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FOREWORD

The International Law Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. Work on this, the sixty-fifth volume of that series, began in the midst of a decade of turmoil in the Persian Gulf. During that time, the targeting of merchant shipping by both Iran and Iraq raised anew questions about the rules regarding targeting of merchant shipping and current viability of those rules in the international community.

This volume consists of papers written for and presented at a recent Naval War College-sponsored Symposium on the Law of Naval Warfare: Targeting Enemy Merchant Shipping. The papers collected in this volume are the work of seventeen of the world’s most highly respected authorities in the field. The principal papers analyze different aspects of the targeting issue, while the commentaries provide critical analyses of those complex and topically important assessments and conclusions. The result is a thorough and well-balanced discussion of targeting issues regarding enemy merchant shipping. While the opinions expressed in this volume are those of the individual authors and not necessarily those of the United States Navy nor the Naval War College, they collectively provide a valuable contribution to the study and development of the law of naval warfare. On behalf of the Secretary of the Navy, the Chief of Naval Operations and Commandant of the Marine Corps, I extend to the editor, Professor R. J. Grunawalt, and the contributing authors of this informative and provocative work our gratitude and thanks.

Joseph C. Strasser
Rear Admiral, U.S. Navy
President, Naval War College

PREFACE

In February 1990, the Naval War College, with the generous support of the Naval War College Foundation, hosted a symposium on the Law of Naval Warfare. The 3-day symposium addressed the legality of targeting enemy merchant shipping during armed conflict and the subsidiary issue of whether the 1936 London Protocol continues to have efficacy as an international commitment for those States party to it. The symposium brought together legal scholars, government officials and operational commanders from the United States, the United Kingdom, Canada, the Netherlands and Germany in a scholarly but free-wheeling examination of this contentious problem. The product of that examination, in the form of the principal papers and supporting written commentaries delivered during the symposium, has been preserved and is presented here as Volume 65 in the 'Blue Book' series.

The first day of the symposium, with Professor John Norton Moore serving as moderator, provided an overview of law and practice pertaining to targeting enemy merchant vessels followed by an in-depth analysis of the origins and purposes of the 1936 London Protocol. The actual practice of belligerents during World War II, and the Nuremberg response thereto, completed the first day's work. The second day of the symposium, moderated by Professor Michael Reisman, began with a review of state practice since the end of World War II, followed by a review of targeting realities in the modern context from the special vantage point of the operational commander, and by an analysis of the strategic imperatives of economic warfare at sea into the 21st Century. The third and final day of the symposium, under the direction of moderator Dr. Robert Wood, examined current U.S. policy on targeting enemy merchant shipping from the perspective of conventional law and state practice.

The central focus throughout the symposium was the following prescription of the 1936 London Protocol:

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 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.

The belligerents of World War II initially sought to conduct commerce raiding in a manner consistent with the Protocol. As the war progressed and merchant vessels were regularly armed and convoyed, participated in intelligence

collection, and were otherwise incorporated directly or indirectly into the enemy's war effort, they were widely regarded as legitimate military targets subject to destruction on sight. By war's end, little, if any, attempt was made by the belligerents of either side to comply with the Protocol. However, the 1936 London Protocol remains "on the books," not having been rescinded nor formally repudiated. It is in this context that the ongoing debate is framed. Is the Protocol still viable? Are enemy merchant platforms "civilian objects" and therefore immune from attack? Or do they constitute an integral part of the enemy's lines of communication, supply and support, subject to destruction without warning as lawful objects of attack?

Professor L.F.E. Goldie's opening presentation proved to be representative of the extraordinary scholarship that was to characterize the substantive work of the symposium. As the principal paper of Chapter I, Professor Goldie's analysis provides an 'overview' of law and practice respecting the targeting of enemy merchant shipping. Noting that total economic warfare at sea, fought with modern weapons platforms such as the nuclear-powered attack submarine and supersonic strike aircraft, renders long-cherished principles of humanitarian armed conflict effectively, if not legally, obsolete, Professor Goldie argues that in more limited conflict there remains a place for the concept of distinction in targeting and for "fellowship of the sea" during naval warfare as exemplified by Lord Nelson at Trafalger.

Session Two of the symposium, and Chapter II of this volume, address the law of submarine warfare with emphasis on the influence of the London Protocol of 1936 on the targeting of merchant shipping by submarines during World War II. Professor Howard S. Levie, the author of the principal paper of Chapter II, provides a concise analysis of the evolution of the submarine into a highly effective instrument of modern warfare, and of the attempts of the international community to define its proper role under the law. Professor Levie traces this development through World War I, describes the failed attempts by Great Britain following that conflict to outlaw the submarine as a commerce raider, and analyzes the antecedents to, and substance of, the 1936 London Protocol. He then examines the practices of the belligerents during World War II, the findings of the International Military Tribunal at Nuremberg, and contemporary views of the maritime powers, particularly the United States, as expressed in modern military manuals. Professor Levie's conclusions as to the continued efficacy of the mandate of the London Protocol, that enemy merchant shipping may not be destroyed unless the safety of passengers, crew and ship's papers are first assured, set the framework for the learned - and spirited - debate of the symposium participants.

Formal comments on Professor Levie's paper were delivered during the Second Session by Professors A.V. Lowe and Dieter Fleck. Professor Lowe's assessment of the development of the 1936 London Protocol provides a British

perspective of that process. His insightful observation that arms limitation agreements, such as the London Protocol, have peacetime implications for procurement, the development of strategy and tactics, and training that may overshadow their impact on the rules of the game, gives pause for thought in the contemporary context. The jettisoning by belligerents of both sides during World War II of the requirements of the London Protocol in the face of the reality of total warfare at sea, demonstrates Professor Lowe's further observation that no arms limitation agreement should be expected to survive the historic context in which it was negotiated.

Professor Fleck's commentary provides a German perspective of the nature and continuing efficacy of the London Protocol. Professor Fleck argues that the Protocol was not intended to apply in circumstances where compliance would place an attacking warship, surface or submarine, in immediate peril. Consequently, state practice during World War II did not, in his view, constitute a wholesale departure from its prescriptions. Professor Fleck argues, therefore, that the protection of civilians and civilian objects articulated in the London Protocol continues to accord with contemporary rules of humanitarian warfare at sea.

Chapter III comprises the principal paper and commentaries presented during the Third Session of the symposium. In the principal paper, the authors, Professor W.T. and Sally V. Mallison, examine the practices of the belligerents at sea during World War II and analyze the legal criteria applicable at the onset of that conflict, as well as the development of those criteria as the war progressed. The Mallisons trace the origins of the London Protocol of 1936 and, in doing so, contend that a contextual interpretation of its provisions makes it clear that the Protocol's protections were not intended to extend to merchant vessels participating in the enemy's warfighting or war sustaining effort. Given the 'normatively ambiguous' nature of the prescriptions of the London Protocol, the Mallisons argue that the practice of the belligerents of World War II cannot be said to have departed from its mandates as significantly as has generally been suggested.

Professor Mark Janis, while applauding the 'mission' of the Mallisons' analysis, argues in his commentary that their "restrictive interpretation of merchant shipping" is in error. Professor Janis contends that if it is true, as the Mallisons suggest, that in modern warfare virtually all enemy merchant shipping "participates" in the enemy's war-effort, the Protocol is robbed of its substance, a conclusion he is not willing to accept. Professor Janis states that he is of the view that the Protocol is in the nature of "soft" international law that was widely disregarded during World War II because it could not be effectively applied.

Commander W.J. Fenrick's commentary concludes that the analysis of the London Protocol provided in the Mallisons' paper is 'quite persuasive.' Commander Fenrick, a serving Canadian officer, argues that if "the law of naval warfare is to have an impact on the conduct of warfare, there should be a crude

congruence between law and practice so that it is marginal, extreme conduct which is condemned, not activities which are routine operations of war.”

The Fourth Session of the symposium addressed state practice regarding targeting enemy merchant shipping since World War II. Professor George Walker's principal paper provides a comprehensive analysis of the practice of belligerents during the Korean conflict, the Chinese civil war, the Arab-Israeli conflicts, the India-Pakistan wars, the Vietnam War, the Falklands/Malvinas War, and the Iran-Iraq Tanker War. In addition, Professor Walker examines the evolution of treaty law during the period as well as the development of military manuals among the nations possessing significant naval capability. For U.S. readers, his commentary on U.S. Naval Warfare Publication (NWP) 9, *The Commander's Handbook on the Law of Naval Operations*, is particularly useful. Professor Walker concludes his presentation with an illuminating discussion of the on-going sponsorship by the International Institute of Humanitarian Law of a series of conferences at which international participants are examining naval warfare issues including those pertaining to the targeting of enemy merchant shipping.

Professor L.C. Green's commentary on Professor Walker's principal paper completes Chapter IV of this volume. Professor Green, *inter alia*, cautions that applying rules of law developed for “one dimension of activity” - *e.g.*, land warfare - to another - *e.g.*, naval warfare - ought to be undertaken with great circumspection. Accordingly, drawing analogues for targeting enemy merchant shipping from rules designed for specific application on land - *e.g.*, Protocol I Additional to the Geneva Conventions of 1949 - or at sea during time of peace - *e.g.*, the 1982 United Nations Convention on the Law of the Sea -, Professor Green argues, are best avoided unless they are so general as to have obvious application irrespective of the area or the circumstances in question.

Chapter V provides an analysis of the military realities of naval targeting in the modern era from the perspective of the operational commander. VADM James Service, USN (Ret.) provides the principal paper entitled “Targeting Realities: Platforms, Weapons Systems and Capabilities.” Noting that targeting enemy merchant shipping will remain a major objective of warfare at sea for the foreseeable future, VADM Service argues that the London Protocol of 1936, if literally interpreted, “would unacceptably put at risk all of my forces, decrease the probability of success for my assigned mission and unnecessarily prolong the conflict.” VADM J.M. Doyle, Jr., USN (Ret.) contributed to Session Five of the symposium with a commentary on and expansion of VADM Service's assessment of the impact of technological advancements on the targeting equation. VADM Doyle stresses the importance of target discrimination in modern warfare at sea, particularly with the advent and proliferation of over-the-horizon weapon systems. Noting that in limited warfare national rules of engagement will likely constrain the operational commander more than will the

law of armed conflict, VADM Doyle argues that the law itself must be sufficiently flexible to permit targeting of enemy merchant shipping if and when the need arises. To that end, "reassessment or fresh interpretation of the London Protocol of 1936" may be required.

Session Six of the symposium examined the strategic imperatives of economic warfare at sea. Professor Hugh Lynch provides the principal paper for Chapter VI of this volume in which he explores that theme in the context of a global conventional war between superpowers and in the more likely scenario of limited conflict between nations other than superpowers. Addressing his subject from the perspective of a military strategist and "practitioner of the operational art at sea," Professor Lynch maintains that the foremost challenge to international law respecting economic warfare in the maritime environment is "keeping abreast of technological change."

Professor Harry Almond provides a comprehensive commentary on Professor Lynch's paper. Professor Almond postulates that economic warfare, as a concept, must be functional if it is to be useful. He argues that "whether perceived as a strategy by policy . . . makers . . . or by . . . naval forces acting in the operational dimension of hostilities, economic warfare is judged under legal standards of reasonableness and effectiveness." Professor Almond agrees that technological change drives change in tactics, which in turn determines how economic warfare is actually conducted in the crucible of armed conflict at sea. These precedents will, over time, lead to continuing change and refinement in the law. Nonetheless, he reminds us that economic warfare at sea is but a subset of economic warfare in general. Strategies adopted to strangle an opponent's capability to sustain his warfighting effort will dictate not only the intensity but the duration of the conflict. Economic warfare at sea will continue to evolve as that calculus changes to accommodate emerging technology and adjustments of community norms or "tolerances." Professor Almond concludes that the precepts of law regulating economic war in the maritime dimension will necessarily, and properly, remain "emerging" law.

The Seventh and concluding session of the symposium focused on current United States policy respecting the targeting of enemy merchant shipping. Professor H.B. Robertson's principal paper for this topic assessed the success of that policy in terms of its utility as an acceptable bridge between conventional law, as articulated in the London Protocol of 1936 and state practice during, and subsequent to, World War II. Professor Robertson's paper, together with commentaries of Professor Fritz Kalshoven and Captain Ashley Roach thereon, comprise Chapter VII of this volume.

Professor Robertson's analysis of U.S. policy in this arena is premised on his scholarly review of *The Commander's Handbook on the Law of Naval Operations*. Noting that the *Handbook* seeks to "walk a fine line between the conventional law as set forth in the 1936 Protocol and the actual practice of states that occurred

in World War II and subsequent conflicts,” Professor Robertson concludes that the U.S. policy of acceptance of the continued viability of the Protocol, while at the same time holding it to be inapplicable in most circumstances, is justified.

Professor Frits Kalshoven, representing a Dutch view on the targeting of enemy merchant shipping, applauds the 1987 publication of the *Handbook* as a “welcome event.” He takes exception, however, to the statement therein that an enemy merchant ship which contributes to the enemy’s war effort constitutes a legitimate military objective. Fearing that criterion is too “permissive,” he would limit use of the concept of contribution to the war effort as a separate ground for attack to circumstances where it is shown that the enemy state exercises complete and effective control over a platform being used to transport “items essential to the war effort.” While generally accepting the U.S. view that the security of the attacking force and mission accomplishment are valid considerations in determining whether an enemy merchant platform may be attacked without first providing for the safety of passengers and crew, Professor Kalshoven warns that such concerns must be balanced with humanitarian values else they degenerate into a “license to kill.”

Captain Ashley Roach, in his commentary on Professor Robertson’s paper, maintains that civilian objects, which by definition are immune from intentional attack, lose that immunity and become legitimate military objectives when “by their nature, location, purpose or use they effectively contribute to the enemy’s war-fighting or war-sustaining capability and when their total or partial destruction . . . would constitute a definite military advantage to an attacker.” He then argues that the circumstances listed in the *Handbook* as to when enemy merchant shipping may be attacked without warning are consistent with those criteria. Accordingly, he finds U.S. policy on this issue, as expressed in the *Handbook*, to be a “reasonable and realistic balance.” With respect to the question of the London Protocol’s construed viability, Captain Roach argues that it “has not lapsed into desuetude, but must be understood to be not applicable across the board as some would have it.”

The spirited debate over the current state of the Law of Naval Warfare respecting the targetability of enemy merchant shipping generated in the course of the symposium, as reflected in the principal papers and commentaries reproduced in this volume, provide the serious reader, whether international lawyer, governmental official or operational commander, with a solid intellectual framework upon which to address this issue.

I would like to add my voice to that of the President of the Naval War College in thanking the authors for their contributions to this volume and to the advancement of the study of the Law of Naval Warfare. I would also like to recognize the contribution of all of the participants of the symposium – legal scholars, military strategists, operational commanders and policy makers – for

their role in ensuring the success of the symposium from whence the papers reproduced here were derived.

Richard J. Grunawalt
Director, Oceans Law and Policy Department
Center for Naval Warfare Studies
Naval War College