not be attempted by submarines. In light of this omission, it is strange that the listing includes refusal "to stop when summoned to do so or otherwise resists capture." To suggest that a submarine might risk its safety by surfacing and signalling an enemy merchant vessel to stop and then to capture it seems just as unlikely as to expect it to carry out a visit and search. Nevertheless, the removal of any reference to visit and search in the submarine section seems to bring a greater sense of reality to the rules.

Whether this greater sense of reality comports with international law remains unresolved. In the McDougalian frame of reference, it is a "claim" put forth by the United States "which other decision-makers, external to the [United States will] weigh and appraise . . . and ultimately accept or reject."[38] The manuals of other naval powers will provide evidence of whether this "claim" by the United States has been accepted or rejected, but only the crucible of actual conflict, and the outcome thereof, will provide the final test.

E. Rules Applicable to Military Aircraft

Just as in the case of submarines, the rules applicable to military aircraft are formulated separately from those applicable to surface warships. Paragraph 8.4 provides in pertinent part:

> Enemy merchant vessels . . . may be attacked and destroyed by military aircraft only under the following circumstances:
>
> 1. When refusing to comply with directions from the intercepting aircraft.
>
> 2. When assisting in any way the enemy's military intelligence system or acting in any capacity as auxiliaries to the enemy's armed forces.
>
> 3. When sailing under convoy of enemy warships, escorted by enemy military aircraft, or armed.
>
> 4. When otherwise integrated into the enemy's warfighting or war-sustaining effort.

Neither the text of the *Commander's Handbook* itself nor the *Annotated Supplement* indicates the derivation of the rules made applicable to aircraft attacks on enemy merchant ships.[39] The 1936 Protocol does not apply, and no other explicit conventional rules exist. Some publicists have suggested that the 1936 Protocol rules are a part of customary international law applicable to aircraft, but the basis for such a conclusion certainly cannot be found in the practices of

belligerents in World War II. The authors of the *Commander's Handbook* seem to have applied the humanitarian considerations underlying the 1936 Protocol, as well as the basic principles of humanitarian law concerning the distinctions between military objectives and civilians, to derive a set of rules similar to those applicable to surface ships and submarines.

The basic rules are similar, with modifications made necessary by the limitations inherent in aircraft. The inability to visit and search or to capture is recognized. For conditions depending on resistance to these actions, the *Commander's Handbook* substitutes refusal to comply with directions from the intercepting aircraft. The rules do not mandate an obligation to provide for the safety of passengers and crew, this being a practical impossibility, although a subsequent paragraph does require, "[t]o the extent that military exigencies permit," that the aircraft search for survivors and report their location to units that might be capable of rendering assistance.

Of the four conditions which allow for attack by aircraft, the last three are essentially a restatement of conditions three through six applicable to surface ships. The reasons for the variation in wording and arrangement are not apparent. As in the case of attacks by surface ships, whether a particular merchant ship has been integrated into the enemy's war-fighting or war-sustaining effort is a question which seems beyond the competence of the on-scene commander and should be addressed at the national level. Whether the vessel is under convoy, refuses to comply with the directions of the aircraft, or is armed may be the subject of individual determination at the scene, but the aircraft may subject itself to substantial risk in determining whether its target is armed before making its attack.

Just as in the case of surface ships, the conditions stated are conditions precedent to attack. Unlike the situation with submarines, the right to attack is not assumed.

V. Assessment

Any of today's navies that attempt to prescribe rules for conduct of sea warfare against commerce face the same dilemma that faced the authors of *The Commander's Handbook* in trying to walk a fine line between the conventional law as set forth in the 1936 Protocol and the actual practices of states that occurred in World War II and subsequent conflicts. The 1936 Protocol is still on the books, and has not been renounced nor formally repudiated by any state that is a party to it. The practices of all parties that took part in World War II bore no resemblance to those required by the Protocol. But these practices were justified not by repudiation of the Protocol but rather by justifications that purportedly rendered it inapplicable to the particular circumstances under which the conflict was carried out. The rationale for the Nuremberg Tribunal's acquittal of Admiral

Doenitz of the charge of unrestricted submarine warfare against enemy merchant fleets gives further credibility to the claim that the 1936 Protocol was not defunct but was merely inapplicable.

The *Commander's Handbook* seems to accept the continued viability of the 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. Recent practice in those few instances of post-World War II conflicts in which the warring states carried on commerce warfare would seem to justify that conclusion.

Notes

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1. For example, some generally accepted principles of war are:

(1) Objective: every military undertaking must have a clearly defined objective and all activity must contribute to that goal;

(2) Concentration (Mass): concentrate superior forces at the decisive place and time and in the proper direction to sustain superiority;

(3) Economy of force: use no more—or less—effort than necessary to achieve the objective;

(4) Surprise: create unexpected situations to achieve maximum object from minimum expenditure of effort;

(5) Unity of effort: focus all efforts on a common goal or objective.

Applying these principles of war, interdicting the enemy merchant supply effort can easily be seen to contribute to the general prosecution of a war effort.

2. The usual special circumstance was the impossibility or extreme inconvenience of sending the prize into port for adjudication. Robert W. Tucker, *The Law of War and Neutrality at Sea*, at 56, 106 (1957).

3. *Id.*

4. One agenda item proposed the prohibition of submarine warfare altogether, but the conference could not agree on the proposal. *See* The Proceedings of the Hague Peace Conference: The Conference of 1899, at 367-68 and *passim* (James B. Scott ed., 1920). At that time the submarine was viewed as a coastal defense platform rather than as a commerce destroyer on the high seas.

5. The Hague, October 18, 1907 [hereinafter Hague Convention VI], *reprinted in* The Laws of Armed Conflict: a Collection of Conventions, Resolutions and Other Documents 791-96, (Dietrich Schindler & Jiri Toman eds., 3rd ed. 1988).

6. The Hague, October 18, 1907 [hereinafter Hague Convention VII], *reprinted in* Schindler & Toman, *supra* note 5, at 797-802. The United States is not a party to this Convention.

7. The Hague, October 18, 1907 [hereinafter Hague Convention XI], *reprinted in* Schindler & Toman, *supra* note 5, at 819-24.

8. The Hague, October 18, 1907 [hereinafter Hague Convention XIII], *reprinted in* Schindler & Toman, *supra* note 5, at 951-96.

9. Proceedings of the International Naval Conference, held in London, December 1908-February 1909, Declaration Concerning the Laws of Naval War 381-393 (1909) (French Language) [hereinafter London Declaration], *reprinted in* English in Schindler & Toman, *supra* note 5, at 845-56. There were no ratifications of this Declaration and it did not enter into force.

10. London Declaration, *supra* note 9, at art. 49.

11. Conference on the Limitation of Armaments, November 12, 1921 - February 6, 1922, Treaty Relating to the Use of Submarines and Noxious Gases in Warfare 1605-11 (1922) [hereinafter 1922 Washington Treaty], *reprinted in* Schindler & Toman, *supra* note 5, at 877-79.

12. *Id.* at article 4. Article 3 declared:

> that any person in the service of any Power who shall violate any of [the rules concerning attacks on neutrals and noncombatants at sea], 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 and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

Although this provision has been interpreted by some as equating violation of the rules to piracy, the negotiating history of the provision makes it clear that the intent of the provision was to create universal jurisdiction over the offenses as is the case for piracy. *See* Howard S. Levie, *Submarine Warfare: With Emphasis on the 1936 London Protocol*, *herein at* 28.

13. Treaty for the Limitation and Reduction of Naval Armaments, art. 22, *reprinted in* Schindler & Toman, *supra* note 5, at 881-82.

14. *Id.* at article 22.

15. *Supra* note 5, article 23.

16. Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth In Part IV of the Treaty of London of 22 April 1930, 173 League of Nations Treaty-Series 353-57 (1936), *reprinted in* Schindler & Toman, *supra* note 5, at 883-85.

17. *See*, Howard S. Levie, *supra* note 12; L.F.E. Goldie, *herein at* 2; Sally V. Mallison & W. Thomas Mallison, *herein at* 87, George Walker, *herein at* 121.

18. The Nyon Agreement, September 14, 1937, 181 L.N.T.S. 137-152, *reprinted in* Schindler & Toman, *supra* note 5, at 887-90.

19. League of Nations, Council Document c. 467.1937.VII, Official Journal, December 1937, at 944-45.

20. *See especially* the paper presented by Sally V. Mallison & W. Thomas Mallison, *The Naval Practices of Belligerents in World War II: Legal Criteria and Developments*, *herein at* 87.

21. International Military Tribunal, 22 Trial of the Major War Criminals 558. It is interesting to note recent decisions by the U.S. Department of Defense and Veterans Administration which determined that members of the U.S. Merchant Marine who served during the period December 7, 1941, to August 15, 1945, constituted active military service in the Armed Forces of the United States for purposes of all laws administered by the Veterans Administration. *See* 53 Fed. Reg. 92, 16,875-76 (May 12, 1988).

22. International Military Tribunal, 22 Trial of the Major War Criminals, *supra* note 21, at 559. There is some dispute as to whether the phrase "sunk at night" should read "sunk at sight." Marjorie Whiteman in her Digest, cites documents concluding that the phrase "sunk at night" is correct. *See* 10 Marjorie M. Whiteman, Digest of International Law 663-64 (1968), *citing* letter from the Assistant Registrar of the International Court of Justice (Aquarone) to the Second Secretary of the American Embassy at The Hague (Heyniger) (Oct. 22, 1962), enclosed in letter from the Counselor of the American Embassy at The Hague (De Palma) to Assistant Legal Adviser Whiteman, (Nov. 2, 1962), (MS. Department of State, file 360/11-262).

23. Alex Kerr, *International Law and the Future of Submarine Warfare*, 81 U.S. Nav. Inst. Proc. 1110 (October 1955). In his paper prepared for this symposium, Professor Howard Levie summarizes the conflicting views on the continuing efficacy of the 1936 Protocol. *See* Levie, *supra* note 12, at note 171 and accompanying text; *see also* Mallison & Mallison, *supra* note 20, at 99 *et.seq.*

24. Horace B. Robertson, Jr., *Submarine Warfare*, JAG J. 3, 8 (November 1956).

25. W. Michael Reisman & William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, 64 The Law of Naval Operations 1 (Horace B. Robertson Jr. ed., 1991).

26. Julius Stone, Legal Controls of International Conflict (2d imp., 1959).

27. *Id.* at 606-07 (Emphasis supplied; footnotes omitted). Unfortunately, Professor Stone gives no suggestions as to how this can be done.

28. U.S. Department of the Navy, Law of Naval Warfare (NWIP 10-2) (1955), *reprinted in* Appendix in Tucker, *supra* note 2, at 357-422.

29. *Id.* at sec. 503b(3).

30. *Supra* note 22.

31. Robert W. Tucker, *supra* note 2, at 70 n. 54.

32. *Id.* at 68-69.

33. U.S. Department of the Navy, Office of the Judge Advocate General, Annotated Supplement to The Commander's Handbook on the Law of Naval Operations (NWP 9) (Rev. A) FMFM 1-10 (1989) [hereinafter

Annotated Supplement] par. 8.2.2.2, n. 49 (1989). One wonders if, without any criteria to determine whether a vessel is "armed," even the carrying of small arms could be used as justification for attacking an enemy merchant vessel without warning.

34. *Id.* n. 51 and n. 52, *citing* W. Thomas Mallison, Studies in the Law of Naval Warfare: Submarines in General and Limited War 123 (1966). The note in the Annotated Supplement adds that "[a]lthough the term war-sustaining is not subject to precise definition, 'effort' that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term." *Id.* This appears to be a substantial broadening of objects of direct attack with a consequent narrowing of persons and objects who are not subject to direct attack.

35. *See* Stone, *supra* note 26.

36. Annotated Supplement, *supra* note 33, annotation to par. 8.3.1, at n. 75.

37. The 1922 Conference did not paper over the issue but met it head on by explicitly prohibiting the use of submarines as commerce destroyers. *See supra* note 13 and accompanying text.

38. Myres S. McDougal, *The Hydrogen Bomb Tests*, 49 Am. J. Int'l L. 356, 357 (July 1955).

39. It is interesting to note that the U.S. Air Force manual covers air attacks on enemy merchant ships in a historical context, noting the traditional rules limiting action to capture and prize proceedings except under special circumstances. It then states: "[t]he extent to which this traditional immunity of merchant vessels, still formally recognized, will be observed in practice in future conflicts will depend upon the nature of the conflict, its intensity, the parties to the conflict and various geographical, political and military factors." It then concludes by quoting verbatim paragraph 503(b)(3) of NWIP 10-2. Department of the Air Force, Air Force Pamphlet 110-31: International Law—The Conduct of Armed Conflict and Air Operations (APP 110-31) par. 4-4c (1976).