VERÖFFENTLICHUNGEN
DES INSTITUTS FÜR INTERNATIONALES RECHT
AN DER UNIVERSITÄT KIEL

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The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare

Report

to the Committee for the Protection of Human Life
in Armed Conflict of the International Society
for Military Law and Law of War

by

Dr. iur. Elmar Rauch LL.M.

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Prefatory Note

The Bureau of the International Society of Military Law and Law of War, during its meeting in The Hague (24—27 March 1983), recommended that the next International Congress take place in Garmisch-Partenkirchen and that the Committee for the Protection of Human Life in Armed Conflict inscribe the Law of the Sea and the Law of Naval Warfare on its agenda. The Board of Directors of the Society unanimously approved these recommendations at the meeting in Dublin (30 June — 3 July 1983).

Scholarly preparation of the Congress should commence early in order to enable all interested participants to familiarize themselves with the problems to be discussed. I submit this paper with the desire of contributing to the scientific success of the first International Congress of Military Law and Law of War to be held on German soil. The views expressed herein embody only my own personal reflections and should not be taken as the official position of the German Government or the Ministry of Defense. Neither, of course, do these views necessarily represent the position of the International Society for Military Law and Law of War or the Committee for the Protection of Human Life in Armed Conflict.

With the conclusion of the CDDH and UNCLOS III, the Law of Naval Warfare is a particularly suitable subject for an enlightening exchange of views within the framework of an international congress devoted to the Law of War.

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Abbreviations

AFDI	=	Annuaire Française de Droit International
AJIL	=	American Journal of International Law
BGBl	=	Bundesgesetzblatt
BYIL	=	British Yearbook of International Law
CCD	=	Conference of the Committee on Disarmament
CDDH	=	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts
DEIS	=	US Navy Draft Environmental Impact Statement
DJZ	=	Deutsche Juristenzeitung
DRK	=	Deutsches Rotes Kreuz
EEZ	=	Exclusive Economic Zone
GYIL	=	German Yearbook of International Law
ICJ	=	International Court of Justice
ICRC	=	International Committee of the Red Cross
ILC	=	International Law Commission
ILM	=	International Legal Materials
LNTS	=	League of Nations Treaty Series
LOS	=	Law of the Sea
MPB	=	Marine Pollution Bulletin
PCIJ	=	Permanent Court of International Justice
RdC	=	Recueil des Cours (of the Academy for International Law, The Hague)
RDPMDG	=	Revue de Droit Pénal Militaire et de Droit de la Guerre
RGBl	=	Reichsgesetzblatt
RGDIP	=	Revue Générale de Droit International Public
SIPRI	=	Stockholm International Peace Research Institute
UN	=	United Nations
UNCLOS	=	United Nations Conference on the Law of the Sea
UNLS	=	United Nations Legislative Series
UNTS	=	United Nations Treaty Series
USNIP	=	United States Naval Institute Proceedings
USTS	=	United States Treaty Series
YILC	=	Yearbook of the International Law Commission
ZaöRV	=	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZVR	=	Zeitschrift für Völkerrecht

I. Introduction

With the exception of the Seabed Arms Control Treaty of 1971,[1] which in any event primarily is an arms control treaty rather than a treaty on naval warfare, the most recent instrument governing the conduct of naval warfare is almost half a century old. Even this instrument, the London Protocol of 1936 relating to restrictions on submarine warfare,[2] proved to be a dead letter during World War II. Its provisions were so completely disregarded by all belligerents that despite the irrefutable evidence, even the International Military Tribunal at Nuremberg refused to hand down a sentence against the two German admirals who had built, trained and commanded the German U-boat arm.[3]

In his 1952 article "The Problem of the Revision of the Law of War", Professor *Hersch Lauterpacht* rightly deplored the vanishing of certain aspects of the law of naval warfare, which had drawn their strength from the traditional distinction between combatants and non-combatants, military objectives and civilian objects, military needs and civilian needs. With respect to the law of contraband, the law of blockade, and the rules relating to attacks upon merchant vessels on the high seas, *Lauterpacht* wrote: "If the practice followed by both sides to the conflict is evidence of the legal position, then the traditional law on the subject, derived as it was from the notion of a legally relevant distinction between military and civilian needs, no longer exists ... In view of this there can be no question here of legal arguments drawn from the obsolete armoury of the past. The possibility must be envisaged that total war has irrevocably removed the foundations of a substantial part of this branch of the law and that juristic — or even political — efforts to give them a new lease of life may be in vain."[4] *Lauterpacht's* treatise is remarkably balanced for an Anglo-Saxon scholar, because the evaluation includes the law of contraband and the law of blockade. He thus avoids any one-sided indictment focussing exclusively on the naval operations of the Axis Powers during World War II.

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[1] *Joachim Hinz/Elmar Rauch*, Kriegsvölkerrecht, 3rd ed., Köln/Berlin/Bonn/München 1984, No. 1514; BGBl 1972 II, 38.

[2] LNTS vol. 173 (1936—1937), 353; *Hinz/Rauch* (note 1), No. 1532.

[3] See, Judgment of the International Military Tribunal (Nuremberg) of 1 October 1946, AJIL vol. 41 (1947), 172—333 (304, 305, 308).

[4] BYIL vol. XXIX (1952), 360—382.

What *Hersch Lauterpacht* could not imagine seven years after the end of World War II has actually happened 25 years later. On 10 June 1977 the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (CDDH) adopted a Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I).[5] As far as the combat provisions of this new treaty instrument are concerned, the basic cornerstone is precisely the revival of the distinction between civilians and combatants, civilian objects and military objectives. The examination of the effects of this new instrument on the law of naval warfare will be the focal point of this paper. Unfortunately, this is a rather difficult task precisely because of the chaotic status of the law of naval warfare which has prevailed since World War I.

Apart from some isolated cases decided during the Crimean War, the American Civil War, and the Russo-Japanese War, the law of naval warfare, including the law of prize, was a set of rules which had developed through the centuries up to the Napoleonic wars. The Declaration of Paris, signed 16 April 1856,[6] as well as the six Conventions on the Law of Naval Warfare and on the Law of Neutrality in Naval War, adopted at the Second Hague Peace Conference on 18 October 1907,[7] and the Declaration of London concerning the Law of Maritime War, signed 26 February 1909,[8] were all codifications of customary rules which had developed during the era of sail. At the outbreak of hostilities in 1914, all parties to the conflict encountered the same difficulties, namely that the traditional rules of naval warfare had become unrealistic. The introduction of new methods and means of warfare and new ways of international communication and transport had brought about tremendous changes of kind. All belligerents in the „Great War" tried more or less faithfully to adapt the generally recognized rules of law to the new circumstances they were facing. As will be shown in detail later, the Entente Powers gradually did away with the customary rules on contraband control and blockade, while the Central Powers pondered the question of which traditional rules were applicable to their highly effective new weapon, the submarine torpedo

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[5] The text of Protocol I is reproduced in *Hinz/Rauch* (note 1), No. 1570; AJIL vol. 72 (1978), 457—502; ILM vol. 16 (1977), 1391—1441; ZaöRV vol. 38 (1978), 86—146.

[6] *Hinz/Rauch* (note 1), No. 1525; Preußische Gesetzessammlung 1856, 585.

[7] *Hinz/Rauch* (note 1), Nos. 1526—1530, 1537; RGBl 1910, 181 *et seq.*

[8] *Hinz/Rauch* (note 1), No. 1531. The authentic English text of the London Declaration of 1909 along with extremely interesting *travaux préparatoires* is published in: *James Brown Scott* (ed.), The Declaration of London, February 26, 1909, Oxford 1919.

boat. In each instance the belligerents decided in favour of what they considered to be military necessity. The Entente Powers felt justified to abolish the distinction between absolute and conditional contraband and to introduce the so-called long distance blockade in order to starve the civilian population of the enemy. The Central Powers, by the same token, considered the submarine, which had no facilities for the accommodation of crews and passengers of enemy merchant ships or neutral blockade runners, as a completely new weapon; commanders were consequently considered not subject to the rules designed for surface ships and could attack and destroy vessels in a duly proclaimed war zone without warning and without making provision for the survival of crews and passengers. Both approaches were tantamount to a complete disregard for any distinction between civilians and combatants. The ambiguity of the law under these circumstances provided an excellent opportunity for reciprocal propaganda and reprisals.

Aside from propaganda and politics, the treatment of foodstuffs as unconditional contraband and the establishment of long-distance blockades by the Entente Powers on the one hand, and the unrestricted submarine warfare waged by the Central Powers on the other created serious legal problems. Had these real-world legal problems been comprehensively analyzed, both by scholars and politicians, in the post-war-era, a significant contribution might have been made to the progressive development in the law of naval warfare; this opportunity was nevertheless wasted. The victorious Entente Powers had so successfully availed themselves of the ambiguities and grey areas of the law of naval warfare to justify their own actions that they were not interested at all in a reaffirmation and development of the pertinent rules. What they were interested in was only to outlaw the effective use of the one and only new means of naval warfare that had been used to the advantage of the Central Powers, *i. e.* the submarine. The first agreement for this purpose was the Washington Naval Treaty, signed 6 February 1922,[9] which contained stringent restrictions on the employment of submarines in naval warfare so as to prevent their use as commerce destroyers. This treaty never entered into force. The next step was the London Naval Treaty of 22 April 1930,[10] which included further restrictions on the use of submarines. These latter restrictions were subsequently incorporated into the London Protocol of 6 November 1936, mentioned above.[11]

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[9] United States of America, Statutes at Large vol. 46, No. 2858; USTS, No. 830, Washington 1931.

[10] British Parliamentary Papers (1930), Command Paper 3758.

[11] See, *supra*, note 2.