

The Ethics of War and the Law of the Sea

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The Song of the Sea

*Let me sing unto the Lord for He surged, O surged –
Horse and its rider He hurled into the sea*

*Pharaoh's chariots and his force
He pitched into the sea
and the pick of his captains
Were drowned in the Reed Sea.*

*The depths did cover them over,
Down they went in the deep like a stone.*

Exodus 15: 1, 4, & 5¹

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It is customary in Jewish synagogues to stand during the reading of only two portions of the Torah – the Song of the Sea (*Shirat HaYam*) in Exodus and the Ten Commandments. The tradition of standing while chanting the Song of the Sea is explained by Rabbis as a reminder to honor the dead – even the dead of our enemies. The Song of the Sea is one of the oldest parts of the Torah, written in archaic Hebrew, and presented as poetry on Torah scrolls (as shown above).

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¹ *R. Alter*, *The Hebrew Bible*, Vol. 1, *The Five Books of Moses*, Torah, 2019.

I. *Ralph Goodman* and the Lure of the Sea

In 1914, my grandfather *Ralph Goodman* took an assumed name (“*Dan Goodwin*”, a name that his older brother, a prizefighter, used in the boxing ring) and at the age of fifteen went to sea on the *SS Corea*. After three trips between the United States (US) and England serving as a mess boy, *Ralph* was hired as an able seaman on the White Star Line’s *SS Georgic*.

On 1.12.1916, then seventeen-year-old *Ralph* departed Philadelphia bound for Liverpool with a cargo of 1,200 horses; 10,000 barrels of oil; and a shipment of wheat. On December 10, when the *SS Georgic* was 590 miles south-east of Newfoundland, she was intercepted by the German merchant raider *SMS Möwe*.

The following is *Ralph Goodman*’s recitation of these events (as reported in the New York Herald):²

“On Sunday, December 10, I came down off duty and went into the galley, asking the cook for something to warm me up. I was nearly frozen from my turn in the crow’s nest. It was Sunday and so we were waiting for the plum duff, which is the English sailor’s delight – the White Star liners are English boats – when –

Crash! The report of a cannon and the ship trembled a little. We sat around stunned and stupid for a moment, and then everybody broke for the deck. There, off to port, not more than one hundred yards away, was a ship – a long, rakish, black ship, with the Imperial German eagle flying from her black masthead. She was racing alongside us just as easy as if she could sail around us three times in a circle without half trying. She was the notorious German raider *SMS Möwe*.

I was rushed over the side by frantic men. I grabbed a rope and managed to reach the Jacob’s ladder. I was going down, rung after rung, when some fool heeled my fingers with one boot and stepped on my head with the other. Down I went. Splash! Ooh, that water was bitter cold. Believe me, I was glad I had learned to swim off the docks of little old New York.

A German life-boat was pulling toward us, the seamen grunting as they bent to their oars. I was dragged on board like a drowned terrier. Somebody gave me a drink. It burned like Third Avenue whiskey, but it warmed me up, despite my clothes freezing about me. Next thing I knew we were on board the German raider, and we were being herded below.”

² Reprinted in: Thrills of War – But the Tragedy of Peace, *The Literary Digest*, Vol. 59, 28.12.1918, 88.

All the horses drowned, but my grandfather survived the sinking of the *SS Georgic* during December 1916 in the frigid North Atlantic. My family owes a debt of gratitude to the courage of the German sailors who risked their lives to rescue my grandfather and over one hundred other shipwrecked British and American sailors. What those German sailors did in December 1916 was a testament both to their fortitude and to the law of the sea, which required them to undertake this rescue effort.

May the memory of those sailors from 1916 (German, British, and American) be a blessing.

II. The Law of the Sea Leading Up to the First World War

The law of the sea regarding merchant vessels began with informal “cruiser rules” that developed during the 17th century.³ The cruiser rule of interest to this paper states that the merchant ships of an opposing power can be seized as prizes, but when doing so a naval vessel had to take all necessary steps for the safety of the prize crew.

The obligation to rescue shipwrecked sailors has been a formal part of the law of the sea since the adoption of the Hague Convention at the Second Hague Conference in 1907,⁴ which focused on naval warfare. Art. 16(1) of that Convention states:

“After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.”⁵

III. The Law of the Sea Leading Up to the Second World War

In 1930, the London Naval Treaty was adopted.⁶ Art. 22, sometimes called the “cruiser rule”, states that the following are accepted rules of international law:

³ A. Gillespie, *A History of the Laws of War*, Vol. 1, 2011.

⁴ See Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Art. 16, 18.10.1907, 36 Stat. 2371, available at <<https://www.loc.gov>> (last visited 26.1.2020).

⁵ Hague Convention (X) (note 4).

⁶ Treaty for the Limitation and Reduction of Naval Armament (hereinafter London Naval Treaty), 22.4.1930, 46 Stat. 2858, available at <<https://www.loc.gov>> (last visited 23.1.2020).

“(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 [...].”⁷

The Second London Naval Treaty adopted the Naval Protocol of 1936 (the Protocol)⁸ and re-confirmed Art. 22,⁹ which was in effect at the outbreak of the Second World War.

IV. The War Crimes Trial at Nuremberg on the Law of the Sea

At the Nuremberg War Crimes trial of 1946, Admiral *Karl Dönitz* was charged with the war crime of waging unrestricted submarine warfare contrary to the Protocol.¹⁰ *Dönitz* insisted that the German Navy had not vio-

⁷ London Naval Treaty (note 6), Art. 22.

⁸ Treaty for the Limitation of Naval Armament (hereinafter Second London Naval Treaty), 18.5.1936, 50 Stat. 1363, available at <<https://www.loc.gov>> (last visited 23.1.2020).

⁹ Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22.4.1930, 173 L.N.T.S. 353, entered into force 6.11.1936, available at <<https://ihl-databases.icrc.org>> (last visited 26.1.2020), (“The Powers which have signed the abortive Treaty of Washington of 1922 relating to the use of Submarines and Noxious Gases in Warfare, concluded the Treaty of London for the Limitation and Reduction of Naval Armaments of 22 April 1930. Article 22 deals with the use of submarines in warfare. It was laid down in the Treaty that this Article – being declaratory of international law – should remain in force without limit of time (Article 23). Accordingly, when the Treaty of 1930 expired on 31 December 1936, Article 22 remained in force. However, in view of the last paragraph of Article 22, which states that the Contracting Parties invite all others Powers to express their assent to the rules embodied in this Article, a procès-verbal was signed on 6 November 1936 which incorporates verbatim the provisions of Article 22 of the Treaty of 1930. A considerable number of States acceded to this procès-verbal.”).

¹⁰ Nuremberg Trial Proceedings (hereinafter Trial), Vol. 1, Indictment, The Avalon Project at Yale Law School, <<https://avalon.law.yale.edu>> (last visited 26.1.2020), (“The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics [...] hereby accuse as guilty [...] of Crimes against Peace, War Crimes, and Crimes against Humanity, and of a Common Plan or Conspiracy to commit those Crimes, all as defined in the Charter of the Tribunal, and accordingly name as defendants in this cause and as indicted on the counts hereinafter set out [...] KARL Doenitz [...].”); Judgment of the International Military Tribunal for the Trial of German Major War Criminal, Judgment: *Dönitz* (hereinafter *Dönitz* Judgment), The Avalon Project at Yale Law School, <<https://avalon.law.yale.edu>> (last visited 20.1.2020) (“*Doenitz* is charged

lated the Protocol when he ordered his submarines to attack merchant ships that sailed in convoy, that refused to stop, or that used their radio upon sighting a submarine.¹¹

On 17.10.1939, *Dönitz* also ordered his submarines to attack all enemy merchant ships without warning on the ground that resistance was to be expected.¹² The Nuremberg Tribunal did not hold *Dönitz* in violation of the Protocol for his conduct of submarine warfare against British armed merchant ships.¹³ However, *Dönitz*'s order to sink neutral ships without warning when found in "operational" zones was determined by the Tribunal to be a violation of the Protocol.¹⁴

The prosecution also asserted that *Dönitz* had ordered the killing of survivors of shipwrecked vessels, but the Tribunal failed to find evidence that clearly established *Dönitz* had ordered these killings.¹⁵ However, the Tribunal did find that the orders in question were ambiguous and deserved the strongest censure.¹⁶

The prosecution finally argued that *Dönitz* had ordered his submarines not to carry out rescue operations.¹⁷ The defense responded that the security of the submarine is paramount to rescue and that rapid development of aircraft made rescue impossible.¹⁸ The Tribunal found that though this

with waging unrestricted submarine warfare contrary to the Naval Protocol of 1936 to which Germany acceded, and which reaffirmed the rules of submarine warfare laid down in the London Naval Agreement of 1930.").

¹¹ *Dönitz* Judgment (note 10), ("[*Dönitz*] testified that when the war began, the guide to submarine warfare was the German Prize Ordinance taken almost literally from the Protocol, that pursuant to the German view, he ordered submarines to attack all merchant ships in convoy, and all that refused to stop or used their radio upon sighting a submarine.").

¹² See, e.g., Trial (note 10), Vol. 13, 10.5.1946, The Avalon Project at Yale Law School, <<https://avalon.law.yale.edu>> (last visited 16.1.2020), (*Dönitz* testifying that in "the beginning of October" he "received the order or the permission [...] to sink armed merchantmen" and that "[f]rom that moment on" he "acted accordingly"); Trial (note 10), 11.5.1946, The Avalon Project at Yale Law School, <<https://avalon.law.yale.edu>> (last visited 16.1.2020), (order, dated 17.10.1939, stating: "Submarines are permitted immediate and full use of armed force against all merchant vessels recognizable with certainty as being of enemy nationality, as in every case attempts to ram or other forms of active resistance may be expected."); Trial (note 10), 13.5.1946, The Avalon Project at Yale Law School, <<https://avalon.law.yale.edu>> (last visited 16.1.2020), (*Kranzbühler* describing 17.10.1939 order as "allowing attacks on all enemy merchant ships with certain exceptions.").

¹³ *Dönitz* Judgment (note 10), ("In the actual circumstances of this case, the Tribunal is not prepared to hold *Doenitz* guilty for his conduct of submarine warfare against British armed merchant ships.").

¹⁴ *Dönitz* Judgment (note 10).

¹⁵ *Dönitz* Judgment (note 10).

¹⁶ *Dönitz* Judgment (note 10).

¹⁷ *Dönitz* Judgment (note 10).

¹⁸ *Dönitz* Judgment (note 10).

might be correct, the Protocol was explicit – if a commander could not rescue shipwrecked sailors, then under the Protocol the commander must not sink the merchant vessel.¹⁹ The Tribunal found that *Dönitz* had therefore violated the rescue provisions of the Protocol.²⁰

Before passing judgement, the Tribunal took judicial notice that the British Admiralty had issued an order dated 8.5.1940, for the sinking of all merchant vessels in the North Sea between Norway and Denmark.²¹ The Tribunal also noted that US Admiral *Chester Nimitz* stated in answers to interrogatories that unrestricted submarine warfare had been waged in the Pacific Ocean by the United States during the Second World War.²² This evidence supported defense claims of *tu quoque* by the British and American navies.

For these reasons, the Tribunal's ultimate finding that *Dönitz* had committed war crimes was not based on his breach of the law of submarine warfare,²³ but rather for other war crimes he had committed (specifically, the "Commando Order"²⁴ and the mistreatment of prisoners of war).²⁵ *Dönitz* was also convicted of crimes against peace by the Tribunal.²⁶

¹⁹ *Dönitz* Judgment (note 10). ("[T]he Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope.")

²⁰ *Dönitz* Judgment (note 10).

²¹ *Dönitz* Judgment (note 10).

²² *Dönitz* Judgment (note 10).

²³ *Dönitz* Judgment (note 10). ("In the actual circumstances of this case, the Tribunal is not prepared to hold *Doenitz* guilty for his conduct of submarine warfare against British armed merchant ships.")

²⁴ *Dönitz* Judgment (note 10). ("*Doenitz* was also charged with responsibility for *Hitler's* Commando Order of 18th October 1942. *Doenitz* admitted he received and knew of the order when he was Flag Officer of U-boats, but disclaimed responsibility. [...]. But *Doenitz* permitted the order to remain in full force when he became commander-in-chief, and to that extent he is responsible.")

²⁵ *Dönitz* Judgment (note 10). ("In a conference of 11th December 1944, *Doenitz* said '12,000 concentration camp prisoners will be employed in the shipyards as additional labour.' [...]. He admits he knew of concentration camps. A man in his position must necessarily have known that citizens of occupied countries in large numbers were confined in the concentration camps.")

²⁶ *Dönitz* Judgment (note 10). ("In the view of the Tribunal, the evidence shows that *Doenitz* was active in waging aggressive war.")

V. The Law of the Sea After the Second World War

In 1949, the Second Geneva Convention was adopted, replacing the Hague Convention (X) of 1907.²⁷ Like its predecessor, the Second Geneva Convention requires all parties to protect and care for the wounded, sick, and shipwrecked. Art. 18 provides, in relevant part:

“After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.”²⁸

Though naval engagements in the 21st century may be carried out hundreds or even thousands of miles distant from the damage that can be inflicted by modern long-range weapons, and though conditions stated in the 1949 Geneva Convention (“take all possible measures”) are slightly different from conditions stated in the 1907 Hague Convention (“so far as military interests permit”), the fundamental obligation under the law of the sea to search for and rescue shipwrecked sailors from seized or sunken merchant vessels during time of war applies today just as it did in December 1916.

²⁷ Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter Second Geneva Convention), 12.8.1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, available at <<https://www.un.org>> (last visited 26.1.2020).

²⁸ Second Geneva Convention (note 27), Art. 18.

