

# GOORANGAI

OCCASIONAL PAPERS OF THE ROYAL AUSTRALIAN NAVAL RESERVE PROFESSIONAL STUDIES PROGRAM

VOLUME 2 – NUMBER 5

APRIL 2007

## BELLIGERENT MARITIME EXCLUSION ZONES

Belligerent maritime exclusion zones are a product of modern naval warfare. They first appeared in the early twentieth century and were made possible by the advent of mine barrages, submarines, aircraft and wireless communications. These technical developments permitted belligerents to exert control over vast areas of ocean to a degree that was hitherto impossible.

Technology not only provided the means, it also provided much of the impetus for naval commanders to implement this measure. This impetus has increased with each new development. In the missile age, when the survival of a warship may depend upon a split second decision, based upon information drawn from electronic sensors rather than visual identification, exclusion zones have a particular appeal as a means of minimising accidental attacks on neutral shipping or as a device to legitimise such occurrences. Developments in the areas of missile weaponry, fast attack craft, stealth craft and high speed military supply vessels, together with the uncertainties arising from asymmetrical warfare, will only accelerate this impetus.

Historical analysis of belligerent maritime exclusion zones, however, reveals that they have been implemented not so much to protect merchant shipping from belligerent acts but rather to restrict sea-borne trade. That is to say, the device has largely been implemented as a means of waging economic warfare.<sup>1</sup>

Yet, despite the repeated resort to this device, the status of belligerent maritime exclusion zones remains uncertain.<sup>2</sup>

### What is a Belligerent Maritime Exclusion Zone?

A belligerent exclusion zone has been defined as 'an area of water and super adjacent airspace in which a party to an armed conflict purports to exercise control and which it denies access to ships and aircraft without permission.'<sup>3</sup>

This feature distinguishes belligerent exclusion zones from the more traditional blockade zones. In blockade zones the risk is that of capture and confiscation. In exclusion zones it is, frequently, the risk of attack on sight.

### Historical Development

Although Japan promulgated twelve 'defensive sea areas' during the Russo-Japanese War (1904-1905), it was not until WWI that the exclusion zone device was first systematised as a means of warfare.

In November 1914 the British Government issued an order declaring the North Sea an exclusion zone. The order emphasised that entry into the area by any vessel without permission would be dangerous because mines had been laid and because warships were searching for the enemy in the area.

On 4 February 1915 the German Admiralty decreed that the waters around Great Britain constituted 'a zone of war' and

that enemy merchant vessels within this zone would be 'destroyed without warning'.

Then, in January 1917, Germany announced that it intended to adopt a policy of unrestricted warfare against all commerce within an expanded war zone.

Although exclusion zones were used by both sides during WWI, they did not win any form of acceptance.



**Figure—1** US outrage at the sinking of RMS Lusitania in the German declared war-zone off Ireland on 7 May 1915. 1,198 of those on board perished. Source: [www.soonerfans.co](http://www.soonerfans.co)

The Commission on the Responsibility of the Authors of War, established under the Versailles Treaty, adopted the language of the Declaration of London (1909) to deprecate 'the destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew.'<sup>4</sup>



Subsequently, the London Protocol (1936) restated Article 22 of the London Naval Treaty (1910) to accord a privileged status to 'merchant ships,' irrespective of their flag or whether they were performing any war sustaining function on behalf of a belligerent state. The Protocol provided that, except in those cases where a merchant ship actively resisted visit and search or capture, or repeatedly refused to stop when summonsed to do so, belligerent attack was prohibited unless preceded by action effectively ensuring the safety of the ship's crew, passengers and papers.

The Protocol made no exception for belligerent exclusion zones. The Protocol remains in force and is still regarded as a basic statement of current international law.

The Second World War also saw belligerents resort to this device. Britain established a small exclusion zone in the Skaggeiak. Within this zone all German ships were subject to un-warned attack by day and all ships by night.

As the war progressed, Germany came to rely, once more, upon an unrestricted anti-shipping campaign within exclusion zones while the US Navy waged a far more successful unrestricted, anti-shipping campaign against the Japanese, declaring the whole Pacific Ocean an exclusion zone.

### The Doenitz Ruling

In 1946 the International Military Tribunal at Nuremberg was forced to consider the legitimacy of these practices when judging Admiral Doenitz who had been charged with waging unrestricted submarine warfare contrary to the Protocol.

The Tribunal found that the 'Naval Control of Shipping' procedures implemented by the British Government had essentially integrated the British merchant fleet into the 'warning network of naval intelligence'. As a consequence of this finding, the Tribunal declined to find Doenitz guilty for waging unrestricted submarine warfare against armed merchant ships.<sup>5</sup>

Unfortunately, the Tribunal failed to unambiguously address the question of whether criminality could be attributed to the sinking of unarmed belligerent or neutral merchant ships that were integrated into the British War effort. Some commentators have argued that the distinction between armed and unarmed merchant ships was irrelevant to the ratio decidendi, noting that the Tribunal exonerated Doenitz from responsibility for attacks on all belligerent merchant vessels incorporated into the war effort. However, this still remains a matter of conjecture.<sup>6</sup>



**Figure 2-** Grand Admiral Karl Doenitz was tried as a major war criminal in 1946. The Doenitz Ruling has left an

ambiguous legacy to international jurisprudence. Source: www.wikipedia.com

Read conservatively, the Tribunal's judgment implicitly accepts the legitimacy of exclusion zones as applied to armed belligerent merchant vessels, but expressly prohibits such zones when they affect unarmed belligerent or neutral merchant vessels. While this is a significant exemption from the prohibition contained in the Protocol, Professor O'Connell, for one, has argued that this exemption can only arise in the context of a general war and does not extend to limited conflicts.<sup>7</sup>

Handicapped by its ambiguous language, the 'Doenitz ruling' has been further diminished by the changing nature of world shipping. Nationally flagged merchant fleets and 'naval control of shipping' [NCS] procedures are now largely anachronistic.<sup>8</sup> What is important, however, is the extent of the merchant vessel's functional incorporation into the belligerent's war effort. Unfortunately, the Tribunal declined to provide any guidance on this issue.

### Falklands/Malvinas War

The Falklands/Malvinas War of 1982 brought the issue of belligerent exclusion zones to the fore as both sides to the conflict promulgated various exclusion zones. Of these zones, the British Total Exclusion Zone (TEZ), declared on 30 April, and the Argentine South Atlantic War Zone, declared on 11 May, appear to contravene the Doenitz ruling as the TEZ subjected all vessels entering the zone, without approval, to attack while the SAWZ subjected all British vessels (including merchant ships, whether integrated into the conflict or not) to attack.

The UK justified these measures by reference to its inherent right of self-defence under Article 51 of the UN Charter while Argentina tended to rely upon the doctrine of 'reprisal'.

The 1958 Geneva Convention of the High Seas and the 1982 United Nations Convention on the Laws of the Sea (UNCLOS) provide little assistance in determining the validity of this device. While UNCLOS notably adopts the concept of 'zones' to facilitate some of its purposes it does not allow for any form of 'war zone'. Article 88 of UNCLOS provides that 'the high seas shall be used for peaceful purposes' but the definition of 'peaceful purposes' does not exclude defensive military uses. Moreover, under Article 87, the freedom of the high seas is expressed to be subject, not only to the provisions of UNCLOS, but also to other rules of international law. This leaves in place the Protocol and the exemption contained in the Doenitz ruling. UNCLOS article 87(2), however, provides that states are required to exercise their rights 'with due regard' for the interests of other states. This latter stipulation imports the requirement of 'reasonableness' into the design and promulgation of any war zone.

### Conclusion

State practice tends to support the proposition that, in a 'general war' an exclusion zone can extend the belligerents' targeting options by legitimising a sink on sight policy directed against vessels in the exclusion zone which are –

- (a) armed enemy merchant vessels (incorporated into their states war effort pursuant to the criteria set out in the Doenitz ruling);
- (b) commercial vessels engaged as enemy naval auxiliaries;
- (c) neutral flagged merchant vessels performing un-neutral service;



- (d) neutral vessels under convoy or escort by a belligerent (but not if convoyed or accompanied by neutral warships); and possibly
- (e) neutral vessels integrated into the intelligence network of a belligerent.

However, an exclusion zone will not permit the adoption of a sink on sight policy by a belligerent directed against:-

- (a) neutral merchant vessels engaged in neutral commerce with non-belligerent states;
- (b) specially exempt vessels (eg hospital ships);
- (c) neutral merchant vessels engaged in neutral commerce with a belligerent state provided that such commerce does not constitute war sustaining commerce to such a degree as to constitute un-neutral service;
- (d) any commercial vessel, whether belligerent or neutral, not engaged in war sustaining activities nor integrated into the war effort (pursuant to the criteria set out in the Doenitz ruling).

As for, *limited conflicts*, apart from those instances where the UN expressly authorises the establishment of exclusion zones, the right to use this measure remains as ill-defined 'as the right of self-defence under article 51 of the UN Charter itself.'<sup>9</sup>

## NOTES

1. see M.G. Fraunces, 'The International Law of Blockade: New Guiding Principles in Contemporary State Practice' (1992) 101 Yale Law Journal, where the author argues that the term 'exclusion zone' is inadequate, as belligerents have most often established these zones to achieve economic interdiction. Additionally, note that during the Iran/Iraq 'Tanker Wars', exclusion zones were used to internationalise the conflict and to crystallize alliances and commercial pacts.

2. see F.C. Leiner, 'Maritime Security Zones: Prohibited Yet Perpetuated' (1984) 24 Virginia Journal of International Law 967-992;

3. W.J. Fenrick, 'The Exclusion Zone Device in Naval Warfare' (1986) 24 Canadian Yearbook of International Law pp. 976-992;

4. quoted in K. Zemanek, 'War Zones' in R. Bernhardt (ed) Encyclopaedia of Public International Law (1982) 337-338;

5. International Military Tribunal, Trial of Major German War Criminals, Nuremberg, 1945-46 Official Proceedings XVIII at 329 and also C. J. Colombos, The International Law of the Sea (6<sup>th</sup> ed) para. 529 at pp. 504-505. Several US Naval commanders, most notably Admirals Thomas Hart and Chester Nimitz, issued statements of support for Doenitz with respect to the charge of unrestricted submarine warfare. It is noteworthy that the USN's campaign of unrestricted submarine warfare against shipping in the Pacific did not develop out of expediency or desperation, as a result of the surprise attack on Pearl Harbour, but had been formulated prior to the outbreak of hostilities.

6. For a summary of current law and a discussion on this point see F. V. Russo, 'Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law' (1988) 19 Ocean Development & International Law 381-388; and see in particular the

arguments advanced by Professor W. Mallison in—Studies in the Law of Naval Warfare: Submarines in General and Limited War, US Naval War College, 58 International Law Studies.

7. D.P. O'Connell, The Influence of the Law on Sea Power (1975) Chapter XII – Operational Zones at p 164-168; For the purposes of the Law of Armed Conflict, general war is tantamount to a total war involving global powers. Limited wars are the more typical wars of recent times.

8. In 1939 only 1.2% of world shipping (measured by GRT) comprised vessels flying flags of convenience, currently more than 60% of the world's merchant fleet is registered under flags of convenience. This trend is accelerating and is particularly pronounced amongst the bulk trades— see Cafruny, A.W.- Ruling the Waves: The Political Economy of International Shipping— (1987) Berkeley University of California

9. C. Michaelsen, 'Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved' Journal of Conflict & Security (2003) Vol 8, No 2, 363-390 at 390.

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Published by: The RANR Professional Studies Program, Office of the Director General Reserves (Navy). The views expressed in this publication are entirely those of the author and do not necessarily represent those of the RAN, The Department of Defence or the Australian Government.

