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THE LAW OF WAR AND NEUTRALITY AT SEA

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III. THE NAVAL FORCES OF BELLIGERENTS

A. THE NAVAL FORCES OF BELLIGERENTS ACCORDING TO THE TRADITIONAL LAW

In warfare at sea it is important to be able to identify clearly the naval forces of belligerents. The reason for this is that many of the rules regulating inter-belligerent and neutral-belligerent relations are dependent for their operation upon the possibility of distinguishing between combatants and non-combatants. Only the naval forces of a belligerent are permitted to conduct offensive operations against an enemy. In addition, the treatment accorded to a belligerent vessel depends, in the first place, upon whether or not the vessel forms a part of the belligerent's naval forces. Whereas the naval vessels of a belligerent are subject to attack and destruction on sight, enemy merchant vessels are normally exempt from such treatment. Whereas title to a vessel in the military service of an enemy immediately vests in the government of the captor by virtue of the fact of capture, title to an enemy merchant vessel normally depends upon adjudication by a prize court. So also may the treatment of personnel taken from enemy vessels differ, depending upon the status of the vessel. Finally, the traditional rules governing neutral-belligerent relations in naval war presuppose throughout the possibility of distinguishing between the naval forces of belligerent and belligerent merchant vessels.[1]

Although the naval forces of states comprise vessels, aircraft and personnel, the warship remains the main combatant unit in warfare at sea and therefore forms the principal object of inquiry.[2] While there is no multilateral convention that directly defines a warship, Hague Convention VII (1907), by enumerating the conditions that must be satisfied in order to convert a merchant vessel into a warship, indirectly defined the latter. In this Convention a vessel in order to qualify as a warship must be placed under the direct authority, immediate control, and the responsibility of the power whose flag it flies; it must bear the external marks distinguishing the warships of the state under whose authority it acts; the commander of the ves-

[1] See pp. 56 ff.

[2] To this extent, a discussion of lawful combatants in naval warfare differs from a similar discussion in relation to land warfare where attention is directed primarily toward determining the status of personnel. As a general rule, in naval warfare the combatant status of the vessel is sufficient to determine the combatant status of the personnel on board the vessel. This is equally true for aircraft, the combatant status of the vessel being extended to aircraft carried on board.

sel must be in the service of the state, duly commissioned, and listed among the officers of the fighting fleet; the crew must be subject to naval discipline; and the vessel must observe in its operation the laws and customs of war. In principle, these criteria may still be regarded as furnishing the distinctive features of warships.[3]

Included among the commissioned naval forces of states are many vessels that are neither heavily armed nor capable, in fact, of carrying out offensive operations against an enemy. The suggestion has occasionally been put forward that such vessels ought not to be subject to the same treatment meted out to heavily armed warships.[4] However, the practice of states has not been to consider these naval vessels as possessing a status essentially different from the status of naval vessels whose primary purpose is to conduct offensive operations.[5] It is the fact of being duly commissioned as a naval vessel, hence being *legally competent* to exercise belligerent rights at sea, that is the decisive consideration, and not the fact that many naval vessels may be only lightly armed or perhaps altogether without offensive armament.[6] A consequence of this incorporation into the naval forces of a belligerent, and the attending legal competence to exercise belligerent rights, is the liability to attack and destruction on sight.

Thus commissioned naval vessels, commanded by commissioned naval officers and flying the naval ensign, which serve either to transport the armed forces of belligerents or to perform various auxiliary services to fighting vessels (i. e., supply tenders, colliers, etc.) are subject, in principle, to the same treatment as naval vessels whose purpose is to conduct offensive operations at sea. To this extent, at least, it would appear misleading to distinguish between the "combatant" and "non-combatant" naval forces

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[3] See *Law of Naval Warfare*, Section 500c. Among writers the following statement may be considered to be representative: "The essential features of a warship are that her commander holds a commission from his state, the ship flies the flag of the navy which in many countries is different from that of the merchant marine, and the officers and crew are under naval discipline." Higgins and Colombos, *The International Law of the Sea*, (2nd ed. rev. by C. John Colombos, 1951), p. 350.

[4] C. C. Hyde, for example, states that "the public belligerent ship which is impotent to fight through lack of armament should not be dealt with as though it were a dreadnought. Hence there appears to be need of a fresh classification differentiating the fighting from the non-fighting public vessels of a belligerent, in case at least it be acknowledged that both are not to be treated alike by an enemy." *International Law, Chiefly As Interpreted and Applied By The United States* (2nd. rev. ed., 1945), Vol. 3, p. 1920.

[5] A similar position is taken by Professor Guggenheim (*op. cit.*, p. 326), who points out that as long as a vessel makes up a part of the naval forces of a belligerent, in the sense described in the text above, it is immaterial whether or not the vessel is armed in the regular manner of warships.

[6] Exception must be made, of course, for naval hospital vessels and cartel vessels, which bear a special status. Although included within the naval forces of belligerents, neither of these categories of vessels is legally capable of exercising belligerent rights at sea, and the unlawful exercise of belligerent rights serves to deprive hospital and cartel vessels of the special protection otherwise guaranteed to them. See pp. 96–8, 126–8.

of belligerents.[7] Whatever differentiation in treatment is to be given to these two categories of naval vessels must instead be attributed to the rule obligating belligerents to apply only that degree of force required for the submission of the enemy.[8]

A special problem concerns the conversion of merchant vessels into warships. In both World Wars the naval belligerents freely resorted to the practice of converting merchant vessels into warships. So long as such conversion was effected within the jurisdiction of the belligerent resorting to conversion (or within the jurisdiction of Allies) and the converted vessel fulfilled the requirements stipulated in Hague Convention VII (1907), requirements which have already been summarized, there was no serious disposition to challenge the right of converting merchant vessels into warships. But neither Hague Convention VII (1907) nor subsequent practice succeeded in settling the question as to whether merchant vessels may be converted on the high seas.[9]

Although the legitimacy of converting merchant vessels into warships must be considered as well established, it has been contended that to permit conversion revives, in fact if not in law, the centuries old practice of privateering, a practice formally abolished by the Declaration of Paris of 1856. There is much to be said for this view.[10] It is quite true that the control

[7] Frequently, however, this distinction results from the fact that belligerents employ vessels in order to perform auxiliary services to combatant naval units though without formally incorporating such vessels into the naval forces. Vessels so serving belligerent forces may retain their private ownership and merely serve under charter to the belligerents for the purposes of the war. On the other hand, they may be owned by the government. In any event, unless commissioned as naval vessels they are not competent to exercise belligerent rights at sea. Thus the term "fleet auxiliaries" must be used with caution, since it may refer to vessels formally incorporated into the naval forces of a belligerent, and therefore competent to exercise belligerent rights, and those not formally incorporated. Neither the fact that both categories of vessels perform essentially similar services nor the fact that both categories are *subject to the same liabilities* if encountered by an enemy (i. e., attack and destruction) should serve to obscure this distinction.

[8] See pp. 46–50.

[9] Conversion within neutral jurisdiction being clearly prohibited. In practice, however, the question as to whether merchant vessels may be converted on the high seas did not prove to be too significant a controversy in either World War. Far more important has been the dispute over the status of vessels that have not been openly converted, but that have been "defensively" armed and subjected to a considerable measure of state control (see pp. 58 ff.). A further unsettled point concerns the legality of reconversion as well as the place where reconversion may take place, if permitted.

[10] E. g., Stone asks whether Hague Convention VII (1907) was not "an abrogation *pro tanto* of the rule of the Declaration of Paris which abolished privateering. Analytically . . . Hague Convention No. 7 contains no such abrogation. Yet it seems idle to blink the fact that functionally the Convention sanctions the use of merchantmen to fill gaps in regular navies formerly filled by the privateers." *op. cit.*, p. 576. These views echo the opinions of earlier writers. On the other hand, Oppenheim-Lauterpacht declares that: "The opinion . . . that by permitting the conversion of merchantmen into men-of-war privateering had been revived, is unfounded, for the rules of Convention VII in no way abrogated the rule of the Declaration of Paris that privateering is and remains abolished." *op. cit.*, p. 265.

belligerents now exercise over converted merchant vessels, and the disappearance of the motive of personal gain, has served to remove some of the most undesirable features that were characteristic of privateering. Yet it seems equally true that widespread resort to conversion serves to fulfill in large measure the principal function formerly accomplished through the use of privateers. Through the conversion of merchant ships a weak naval power hopes to compensate for its weakness in much the same manner that weak naval powers in the past compensated for their weakness by the use of privateers. In view of the disparity that will usually exist between a regular warship and a converted merchant vessel, the principal use of the latter must be—and in practice has been—confined to forays against enemy merchant shipping. Rather than utilize his warships for the protection of merchant shipping, the belligerent against whom such converted merchant vessels operate will resort to the defensive arming of his merchant vessels. In this manner the widespread use by belligerents of converted merchant vessels has been one factor, in addition to the submarine and aircraft, that has served to lead to the present unsettled status of the distinction between combatants and non-combatants in naval warfare.

B. THE PROBLEM TODAY

The preceding considerations have dealt with the identifying characteristics of naval forces, characteristics which are well established by the customary practices of states. Vessels possessing these characteristics are competent to exercise belligerent rights at sea, are subject to attack and destruction at sight by the military forces of an enemy, and are obligated to observe certain restrictions when in neutral territorial waters and ports.[11] Recent developments, however, have served to cast considerable doubt upon the adequacy of the characteristics established by the traditional law for identifying the naval forces of belligerents. The criticism is increasingly made that the traditional law, and the formal requirements laid down by this law, are no longer entirely appropriate given the circumstances under which the two World Wars were fought. More specifically, it has been held that the traditional law fails to include within the naval forces of belligerents many vessels which constitute at present an integral part of a belligerent's military effort at sea.

This criticism undoubtedly warrants the most serious consideration. Despite the obvious importance of being able to identify clearly the naval forces of belligerents the task has never proven easy. The traditional law attempted to resolve some of the difficulties involved in making this identification by drawing a distinction between those vessels competent to exercise belligerent rights and those vessels not so competent but whose behavior might nevertheless result in liability to the same treatment as belligerent warships. Competence to exercise belligerent rights, as already

[11] See pp. 219–45 for a discussion of such restrictions.

noted, is vested by the traditional law only in those vessels that are formally incorporated into the naval forces of a belligerent, that are commanded by a commissioned naval officer and manned by a crew submitted to naval discipline, and that fly the naval ensign. On the other hand, any merchant vessel—including the merchant vessels of neutral states—could become liable to the same treatment as belligerent warships, such liability following from the performance of certain acts. Thus a merchant vessel actively resisting visit and search or performing certain acts of direct assistance to the military operations of a belligerent has always been considered as subjecting itself to attack and possible destruction.[12] Nevertheless, this liability of merchant vessels did not warrant their being considered as bearing the same legal status as the naval forces of belligerents. In particular, the subjection of merchant vessels to treatment similar to that meted out to belligerent warships did not, for that reason, serve to confer upon such vessels the rights which belonged only to warships.

The utility of this distinction admittedly has been substantially reduced today when belligerents either own and operate directly all vessels engaged in trade or submit the activities of privately owned vessels to far reaching controls. The traditional law necessarily assumed that the occasions in which privately owned and operated vessels would become liable to the same treatment as warships would be limited in number. Perhaps equally important was the assumption that this liability of merchant vessels would follow—when it did occur—as the result of acts freely undertaken by the owners of private vessels. These assumptions are valid only to a very limited extent at present, and it is with their gradual disappearance during the two World Wars that the principal difficulty involved in identifying the naval forces of belligerents is intimately related. The "defensive" arming of belligerent merchant vessels at the direction and expense of the state, the manning of defensive armament by naval gun crews, sailing under convoy of warships, and the incorporation of merchant vessels into the intelligence system of the belligerent, have become common practices.

It may, of course, be argued that despite this ever increasing control exercised over merchant vessels, that despite this growing integration of merchant vessels with the military forces of a belligerent, the legal status of merchant vessels—whether publicly or privately owned—remains essentially unchanged so long as such vessels do not satisfy the strict requirements of warships as established by the traditional law.[13] The accuracy

[12] See pp. 56–7, 67–70, 319–22, 336–7.

[13] In one opinion of the American-German Mixed Claims Commission, established after World War I, adjudicating claims for compensation of losses suffered through the destruction of ships by Germany or her allies, the following conclusion was reached: "Neither (a) the arming for defensive purposes of a merchantman, nor (b) the manning of such armament by a naval gun crew, nor (c) her routing by the Navy Department of the United States for the purpose of avoiding the enemy, nor (d) the following by the civilian master of such merchantman of instructions given by the Navy Department for the defense of the ship when attacked by or

of this contention must be found, however, largely in the identification of "legal status" with the competence to exercise belligerent rights at sea. It cannot prejudice the possible conclusion that this lack of competence to exercise belligerent rights does not—at the same time—also serve to confer upon merchant vessels continued exemption from the liability of commissioned naval vessels to attack and possible destruction.[14] It should further be observed that if the principal purpose of restricting the legal status of naval forces to those vessels possessing the characteristics of warships as established by the traditional law is to preserve the distinction between combatants and non-combatants in naval warfare this purpose is not being well served. For the apparent effect of retaining the traditional requirements in a period when merchant vessels are increasingly integrated into the military effort of belligerents is to deprive such vessels of the immunities of non-combatants while at the same time denying them the full rights conferred upon combatants in warfare at sea.

C. AERIAL FORCES IN WARFARE AT SEA

It is hardly possible to assert that the identifying characteristics of combatant forces in aerial warfare has as yet been resolved in a definitive manner. In the absence of international convention regulating this aspect of aerial warfare such regulation as does exist must be based either upon an application to aerial warfare of the rules identifying legitimate combatants in naval or land warfare or upon the actual practices of belligerents in the conduct of aerial warfare. Both of these possibilities involve certain difficulties. The practices of belligerents during World War II were not always uniform, and even where a marked degree of uniformity was apparent doubt may remain as to whether so short a practice is to be considered as satisfying the requirements of customary law.[15] The application "by analogy" of the requirements lawful combatants must meet either in naval or land warfare is objectionable if only for the reason that aerial warfare is a distinct form of waging war, which cannot be easily assimilated to the older forms of warfare. The differences existing between land and naval warfare with respect to the identification of legitimate combatants

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in danger of attack by the enemy, nor (e) her seeking the protection of a convoy and submitting herself to naval instructions as to route and operation for the purpose of avoiding the enemy, nor all of these combined will suffice to impress such merchantman with a military character." At the same time, however, the Commission expressly disclaimed passing judgment upon whether any of the conditions enumerated above entitled Germany, according to the existing rules of international law, to attack and destroy allied merchant vessels. *U. S. Naval War College, International Law Decisions and Notes, 1923*, pp. 189–90, 214.

[14] See pp. 55–70 for a detailed discussion of the conditions under which belligerent merchant vessels may be attacked and destroyed either with or without prior warning.

[15] See pp. 27 ff.

should constitute a warning against attempts to apply to aerial warfare rules operative to troops on land or to vessels at sea.[16]

In this study the problem of identifying legitimate combatants in aerial warfare is limited to aircraft which either make up a part of the naval forces of belligerents or which participate in operations of a naval character. In the light of this qualification and of the relevant practices of World War II the following tentative conclusions may be drawn. In principle, the characteristics considered essential to qualify a vessel to exercise belligerent rights at sea have been applied to the conduct of aerial warfare as well. During World War II there was a general disposition on the part of the belligerents to consider as entitled to exercise belligerent rights only those aircraft that were incorporated into the military forces of the state, that were commanded and manned by military personnel, and that showed such marking as would clearly indicate nationality and military character.[17]

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[16] Thus an element of uncertainty remains as to whether in naval warfare the identifying characteristics of lawful combatants should attach to the aircraft (as in naval warfare to the vessel), to the personnel manning the aircraft (as in land warfare to troops), or to both aircraft and personnel. J. M. Spaight, *Air Power and War Rights* (3rd. ed., 1947), pp. 76 ff., contends that in aerial warfare combatant identification must be primarily attached to the aircraft, that aircraft are obligated to use the military markings of their state, and that personnel are not required to wear a uniform (identity tokens being sufficient to establish combatant status). It is apparent that Spaight considers aerial warfare to resemble, in this respect at least, naval warfare. Stone (*op. cit.*, p. 612), on the other hand, questions these conclusions, and while admitting that practice to date suggests an "inchoate prohibition" against the use of false markings by aircraft, asserts that the details of any clear prohibition to this effect have yet to emerge.

[17] See *Law of Naval Warfare*, Section 500d.—For a review of World War II practices regarding combatant quality in aerial warfare, see Spaight, *op. cit.*, pp. 76–107.—Articles 13 and 14 of the unratified 1923 Rules of Aerial Warfare, drafted by the Commission of Jurists at The Hague, stated that: "Belligerent aircraft are alone entitled to exercise belligerent rights . . . A military aircraft shall be under the command of a person duly commissioned or enlisted in the military service of the State; the crew must be exclusively military." The General Report on these provisions of the 1923 Rules declared that: "Belligerent rights at sea can now only be exercised by units under the direct authority, immediate control and responsibility of the State. This same principle should apply to aerial warfare. Belligerent rights should therefore only be exercised by military aircraft . . . Operations of war involve the responsibility of the State. Units of the fighting forces must, therefore, be under the direct control of persons responsible to the State. For the same reason the crew must be exclusively military in order that they may be subject to military discipline." *U. S. Naval War College, International Law Documents, 1924*, p. 114.