

## BLOCKADE: EVOLUTION AND EXPECTATION

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### INTRODUCTION

The principles of modern international law recognize the doctrine of blockade as a legitimate option between states in a declared state of war, giving them the right to apply naval power to stop all seaborne commerce with the enemy, including that carried in neutral ships. However, the "legality" of this instrument for exercising national power is a very tenuous matter in the minds of jurists, being circumscribed by a number of significant preconditions, the absence or violation of any of which may void the blockader's claim to legitimate right, and expose him to heated controversy.

The fundamental concept of maritime blockade is an ancient one, and, in its essence, it seems to be fully in harmony with the realities of national existence even in a modern world. However, it is the purpose of this paper to suggest that the precise technical conditions surrounding the modern instrument of blockade have overlaid this fundamental concept with elements which have divorced the doctrine from reality.

The modern doctrine of blockade and the associated principles of contraband have evolved over centuries, remaining basically constant in the principles invoked but continuously changing as to structural details. Thus, there

appears to be a sound basis for considering that the current "legal" definition of the terms and concept of blockade is but the most recent step of an evolutionary process which has not yet arrived at logical maturity.

That the process might shortly be required to respond once more to the stress of international conflict seems apparent. With few exceptions, those modern states having pretensions of becoming international makeweights have sought to establish for themselves a claim to a share in the wealth and prestige resultant from international carrying trade. Even the Soviet Union, long a formidable land power, has begun to make its presence felt in the great competitive arena formed by the world's oceans. Compounding the commercial threat of this seaward expansion by the Soviets, the United States is faced as well with their sponsorship of militant world communism through the new medium of "wars of liberation." It seems superfluous to state that the United States today finds itself in a position analogous to that of insular Britain in the face of Napoleon—a power dependent on sea communication with its allies, its sources of crucial materials, and its markets, opposed by a dedicated and ingenious enemy having central lines of communication. To confine that threat to the limits of continental Europe was the aim of Britain's effort in the 18th

and 19th centuries, while the aim of the United States today must also be to contain the Communist threat within the limits of its existing sphere of influence in Eastern Europe and Asia.

Britain's success against Napoleon was gained largely through her intelligent application of all the devices of seapower available to her, including that of blockade—not a blockade according to rules made by scholars and law clerks, but one governed by rules born of the dictates of necessity and the talents of seamen—a viable doctrine, responsive less to the protests of diplomats than to the realities of the threat to be overcome.

This paper proposes to review in detail the evolutionary process to which the concept of maritime blockade has been subjected in order to point out the historic facility by which nations yield up principle in favor of political reality. Further, it is intended to illustrate that the doctrine of blockade is merely part of a larger scheme which is appropriate for application as an instrument of national power in the complex international society of the current century.

It will not be advocated that the "rule of law" so treasured by our Western society be overthrown in a quest for temporary advantage. It is hoped merely to articulate what is believed to be an existing ground swell of legal and lay opinion that "laws and institutions are constantly tending to gravitate. Like clocks, they must be occasionally cleansed, and wound up, and set to the true time."<sup>1</sup>

## I—FOUNDATION OF THE LAW AND CUSTOM OF BLOCKADE

In ancient times, conflicts between rulers of tribes or the early city-states usually resulted in the involvement of all political entities adjacent to associated military operations. Belligerents, as the active participants became known, always attempted to convert non-

participants into allies; failing in that, it was expected that action could be taken to at least insure that the opposition would not receive the assistance of bystanders. Such action normally resulted in some form of operations against the commerce of the neutrals, as they later came to be known, and such interference was justified on political rather than legal grounds, if indeed it were thought necessary to justify it at all.<sup>2</sup> In those early centuries of human violence, the "style" of warfare was usually that of the siege against the strong points of an enemy rather than general campaigns throughout the countryside. Under such circumstances, little need existed among states to formulate any sort of legal basis for regulating the trade of neutrals with all belligerents, since it was clearly unprofitable for an apolitical neutral to attempt to continue trade with a besieged point when a ready market for his goods existed among the besiegers. On the other hand, neutrals were normally required to continue trade with any accessible belligerent, since "the discontinuance by a neutral of intercourse with either belligerent, where not an effect of the operations taking place . . . seemed . . . so plain a form of alliance with or subservience to, the other . . ."<sup>3</sup> that it was clearly a political act rather than one arguable as a matter of law.

Before it was possible to contemplate legal justification for the continuance or suspension of commerce with a belligerent by a neutral, it was first necessary for the concept of neutrality to become in "some" form a recognized institution of the law of nations, and until the freedom of neutral commerce was in some form guaranteed.<sup>4</sup> This status of authorized impartiality of third states while war raged between others was not formalized and incorporated into the law of nations as the institution of neutrality until the 16th century.<sup>5</sup> Until that time, the principle of land warfare which forbade all forms of intercourse

with besieged places governed. Toward the later portion of the period the growth of international commerce intensified the belief that partial neutrality was unjust, and rules aimed at formalizing the limits of a "just neutrality" began to evolve. The earliest of these rules ended the total interdiction of neutral commerce with besieged places but enjoined neutrals from transporting into such places either armed troops or specified materials which would tend to mitigate the effects of the siege.<sup>6</sup> One author points out that this relaxation was more significant as the establishment of a principle rather than any meaningful authorization to trade, "since places so circumscribed would be very unlikely markets to seek with articles not of some immediate utility to the defense."<sup>7</sup>

Thus, by the 16th century, at least some elementary rules regulating neutral commerce with respect to belligerents existed, although they were derived principally from the experiences of land warfare. It was at this time that the unilateral action of one state, Holland, introduced into the growing stream of international law a new principle, based in part on older precedent. The principle was that of blockade, whereby a belligerent has come to be entitled as a matter of law to cut off the free access of neutral commerce to the ports or coast of an enemy.<sup>8</sup>

In 1584, while at war with the Spanish Netherlands, the Dutch Government issued a proclamation (*placaat*) declaring that all Flanders ports then in the hands of Spain were under siege *from the sea*, and that no commerce would be allowed entry.<sup>9</sup> This pretension was based on the ancient right of a besieger to prevent by all means available the crossing of a line of investment by a neutral and the fact that the Dutch naval forces had considerable power to enforce the declaration on neutrals seeking entry. Significantly, no effort was made to invest these ports with land

forces at the same time, although it was clearly the Dutch intention "to use the right of siege on an unprecedented scale."<sup>10</sup>

The concept of the maritime blockade thus was established at the end of the 16th century, but before any sense of legality could be attached to it, it was necessary for the publicists to begin the process of formalizing the institution by incorporating it into the growing body of writings which we have come to know as the law of nations. The most renowned of the early publicists, Grotius, writing in 1624, obliquely mentions the justification for the closure of ports as distinct from the idea of concurrent siege by land forces in the following terms:

For if I cannot defend myself without intercepting what is sent, necessity . . . will give me the right to intercept it . . . If the introduction of the supplies impeded me in the pursuit of my right, and this was open to the knowledge of the person who introduced them, as if I was [sic] *keeping a town invested, or ports closed*, and a surrender or peace was already looked for, he will be bound to repay me for the damage occasioned by his fault . . .<sup>11</sup> (Emphasis added.)

This early articulation by Grotius is significant for several reasons. First, by the use of the words "keeping a town invested, or ports closed," he seems to imply that he was considering two distinct concepts, one of siege in the traditional sense, and the other of blockade in the more modern sense, although he fails to use the word "blockade."<sup>12</sup> Secondly, the use of the phrase, "and a surrender or peace was already looked for," has been interpreted as indicating an essential difference between actual blockades backed up by real naval strength as opposed to fictitious blockades laid on only by *placaat*.<sup>13</sup> It is exactly this point of

actual versus "paper" blockades that later became so controversial in the evolution of neutral rights at sea, and it is noteworthy to see that this issue was anticipated in the earliest days of the institution. Finally, the statement actually prohibits all commerce with besieged places, since, as noted above, such places would have little interest in goods not helpful in some way to the defense, and all such goods were historically prohibited.

In 1630, with Grotius' formulation only five years old, the Dutch once more desired to apply naval pressure on Flanders, but by this date had not the means to apply this new form of siege to all ports at the same time. Questioning the applicability of blockade under these conditions, and fearing to antagonize the now-neutral England, the Admiralty of Amsterdam was queried for its opinion. The analysis given was summed up by a jurist writing in a later century, and was to the effect that "the rule which obtains in the case of towns, which are properly said to be besieged . . . extends also to the enemy's ports, which when invested by ships, are said to be besieged."<sup>14</sup> Accordingly, the States General announced in a *placaat* dated 9 July 1630, that the Flanders coast was blockaded and that neutral ships found at any distance from Flanders intending to call at those ports would be confiscated. Further, the *placaat* went on to state that ships which succeeded in passing the blockade into Flanders ports would remain subject to confiscation wherever intercepted on the outward voyage.<sup>15</sup> Here, then, is the source document of the modern institution of blockade—all commerce to be cut off, without regard to its status as contraband, with the further claim to vast powers over neutral commerce far removed from the actual place of investment. This pretentious claim by the Dutch did not remain unchallenged, of course. Although the blockade thus established did not last

very long and no records are available as to its results, the swift development of a body of treaties between Holland and various countries beginning with the French in 1646 (all of which rejected the broad principles of the 1630 *placaat*) indicates vigorous neutral diplomatic activity to secure their trade with belligerents.<sup>16</sup> Such activity continues even today.

As the proponents of the institution of blockade, the Dutch continued to figure prominently in its development so long as they remained a significant seapower. Their stewardship of the institution during this era has been characterized by the English jurist Westlake as having been "marked by the widest renunciation of the right to interfere with neutral commerce, the widest actual interference with it when opportunity offered, and the absolute refusal to recognize [the right to] a similar interference with it by others."<sup>17</sup> The Dutch did not remain alone for long, as the changing realities of European power soon brought the rising seapower of England into partnership with them in proclaiming a blockade "of France and all French possessions" after 1689. In this proclamation, both states resurrected completely the spirit of the 1630 Dutch *placaat* by asserting the intention of capturing ships bound for French ports wherever found.<sup>18</sup> This first appearance of England as a blockading power should be marked as some sort of milestone since she continued to occupy that role almost perpetually afterward, rapidly assuming from Dutch hands the responsibility for enforcing and enlarging the doctrine. Additionally, Westlake claims that this event is the probable source of the basis for all English (and consequently American) Prize Law, which, according to repeated Admiralty and U.S. Supreme Court decisions, has been derived from "the received law of nations": i.e., the *placaat* of 1630.<sup>19</sup>

The British, however, did not

vacillate in their application of this new doctrine as had the Dutch. They claimed the right to interdict completely neutral commerce bound for their opponents and in the years immediately following established the British "doctrine of war that, no matter by whom carried, goods for an enemy or belonging to an enemy could legitimately be taken."<sup>20</sup> From this date onward, the history of blockade is largely the history of England and her rise to maritime greatness. When Britannia ruled the waves, one of the most efficient tools of her leadership was the blockade.

## II—BRITISH SEAPOWER AND BLOCKADE

Throughout the 18th century, Europe was in an almost constant state of war, with Britain sometimes a belligerent, sometimes neutral, and sometimes cast in both roles simultaneously.<sup>21</sup> During the period, the crucible of frequent and intensifying war not only permitted the forging of a refined instrument of blockade but forced as well the advancement of naval technology at an accelerated pace. In 1700, fleets generally duplicated the practice of land armies in retiring to winter quarters, leaving only a small force to patrol vital areas. By 1800, large squadrons were able to be constantly at sea, exercising dominion over vast areas of the ocean surfaces by virtue of their presence. Such increased activity "made far more rigorous and oppressive" those British assertions over control of neutral commerce made in earlier years.<sup>22</sup> The growing presence of the Royal Navy at sea was met by ever more vociferous, but generally ineffective, resistance on the part of maritime neutrals toward interference with their claimed rights to trade with any country with which they were at peace.

The turbulence of the age was capped by the cataclysmic struggle

against the French Revolution and Napoleon. A passage by Mahan best describes the situation as it affected neutral states:

In the effort to bring under the yoke of their own policy the commerce of the whole world, the two chief contestants, France and Great Britain, swayed back and forth in deadly grapple over the vast arena, trampling underfoot the rights and interests of the weaker parties; who, whether as neutrals, or as subjects of friendly or allied powers, looked helplessly on, and found that in this great struggle for self-preservation, neither outcries, nor threats, nor despairing submission, availed to lessen the pressure that was gradually crushing out both hope and life.<sup>23</sup>

British practice was especially onerous, as she clung to her contention that blockades were enforceable by far-ranging isolated cruisers, and she frequently declared blockades backed by just sufficient naval force as to permit the barest claim to efficiency. But the real basis of neutral complaint against England was the belief that the British use of the blockade often had the aim, not to deprive an enemy of goods, but to secure for Englishmen the trade thus barred to neutrals. The suspicion appears justified in the light of an observation by Lord Grenville in a letter of 18 February 1806, in which he says:

We have a right to prevent that [trade] which is injurious to us, and may, if we think right, in cases where we think the advantage to ourselves compensates or overbalances the injury; a principle manifest in the case of a siege, where we exclude all the world from intercourse with the town besieged, but carry it on ourselves, whenever we think it beneficial to our interests to do so.<sup>24</sup>

In response to this so-called British system, "the continental powers began to aim only at establishing some rule which should prevent ineffective, and therefore . . . inequitable, blockades."<sup>25</sup> These continental powers advocated another interpretation of the blockade principle which was drawn from their own experience as maritime states more often cast in the role of neutrals rather than belligerents. In their view, blockades could only be legitimate "if there be manifest danger in entering the blockaded port, from the cannon either of ships, stationary and sufficiently near one another, or of works on land."<sup>26</sup> That is, they claimed that the right of the blockading power to interdict non-contraband neutral commerce derived solely from the blockader's ability to control the sea immediately off the port in the same sense that a besieging army could command the land approaches to a town.<sup>27</sup>

Countering this claim, the British insisted that the legality of a blockade was proven if the blockader could "maintain such a force as would be of itself sufficient to enforce the blockade."<sup>28</sup> Additionally, Britain refused to accept any limitation on the geographic placement of the blockading forces or of their numbers. The real danger needed to make a blockade effective, and thus legal, she asserted, could be posed by numbers of individual cruising warships even at great distances from the blockaded coast; and that such cruisers, in keeping with the practice of Holland in earlier years, could capture lawfully even *intended* violators of the blockade. The British position, thus, was identical to that of the Dutch at the time of the 1630 *placaat*, and, as the Mahan quote above indicates, no power or plea could move them from it in the face of the threat from France.

At the same time, however, it was realized in Britain that the maritime balance of the world had begun to shift from European waters, for "a new

power had now arisen on the western shore of the Atlantic, whose position, and maritime spirit, were calculated to give new and vast importance to every question of neutral rights."<sup>29</sup> The early British appreciation of deep American interest in affairs concerning maritime neutral rights was predicated on the announced aims of the newborn Republic from the earliest days of independence.<sup>30</sup> Even the earliest American diplomacy attempted to deal with all aspects of maritime commercial freedom in order to secure for her private traders and national good the benefits of international commerce, but the basic American view of blockade is best represented in the instructions given to the American Minister in London in 1804, which said, in part:

In order to determine what characterizes a blockaded port, that denomination is given only . . . where there is by the disposition of . . . ships stationary or sufficiently near an evident danger in entering.<sup>31</sup>

The fictitious blockades proclaimed by Great Britain, and made the pretext for violating the commerce of neutral nations, has been one of the greatest abuses ever committed on the high seas. . . . The whole scene was a perfect mockery, in which fact was sacrificed to form, and right to power and plunder.<sup>32</sup>

What had been a controversy between Britain and the continental neutrals was now joined by a parallel, but independent, controversy between Britain and America; yet, British determination to uphold her position "became a cornerstone of national policy," and "was considered of such importance in 1812 that . . . we considered the disadvantages of having the United States added to our enemies less than those that would follow from a modification of our code."<sup>33</sup> This intransigence had

its expected result when President Madison "made clear that 'mock blockades' were one of the principal causes of the war" which opened in 1812.<sup>34</sup>

Neither the European settlement at Vienna in 1815 nor the Treaty of Ghent between Britain and the United States late in the preceding year resolved the issues of neutral rights so hotly contested through the previous 25 years. It remained for the next major European war to bring about the conditions under which some degree of reconciliation between the opposing views could be attained. In 1854, the perpetual enemies, continental France and insular Britain, were allies in the Crimean War which opened in that year. If they were to be effective in the joint application of their seapower, it was recognized that some compromise must be struck on their policies toward neutral rights at sea, and a temporary agreement was reached. At the Congress of Paris in 1856, this compromise was enacted into a joint convention among the states present and was promulgated as the Declaration of Paris, in which all maritime powers were invited to join.<sup>35</sup>

The Declaration of Paris represented the first codification of the rules of maritime war which was generally accepted among maritime states. The Declaration consisted of four points of agreement among the powers, of which the first abolished privateering, and the fourth declared the principle that:

Blockades, in order to be binding, must be effective; that is to say, maintained by force sufficient really to prevent access to the coast of the enemy.<sup>36</sup>

Even this enunciation fell far short of complete reconciliation of the differences of the powers, as the language apparently was left deliberately obscure and ambiguous. Britain remained free to interpret "force sufficient really to prevent access" as she might see her interests at the moment. In retrospect, it is clear that the Declaration simply

codified the pragmatic essence of recent experience, and is significant less for its content than for the fact that *any* agreement was possible among the self-seeking states which authored it. It is significant to point out that it was historic British policy and seapower after 1689 which essentially fixed both the form and scope of the Declaration, since the principles set forward either conformed directly with those policies or were generated by the erosion of certain facets of them by decades of neutral resistance.

The broad theoretical claims of British blockade policy over those years were given meaning and effect by British seamen. However, the reality of British principle is summed up by the remarks of one Member of Parliament, who, after acknowledging insular Britain's dependence on imported food and exported manufactures, goes on to say:

These considerations have always led us, practically, to violate our own theory of a commercial blockade, whenever the power to do so has remained in our hands. . . . It is true we have maintained, for our navy, the traditional right and duty of a blockade, whilst (I beg your attention to the distinction) we have invariably connived at its evasion.<sup>37</sup>

### III—AMERICAN INFLUENCE ON THE LAW: CONTINUOUS VOYAGE

Although American influence on the Declaration of Paris was negligible, the maturing of her sea strength and the necessities of the American Civil War which broke out in 1861 were to leave a distinct American influence on the further evolution of the recognized principles of blockade. During that conflict, American courts were to apply a principle to blockade which had once been purely a colonial policy of the European mercantilist states, i.e., the Doctrine of Continuous Voyage.<sup>38</sup>

Shortly before the outbreak of the insurrection, the United States position with respect to the law of blockade was summarized in the instructions of the American Secretary of State to American Ministers abroad. The position taken reverted to the archaic view of the blockade as an extension to seaward of investing forces around localized military strongpoints. In the words of the Secretary:

The investment of a place by sea and land with a view to its reduction . . . is a legitimate mode of prosecuting hostilities . . . But the blockade of a coast, or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade . . . is a proceeding which is difficult to reconcile with reason or with the opinions of modern times. To watch every creek, and river, and harbour upon an ocean frontier, in order to seize and confiscate every vessel . . . attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates if now first presented for consideration.<sup>39</sup>

This interpretation was one not only substantially out of step with the distilled theory of the previous centuries but one directly contrary to that adopted by the Federal forces in 1861. It is instructive only as one additional example of the readiness of states in the international community to lay whatever interpretation on ambiguous aspects of the law of nations as best serves their instant interests. In 1859, Cass was expressing an interpretation that would favor the commercial interests of the United States in any contest of major European naval powers; it represents merely a diplomatic gambit to compensate for America's weak naval strength

as opposed to the European states. In 1861, however, the Federal Government found itself at war with a group of southern states whose maritime potential was miniscule compared to that of the North, and consequently we find the North quickly attempting to occupy the same "high ground" so firmly held by Great Britain vis-a-vis the United States. Once more, principle yielded to political reality.

President Lincoln acted within a week of the fall of Fort Sumter to proclaim on 19 April 1861, that the ports of the rebellious states from South Carolina to Texas were blockaded "in pursuance of the laws of the United States and the law of nations," later extending the blockade to the states of Virginia and North Carolina as their rebel status became apparent.<sup>40</sup>

Although the United States had refused to accede to the recent Declaration of Paris,<sup>41</sup> the question of effectiveness of the blockade was immediately a point of controversy, as the United States had long championed the principle of "effectiveness" as a determinant of legality. One historian has noted that in April 1861 the Federal Navy possessed only 35 modern vessels, and that only three steam-propelled vessels were immediately available for blockade duty.<sup>42</sup> Another points out that the length of the shoreline to be interdicted by this force was in excess of 3,500 miles, from Washington down the Potomac around to the mouth of the Rio Grande, and that it included 189 river mouths and harbors.<sup>43</sup>

It is easy to visualize the mixture of skepticism and outrage with which Britain and the other European maritime powers greeted the pretensions of the Federal Government! Truly, "an effective blockade on such a scale was a thing unprecedented, even in the operations of the foremost naval powers in the world."<sup>44</sup>

Nevertheless, the normal seaborne trade of the southern states declined



immediately after the proclamation of blockade, partly because some neutrals acceded to it voluntarily and took their trade elsewhere, but more likely because of the normal dislocation of trade accompanying a shift from a peacetime to a wartime economy.<sup>45</sup> This reduction of trade and its effect on the price of cotton in Europe lent credence to the Federal claim to effectiveness of their skeletal sea forces in the early months of the blockade.<sup>46</sup>

Soon, however, the weakness of the Federal force, combined with the growing demand in the South for the import of the sinews of war, encouraged the development of enlarged trade efforts in defiance of the blockade. Since under Anglo-American policies the liability to capture began for the blockade runner at the moment of departure on the illegal voyage, enterprising shippers sought to shorten this exposure to a minimum. The several neutral ports which closely surrounded the blockaded area, such as Bermuda, Nassau, Havana, etc., soon became entrepôts for the transshipment of goods bound in and out of the South. The arrangement facilitated specialization of shipping used in the trade, with fast, shallow-draft steamers used for the two- or three-day run in and out of the blockaded ports, and large slow, and stout vessels used for the long ocean crossing to Europe.<sup>47</sup>

The Federal authorities now looked to the mercantilist Doctrine of Continuous Voyage as justification for the arresting of this trade. Union cruisers operated far offshore to back up the forces available for close-in observation of southern ports, and deliberately positioned themselves to intercept oceangoing traffic bound from Europe to the various neutral ports off the southern coast. They soon began to bring in for adjudication under prize law a number of neutral vessels, mostly British, which appeared from their cargoes and documents to be enroute to

such ports. In the first announced decision, which was not appealed by the British owners, ship and cargo were condemned for attempting violation of the blockade. The U.S. District Court held that:

The cutting up of a continuous voyage into several parts . . . cannot make a voyage which in its nature is one to become two or more voyages, nor make any of one entire voyage to become legal which would be illegal if not so divided.<sup>48</sup>

A better-known case, that of the *Bermuda*, which was finally decided in 1865, is even more definitive of the Doctrine as applied by the American Courts. Intercepted on a voyage between Bermuda and Nassau, both neutral ports, the *Bermuda* and her cargo were condemned by the District Court for attempted blockade running. On appeal to the U.S. Supreme Court, the decision was confirmed, because, in the words of the Court:

Successive voyages, connected by a common plan and a common object, form a plural unit. They are links in the same chain, each identical in description with every other, and each essential to the continuous whole. The ships are planks of the same bridge, all of the same kind, and all necessary to the convenient passage of persons and property from one end to the other.<sup>49</sup>

The most celebrated case of the war was that of the *Springbok*, which had been captured enroute from London to Matamoros, Mexico, a port adjacent to the Rebel port of Brownsville, Texas. On appeal, the Supreme Court confirmed the condemnation of the cargo only, saying:

That the voyage . . . was as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation . . . attached to the

cargo from the time of sailing.<sup>50</sup>

Two significant aspects of the *Springbok* case are worth noting. First, the initial condemnation had been based on evidence adduced from two other cases then in the process of being tried.<sup>51</sup> This violated the traditional principle that condemnation must derive solely on evidence adduced from the ship's papers or the responses of her officers or crew to interrogation. Secondly, the British Government openly approved the decision in its rejection of the request of the British owners for an expression of protest, by saying:

Having regard to the very doubtful character of all trade ostensibly carried on at Nassau, and to many other circumstances of suspicion before the Court, Her Majesty's Government are not disposed to consider the argument of the court on this point as otherwise than tenable.<sup>52</sup>

Some observers<sup>53</sup> viewed the absence of British protest as reflecting a sinister intent to let the method and decision stand as a precedent upon which to base future British actions, as in fact they did during World War I.

In the extension of the Doctrine of Continuous Voyage to blockade, the American courts had moved into an area without exact precedent; even in the colonial confiscations, no ship or cargo had been condemned during the first stage of an illegal voyage. Understandably, international jurists expressed general disapproval, and over the next several decades dozens of criticisms of the American action were delivered within the international law community. This wave of disapproval culminated in an expression by the maritime prize committee of the Institute of International Law in 1882 that such a doctrine, if allowed to stand, would "*annihilate*" neutral trade on the mere "*suspicion* that the cargo . . . may be transhipped . . . and

carried to some effectively blockaded port."<sup>54</sup>

The Doctrine of Continuous Voyage was not a uniquely American contribution to the developing law, being founded in earlier British colonial practice, but its application to blockade by American courts opened the Pandora's box which had long served to contain in large measure the most volatile issues of neutral rights. By this action, the United States unwittingly contributed to the growing demand of all maritime powers for some consensual formulation of the law of maritime warfare, a demand which was realized shortly after the opening of the new century at the London Conference of 1908-1909. At that conference, the confused interpretations of centuries of experience would be clarified in a code of maritime warfare known as the Declaration of London—a code which even now in the 1960's stands as the only accepted formulation of the law of blockade and contraband.

#### IV—PRECEDENT ENSHRINED: THE DECLARATION OF LONDON, 1909

The Hague Peace Conference of 1907, at the suggestion of both the British and German delegates, adopted a Convention for the establishment of an International Prize Court as a court of appeal from the national prize courts which alone had traditionally evaluated the lawfulness of captures made at sea in time of war. Before such a court could function, however, it was necessary for all maritime powers to agree on the standards of maritime warfare which the Court would be required to enforce. Accordingly, Great Britain suggested that a conference of such states be assembled in London in late 1908 to formulate "rules which, in the absence of special treaty provisions applicable to a particular case, the Court should observe in dealing with appeals brought before it."<sup>55</sup>

Such a conference did convene in November 1908, and proceeded to devise a code of maritime warfare which was generally acceptable to the representatives of the maritime community. It was issued in February 1909 as the Declaration of London.

The Declaration was the first, and only, exhaustive compilation of all the aspects of maritime warfare which had for so long divided the maritime powers of the world. Even though the Declaration ultimately failed to be incorporated formally into the law of nations, it remains even today as the basis for the current international law on blockade, contraband, and neutral maritime rights.

The Declaration treated the matters of blockade and contraband quite extensively, devoting 44 of its 71 Articles to those topics. In brief, it confirmed the 1856 pronouncement of effectiveness as the test for legality of blockade and, contrary to the wishes of the United States,<sup>56</sup> forbade the application of the Doctrine of Continuous Voyage to blockades, reserving it for use only against absolute contraband.<sup>57</sup> Further, the Declaration forbade interference by blockading forces with access to neutral coasts or ports, a point much sought after by the northern European neutrals.<sup>58</sup>

When the Conference adjourned on 26 February 1909, the delegates returned home feeling that they had contributed to a great stride forward in the regularization of international affairs. However, despite Britain's role as sponsor, the publication of the Declaration while pending ratification brought great opposition by many Britons who saw it as an abdication of British power.<sup>59</sup> When the House of Lords failed to enact a bill in support of the International Prize Court in 1911, the Declaration was effectively rejected. Since Britain had failed to take the initiative in ratifying the Declaration, the remaining powers saw the futility of attempting to consider it as a viable

segment of the law of nations, and the Declaration began to gather dust on the shelves of law libraries throughout the world.

Nevertheless, the Declaration did exist as the most recent consensus of the law of maritime war when World War I broke out in 1914. Further, since British representatives had contributed to its construction and had endorsed its provisions at the close of the Conference, the maritime powers of the world looked on the defunct Declaration as "not merely a codification of law," but as a "declaration of British maritime policy."<sup>60</sup>

Although this appraisal may have been accurate under the conditions existing in 1909, it appears that when faced with the actuality of war with the Central Powers in 1914, Britain realized that a blanket acceptance of the Declaration would be inimical to her national interest. Consequently, she announced on 20 August 1914, that the Declaration would be the general basis of her maritime policy during the war but "with certain modifications."<sup>61</sup> These modifications ultimately rendered impotent the most significant advances made under the Declaration, from the point of view of the neutral maritime states. By 1918, the terms of the Declaration aimed at protecting neutral rights had been honored more by their breach than their observance. With respect to the detailed principles of the law of blockade so extensively set out in the Declaration, Britain avoided their restrictions simply by not declaring a formal blockade. The rationale was quite pragmatic, although not expressed openly until long after the war. From the British view,

A formal declaration of blockade was deemed inadvisable for strategic and legal reasons; naval experts realized that we could not operate successfully in the Baltic with any continuity . . . Moreover, the Baltic is only one of the

commercial gates into Germany, and much of her trade arrives via Rotterdam . . . Thus, it would be wiser not to announce the word "blockade."<sup>62</sup>

The prewar views of at least one British naval authority had recognized before 1911 that the realities of modern war had outstripped the detailed legalisms of the Declaration. After noting the practical impossibility of maintaining a close blockade against a continental enemy in the face of submarines, torpedo boats, and mines, this prescient naval officer went on to assert that the doctrine of blockade had become merged within a larger doctrine dictated by 20th century necessity—that of total economic war. Pointing out the particular sensitivity of both Britain and Germany to attack through their commerce, he went on to outline proposed British actions in the event of a war with Germany on the assumption that the terms of the London Declaration could be ignored or avoided. He advised:

In that case, our obvious course, to be adopted as soon as the naval situation permitted, would be to declare a blockade of the North Sea ports, and simultaneously to make a sweeping declaration of what was contraband, including all the principal raw materials . . . Neutral vessels would be rigorously held up and examined . . . the doctrine of continuous voyage would be rigorously applied.<sup>63</sup>

The British actions after 1914 closely paralleled this program with all manner of additional devices employed in the effort to completely cut off all German sea commerce. These activities greatly antagonized the neutral trading powers but ultimately resulted in the total disruption of German economic strength and starvation for her population. Despite an intention early in the war to remain within the generally

accepted rules of the Declaration, by 1915 the effects of new technology had begun to be exerted, and both Germany and Britain embarked on open and unrestricted economic war against the other's commerce. It might be suggested that the only principle of international law which was strictly observed throughout the war was that of necessity, whereunder all manner of heretofore reprehensible actions could at least be rationalized.

The enactment of the Declaration, its failure of ratification, and its ultimate rejection under the stress of modern technology are all significant to this study, but it seems specious to berate the obvious direct contribution of these events to the thesis of this paper. It seems more profitable to point out some of the less obvious lessons to be drawn from this experience.

The code of maritime war hammered out by the delegates to London in 1908-1909 has made a contribution to the developing law of nations. It is instructive primarily as a codification of historical experience, and also as example of the considerable risk inherent in the enshrinement of precedent without regard either to the special circumstances of its creation or the immediate realities of existing technology and politics.

## V—CURRENT STATUS OF THE LAW

The evolutionary process described in earlier chapters has remained essentially at a standstill since the abortive London Declaration of 1909. Despite the failure of the Declaration to be formally adopted by the international community, and despite the almost universal rejection of its key principles during the major wars of this century, the terms of the Declaration are yet considered to be an acceptable expression of the developed law of maritime warfare. This paradox is explained by the customary practice of the inter-

national legal profession of regarding all such consensual agreements among states as contributory to the formation of law. In its view, the Declaration itself is meaningless as a matter of law; but it is significant still because it represents the then-current views of the international community and, thus, can be used as a standard against which to compare state practices since that time. Thus, it is common to find heavy reliance placed by jurists and publicists on the terms of the Declaration in their extensive writings on the subject of maritime warfare.

There are, therefore, some number of fundamental characteristics which a given instance of blockade must display if it is to avoid condemnation by the international jurist and thus command the respect and cooperation of the community of nations which inhabit the modern world. These characteristics are derived from the terms of the entire developed body of the law, including the London Declaration which so conveniently reflects previous experience. It will be meaningful, then, to review those characteristics given the greatest significance by those two bodies of organized opinion: First, in order to complete the summary of the evolutionary process begun in the 17th century; and second, to permit a critical analysis of the continued validity of such criteria in the world of today.

The first principle generally applied is that the right to blockade is one deriving only to a belligerent power, solely as a function of the existence of that state of belligerency.<sup>64</sup> Modern publicists do recognize a similar institution under a condition short of belligerency known as *pacific blockade*, but generally dismiss this device of the 19th century as *outmoded*<sup>65</sup> and in any event not subject to the principles of commercial blockade under discussion.

Secondly, the acknowledged principle of the Declaration of Paris regarding effectiveness is regarded as crucial to

establishing the legal sufficiency of a blockade since this element requires the application of actual naval power to enforce the blockade, and is the only principle truly accepted as a part of the law of nations on the subject of blockade.<sup>66</sup>

Further conditions must be satisfied, and they are again usually found to have been expressed in the London Declaration. Among them is the requirement that blockades must be confined to the coasts or ports of the enemy and that access to neutral ports may not be restricted.<sup>67</sup> A natural corollary to this requirement is the principle that captures may not be made if, at the moment of interception, the neutral vessel is enroute to a neutral port.<sup>68</sup> This, of course, prevents the application of the Doctrine of Continuous Voyage to blockades and constitutes a rejection by the international law community of American practice during the Civil War.

The issue of when a vessel becomes liable to condemnation for breach of blockade was left obscure by the London Declaration, which merely mentions the possibility of condemnation if "at the time of shipment of the goods" the shipper could be presumed or proven to have knowledge of intent to break the blockade.<sup>69</sup> However, it appears that at least Anglo-American jurists would support the practice whereunder liability would commence at the instant of departure for a blockaded port. Such a position appears to have been supported by American practice in 1917.<sup>70</sup>

In addition to imposing restrictive conditions on the blockading state, current law as expressed by the publicists continues to reward it by acknowledging its right to stop completely all sea traffic enroute to or from the enemy.<sup>71</sup> In the view of the international law community, no state has the right to seize or delay commerce on the high seas except under specific conditions associated with belligerent and neutral

status; it is, therefore, asserted by them that the advantages to be secured by a state only under the precise conditions associated with the developed law of blockade are sufficient to warrant the insistence that states comply completely with these conditions when exerting naval power against commerce at sea.

It appears, however, that there are some fatal flaws in this argument, some of which are traceable to faults in the source of modern law and others arising purely from the modern status of international law itself.

First, it is clear that the technical conditions of the modern law of blockade are derived from the experience of maritime states since the 17th century, and that these conditions are the progeny of similar terms expressed in the Declaration of London. But, if the Declaration itself could have been regarded within only a few years of its formulation as "merely a body of rules for regulating naval operations against commercial systems that had disappeared,"<sup>72</sup> is it not valid to suspect that a modernized form of that code is equally contaminated by that charge of anachronism? In short, does the view of blockade expressed by modern writers agree with the realities of the social and economic system which it seeks to regulate as sound international law must do,<sup>73</sup> or is it so far out of step with the reality that it needs to "be set to true time"?

#### VI—BLOCKADE IN THE COLD WAR ENVIRONMENT

It has been shown that the developed law of blockade has evolved parallel to and coordinate with that body of rules generally referred to as international law or the law of nations. The general subject, international law, is one of enormous scope and importance in the modern world. However, it is also one of broad controversy, imprecise both in acceptance and application—a thicket

into which a layman may proceed only with great caution after accepting the sure knowledge that at least as many authorities in the field will disagree with him as may be inclined to agree with his views. However, it is necessary to at least express some general views about the institution in order to analyze the position in its context of the modern law of blockade.

First, international law must be a tool of world society to be applied in regulating the political and economic affairs among the member states of that society. Historically, the applications of this tool have met with varying degrees of success and cooperation. Generally, the greatest success has occurred in applications to matters of obvious benefit to all states, such as in the establishment of rules for the prevention of collisions at sea and the principles governing the exchange of diplomatic and consular agents. Further, it appears that international law has shown the ability to grow in usefulness with the passage of time. Those of a legalistic turn of mind might suggest that this growing utility arises primarily from the parallel growth of custom and precedent, touching on an ever-wider scope of matters of interest to state relations. It seems more believable, though, to attribute the growing influence of the law to the increased recognition by states of the necessity for members of international society to get along with one another in their mutual self-interest. Additionally, it appears that this recognition of mutual interest is directly attributable to the enlarged economic and social interdependence of the states within the community.

However, it may be that the law has become more effective, and, whatever theories one might wish to credit with the responsibility for improved performance, it remains clear only that such a body of "law" exists, and that it is respected and obeyed by states in varying degrees. If it is necessary to

correlate this variable acceptance with *some* factor, it readily appears that, at least in the past, obedience and respect for the law has generally been a function of state power and the interpretation of national interest. It must be admitted that this situation seems reasonable to the individual observer in the light of his own experience with his fellowmen.

This last generalization, at least, would seem to be borne out by some members of the juristic community who have considered the revised status of the law of nations in the environment of the world of the Iron Curtain and the cold war. Regarding the historic evolution of the law of nations itself, one author states that "international legal norms underwent constant reinterpretation and development—generally keeping in step with the evolving needs and policies of the stronger states."<sup>74</sup> Another, addressing himself more directly to the polarized nature of modern world politics, observes that "a realistic analysis of the limited scope for international law in East-West relations implies that ultimately, these relations are not governed by law, but by power."<sup>75</sup> The most chilling confirmation of the observer's assumption of a "power and self-interest" theory to explain the applicability of law in the modern context is provided by the words of a Soviet jurist, who said in 1948:

Those institutions in international law which can facilitate the execution of the stated tasks of the USSR are recognized and applied by the USSR, and those institutions which conflict in any manner with these purposes are rejected by the USSR.<sup>76</sup>

How then should the law of blockade be regarded in an era characterized by such apostasy toward an institution which once was viewed with almost the same blind faith accorded religion? If the law of blockade be a part of the law of nations, and if that law of nations

can be expected to command the adherence of states only so long as those states remain convinced of the self-advantage of such adherence, it would seem that the law of blockade may be regarded as binding only insofar as its tenets reflect the reality of modern politics and economics. Wherever the developed law of blockade can be shown to rest on precedent no longer valid in modern society, it should be adhered to only if such adherence is in the national interest. Preferably, such aspects of the law should be rejected, and newer and more timely principles should be enunciated in order to bring that doctrine to a more logical maturity.

In keeping with this view, let us evaluate the elements of the law of blockade as it seems to exist in the eyes of modern writers and jurists and see if it, in fact, conforms to the social order which it is intended to serve.

First, it is contended that the right to blockade is a belligerent right only; that is, one which may be exercised only by a nation in an acknowledged state of war with another. The essence of the point is that legality (i.e., general approval by the states of society) can attach only to a blockade proclaimed as an act of war. However, there now appears to be some doubt that *any* act of war can be regarded as "legal" because of the direction taken by the body of international law after World Wars I and II. Beginning with the Covenant of the League of Nations after World War I,<sup>77</sup> progressing through the Pact of Paris in 1928,<sup>78</sup> and culminating in the Charter of the United Nations signed in 1945,<sup>79</sup> the international community steadily progressed toward the official banishment of war as an acceptable "legal" means of solving international differences.

At least one authority considers that the ancient right of states to make war in the "traditional sense is definitely ruled out" under the Charter of the United Nations since the use of force

for the settling of disputes is reserved to the Security Council by that agreement.<sup>80</sup> Thus, in a strict sense, no degree of legality can be attached to any violent act, excepting only acts taken in self-defense.

However accurate this interpretation may be, additional grounds seem to exist for claiming legality for a blockade not declared as an act of war under the sanction of belligerent right. The status of belligerence exists under law simply as a means of describing the condition of states not at peace. That is, it appears to be based on the inability of the early jurists or publicists to conceive of states existing in a condition other than that of war or its opposite, peace. There is, however, some evidence indicating the recognition by a measurable segment of opinion of a third status, beyond that of peace yet short of war. For example, as early as 1907 the English jurist Westlake considered that such a condition could exist, observing that "acts of force are not war unless either a government does them with the *intent* of war or the government against which they are done elects to treat them as war."<sup>81</sup> A more recent publicist expressed the idea more concretely by stating that "there may be . . . a state of 'intermediacy' between peace and war . . . characterized by . . . hostility between the opposing parties . . . but accompanied by an absence of intention or decision to go to war."<sup>82</sup> In a comprehensive discussion of the matter, another eminent authority conceded the significant advantage of recognizing such a status of intermediacy to be that it could be endowed with "legal consequences" similar in force and effect to the two traditional conditions.<sup>83</sup> In the view of another author, such legal consequences might "include limited restrictions on the freedom of the seas hitherto recognized only in war but falling short of full scale blockade."<sup>84</sup> It is clear from these observations that such a state of intermediacy could exist only where the

parties to the dispute were unable to resolve it within the purely peaceful means now available under modern international law yet were unwilling to extend the tension to a complete war status. Is it not equally plain that many such situations can and will occur as a result of the Soviet-American contest for world leadership? Further, in view of the great expansion of the Soviet merchant marine in the last decade<sup>85</sup> and the expressed intention of the Soviets to support "wars of national liberation" wherever occurring, is it not probable that confrontations at sea will become commonplace in the future between the naval forces of the West and Soviet seapower? Already the Cuban "quarantine" crisis of 1962 appears in retrospect as an obvious example of a condition of intermediacy. Because the status of that time had not been widely enunciated, the condition was not so easily recognized, nor even now has it been generally accepted as a principle. Yet, it would seem that such a status must ultimately be recognized, as so many others have been in the past, because of the reality of political and economic circumstances now abroad in the international community.

Another characteristic of the law of blockade which might be open to question in the light of modern experience is that provision forbidding interference with free access to neutral ports. In discussing this provision, it might first be observed that it, above all others, seems to have been honored more in the breach than in the observance almost from the day of its formulation in 1909. In World War I all pretense of compliance with this principle was dropped after early 1915 by Great Britain.<sup>86</sup> The reality of her position on the subject was expressed at a later date in terms of clearly recognizing the dominance of self-interest over principle. At that time one authority stated:

. . . the extent of a belligerent's right to interfere with seaborne



commerce is conditioned by the extent of his command of the sea, and that the real principle underlying the idea of blockade is the right of a belligerent to deny to the commerce of his enemy the use of areas of sea which he is in a position effectively to control.<sup>87</sup>

Associated with the dictum that blockading forces may not interfere with traffic enroute to and from neutral ports is the requirement that no vessel may be seized for breach of blockade if she is first encountered on her way to a neutral port. That is, the Doctrine of Continuous Voyage may not be applied to blockade.<sup>88</sup> A cursory review of world history since 1914 would reveal that the practice of states at war during that period has been quite directly the opposite from that intended by both these requirements. In both world wars the commerce of neutrals and belligerents alike was attacked mercilessly with all of the means available to the contesting powers. There does not seem to be any reason to suspect that such rules would be observed by the parties to any future contest between the major antagonists now dominating world politics.

In point of fact, it seems ludicrous to contemplate the possibility of any meaningful observance of the "legal" code of blockade in the current or predictable future state of political reality. It is clear that the rules of blockade came into existence solely to protect the ordinary sea commerce of neutrals and to regulate the circumstances under which such trade could be interrupted. The rules derive out of a 19th century legal regime—a regime oriented toward *regulating* the conduct of states in war and peace.<sup>89</sup> But modern international law, of which blockade is a part, no longer seeks to regulate war but to *prevent* its occurrence. The formation of a world organization dedicated to this end has effectively ended the issue of neutral rights

at sea in war by outlawing war and by the implied denial of the status of neutrality in the face of armed conflict by any member of the organization. If neutrality as a legal subsystem in international law is inconsistent with the collective security system of the United Nations as alleged,<sup>90</sup> then observance of rules created as part of that subsystem have at least become optional if not completely unnecessary. Certainly, in view of the expressed intent of the Soviet Union to observe only those portions of the law of nations which are consistent with its wishes, it would be wise for other states to reserve to themselves the degree of observance to be given to patently outdated rules of maritime war.

## VII—CONCLUSIONS AND RECOMMENDATIONS

Under the simplified circumstances of antiquity, combatants recognized the necessity of depriving the enemy of supplies and reinforcements essential to his continued resistance. As society grew more complex and economically more interdependent, the realities of international politics dictated that some concession be made to nonparticipants to retain the support their supplies would provide for warlike operations by both sides. Such concessions led to the concept of neutrality and ultimately became thoroughly circumscribed with technical conditions under which neutrals might continue trade with any belligerent they could reach. But the continuing evolution of international society resulted in widening the scope of wartime operations, as individual states accrued great military power, they acquired the ability to destroy completely the social and economic fabric of their enemies, and war had become a matter of national survival by the beginning of the 19th century.

Under these classic rules of neutrality, the right to blockade an enemy

was a valued tool of the belligerent, for only by complying with certain accepted principles associated with the institution could he deprive his enemy of commerce with the general acquiescence of the world society. However, as war became more total, the once simple rules of blockade became more and more complex until the technicalities imposed in the name of neutral rights obscured the fundamental purpose of the institution itself—to cut off an enemy's commerce and thus weaken or starve him to the point of submission. As the law grew out of touch with the realities of power and politics, states which had the naval strength and the national will to survive began to ignore, corrupt, or circumvent the principles so carefully constructed by the scholars and legalists. The determining factors of compliance with the laws became those of self-interest and naval power—tempered only by the ability of a state to recognize its own long-term self-interest. Principle yielded to power and necessity, and the emergence of the 20th century concept of total war sounded the tocsin for any carefully drawn rule which conflicted with the necessities of such conflict.

The body of international law which exists today represents the result of forces generated by conflict of the international state system since the 17th century. It grew in an environment of constant change, but the rate of such change remained fairly slow until recent decades. Many of its precepts are rooted in economic, social, and political experiences of the last century—and the law of blockade is peculiarly representative of this fault.

Speaking of international law in general, one writer has said:

To the majority of the writers and exponents of international law, contemporary changes appear as extensions and modifications rather than as basic challenges to the structure of international law

and relations. It is submitted that the extent of the structural changes in international relations in our time requires a far more basic reorientation in our thinking in international law.<sup>91</sup>

Such a basic reorientation is necessary at this time with regard to the law of blockade. If the historic status of "neutrality" can be regarded by some authorities as extinct, why cannot a new status supersede it? If armed confrontations between East and West are accepted by the international community as being something other than "war" in the traditional sense solely because the contestants have no intention to engage in war, then some status under law should be accorded to the condition. Within such a new category of law arising from the circumstances of the society it is intended to serve, there would be a place for a new code of maritime war—a code which would reflect 20th century conditions rather than the outmoded precedents set in an era which could not even conceive of a totally bipolarized world. It appears to be manifestly clear that such a code would contain rules for the conduct of operations against commerce at sea. Whether such actions be called blockade or "quarantine," commerce warfare will always remain as a tool of seapower, and a workable code for its conduct could only benefit all of world society.

We are in an era of "limited war" because the realities of "total war" in the nuclear age are too grotesque to consider as real possibilities. The one characteristic of the 1962 Cuban "quarantine" which drew general approval from the world community of nations was its controlled and limited nature.<sup>92</sup> And one view expressed with regard to the selection of the quarantine method in response to the Soviet challenge of that autumn remains valid today. Discussing the President's reasoning on the selection of this action, Theodore Sorensen has said of the operation:

Whatever the balance of strategic and ground forces may have been, the superiority of the American Navy was unquestioned; and this superiority was world-wide, should Soviet submarines retaliate elsewhere.<sup>93</sup>

What is proposed herein is simply that some form of sea operations against commerce be sanctioned despite the absence of a traditional condition of belligerency. If ever a traditional war erupts between the major antagonists of the modern world scene, the issue of neutral rights at sea will be academic even for the survivors. Some form of conflict seems to be a reasonable expectation in the future as it even now exists in Southeast Asia, and, therefore, some provision should be made by the international community to regulate the application of seapower in such conflicts.

The most vociferous retort to this proposal may very well be based on its apparent suggestion that America abandon its traditional advocacy of "freedom of the seas," and so some brief observations are appropriate on that subject.

Freedom of the seas, in the classic Wilsonian sense, means those rights which we believe have accrued to all states as a result of British policing of the oceans in the decades since Trafalgar. The basic concept of freedom of the seas presupposes the dominance of a naval power so disposed as to make such freedom possible for itself and others. That Great Britain was such a power is borne out by study of naval history. As Bell remarks, "Great Britain was recognized to have protected the usages and customs of Europe [and consequently all of Western society] by her unflinching resistance to the Napoleonic empire."<sup>94</sup> Now, with Britain eclipsed by modern U.S. naval power, the burden of protecting, exploiting, or refuting those rights associated with the concept of "freedom of the seas" lies

with the United States under the same grounds that they once devolved upon Britain. It is clearly the duty of such power to be exercised in defense of the concept when threatened by a power which might not act to preserve such freedom, but to hamper or destroy it. All states have recognized the need to accept restrictions on the usual freedom to use the sea when war has broken out between maritime states.<sup>95</sup> Such restrictions imposed in times of nominal peace would undoubtedly generate widespread outcry by the maritime states of the world, but historic experience indicates that under the pressing circumstances now at issue—for example, in Vietnam—such a move by the United States would not long be opposed by states having a sincere interest in preserving the freedom which we have long championed at sea.

It is, therefore, proposed that the United States take the initiative in forcing the modification of the traditional laws associated with the institution of blockade: First, by a unilateral statement that the existing doctrine is inconsistent with the needs of modern society; and, second, by proposing appropriate modifications to the doctrine. Such action should be followed by the announcement of a naval "quarantine" of the port of Haiphong in North Vietnam, including the application of the Doctrine of Continuous Voyage to designated contraband at least to the British Crown Colony port of Hong Kong, where it has been observed that much of the Haiphong commerce "originates."<sup>96</sup> Such action could be tied in with the recent and continuing efforts of the United States to secure peace in that area by: (1) announcing the naval quarantine to be a more humane substitute for the aerial bombing campaign recently resumed; and (2) calling upon all states who have expressed disapproval of the bombing action to join with the United States in carrying out the quarantine operation.

One precedent of the historical law of maritime warfare seems most applicable even today, and that is the argument in favor of exceptional measures being valid when states find themselves engaged in an "exceptional" struggle. Writing of the events at sea in 1689, Samuel Puffendorf acknowledged that powers engaged in defense of the religious liberty of Europe were not required to observe ordinary rules of capture; again in 1792, it was claimed, with some justice, that "extraordinary rigours were justifiable against a regicide government [France], who were themselves contemptuous of the law of nations."<sup>97</sup>

The United States is today engaged in an exceptional struggle for which there are few hard and fast rules. If we must act to set new precedents on the ground in the face of this need, we should equally act to set precedents on the seas. Both actions will stand to guide nations in the future.

In the words of one commentator:

United States naval power makes freedom of the seas possible. During periods of belligerence, that freedom is subject to control. The bloody Ho Chi Minh trail is long and winding. It begins at sea.<sup>98</sup>

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## NOTES

1. Henry Ward Beecher, *Life Thoughts*.
2. John Westlake, *The Collected Papers of John Westlake on Public International Law* (Cambridge, Eng.: Cambridge University Press, 1914), p. 325.
3. *Ibid.*, pp. 316-317.
4. Lassa F. Oppenheim, *International Law: Disputes, War and Neutrality*, H. Lauterpacht, ed., 7th ed. (London: Longmans, 1952), v. II, pp. 768-769.
5. *Ibid.*, pp. 624-625.
6. Such materials later came to be known as "contraband," and as such have often become confused with the concept of Blockade.
7. Westlake, *Collected Papers*, p. 321.
8. Some evidence exists that the idea was not original with the Dutch. See, *Neutrality, Its History, Economics and Law: the Origins* (New York: Columbia University Press, 1935), v. I, p. 106. It is unquestioned that the Dutch made the greater contribution to the establishment of the doctrine, however.
9. Westlake, *Collected Papers*, p. 325.
10. John Westlake, *International Law* (Cambridge, Eng.: Cambridge University Press, 1907), pt. II, p. 222.
11. *De Jure Belli ac Pacis*, quoted in Westlake, *Collected Papers*, p. 324. See also Westlake, *International Law*, p. 222.
12. Westlake points out that there is no inconsistency here, as the word itself, although coined in the original Dutch *placaat* nearly a half century earlier, was not commonly applied in the technical sense until a later date. (*Collected Papers*, p. 330)
13. Westlake, *Collected Papers*, p. 326.
14. Bynkershoek, *Quaestiones juris publici*, i, 11. Quoted in Westlake, *Collected Papers*, p. 327.
15. Westlake, *Collected Papers*, p. 327. See also *Neutrality: Origins*, pp. 111-112.
16. *Neutrality: Origins*, p. 113 ff gives good account of reactions of maritime neutrals and treaty development.
17. Westlake, *Collected Papers*, p. 328.
18. *Ibid.*, pp. 330-331.
19. *Ibid.*, p. 332.
20. Herbert W. Richmond, *National Policy and Naval Strength, CVI to XX Century* (London: Oxford University Press, 1923), p. 10.
21. *Neutrality: Origins*, p. 82 ff. Summarizes the wars of the period and Britain's changing roles therein.
22. Archibald C. Bell, *A History of the Blockade of Germany, 1914-1918* (London: H.M. Stationery Off., 1937), p. 5.
23. Alfred T. Mahan, *The Influence of Sea Power upon the French Revolution and Empire*, 10th ed. (Boston: Little, Brown, 1898), v. II, p. 199.

24. Grenville to Lord Auckland. Quoted in *Neutrality: Today and Tomorrow* (New York: Columbia University Press, 1936), v. IV, pp. 40-41.
25. Westlake, *Collected Papers*, p. 334.
26. *Ibid.*, p. 335.
27. Westlake, *International Law*, p. 230.
28. Great Britain, Lords of Appeal, decision in the case of the *Nancy*, quoted in Westlake, *International Law*, p. 230.
29. James Stephen, *War in Disguise*, 3d ed. (London: University of London Press, 1917), p. 18.
30. Carlton Savage, ed., *Policy of the United States toward Maritime Commerce in War* (Washington: U.S. Govt. Print. Off., 1934), v. I, pp. 1-10.
31. Madison to Monroe, 5 January 1804. Reproduced in Savage, v. I, p. 246.
32. *Ibid.*, pp. 243-249.
33. Richmond, p. 11.
34. Savage, v. I, p. 118.
35. Westlake, *International Law*, p. 128.
36. Congress of Paris, "Annex to Protocol 23—Declaration." Reproduced in Savage, v. I, p. 381.
37. Letter from Mr. Cobden, M.P., to Henry Ashworth, Esq., 1862. Quoted in Westlake, *Collected Papers*, p. 357.
38. For the colonial evolution of this principle, see Appendix I. The Doctrine had been previously applied to blockade in only one instance, during the Napoleonic Wars, but under highly specialized circumstances.
39. Cass to Mason, 27 June 1859. Reproduced in Savage, v. I, pp. 402-412.
40. See Savage, v. I, pp. 415-416 for complete text.
41. The United States refusal was predicated on the outlawing of privateering, and the refusal of the Congress Powers to agree to forbid the confiscation of private property at sea belonging to belligerents. See Savage, v. I, p. 76 ff for diplomatic exchanges on subject.
42. James R. Soley, *The Blockade and the Cruisers* (New York: Scribner, 1883), p. 27.
43. Allen Westcott, ed., *American Seapower since 1775* (Philadelphia: Lippincott, 1952), p. 109.
44. Soley, p. 27.
45. *Ibid.*, p. 42.
46. See Seward to C.F. Adams, 6 March 1862, quoted in Savage, v. I, p. 439.
47. Soley, pp. 35-38, describes development of this trade.
48. The *Dolphin*, 7 Fed. Cases 868. Quoted in Herbert W. Briggs, *The Doctrine of Continuous Voyage* (Baltimore: Johns Hopkins Press, 1926), p. 45.
49. Quoted in Briggs, p. 54.
50. Quoted in Savage, v. I, p. 466.
51. The *Stephan Hart* and the *Gertrude*. Both ships held cargo for the same port as the *Springbok*, all of which was complementary in use and linked by common ownership.
52. Briggs, p. 68. See also Lord Russell's comment of 20 February 1864, quoted in Briggs, p. 67.
53. Notably Mr. L. Gessner, in *Zur Reform des Kriegs-Seerechts* (Berlin: 1875), quoted in Briggs, p. 68.
54. Quoted in Briggs, pp. 78-79. (Emphasis in original)
55. Arthur Cohen, *The Declaration of London* (London: Hodder and Stoughton, 1911), pp. 6-9.
56. See Instructions to the Delegates to the London Naval Conference of 1908-1909, dated 21 November 1908. Quoted in full in Savage, v. I, pp. 521-524.
57. See Savage, v. II, pp. 163-179 for complete text of the Declaration. Specifically, see arts. 2, 19, and 30.
58. *Ibid.*, art. 18.
59. A number of contemporary writings reflect the intensity of the controversy. See particularly T. Gibson Bowles, *Sea Law and Sea Power* (London: Murray, 1910); Norman D. Bentwich, *The Declaration of London* (London: Wilson, 1911); Thomas Baty, *Britain and Sea Law* (London: Bell, 1911); and Arthur Cohen, *The Declaration of London* (London: Hodder and Stoughton, 1911).
60. Bell, p. 38. See also Marion C. Siney, *The Allied Blockade of Germany, 1914-1916* (Ann Arbor: University of Michigan Press, 1957), p. 8 ff.
61. Bell, p. 40.
62. Edward K. Chatterton, *The Big Blockade* (London: Hurst and Blackett, 1932), p. 28.

63. Captain M.P.A. Hankey, RN, Naval Assistant Secretary, Committee of Imperial Defence, undated memorandum, extensively quoted in Bell, pp. 20-22. Note the emphasis on cutting off of raw materials; practically all such materials had been specifically exempted from capture by the Declaration. (See art. 28.)

64. All definitive texts of International Law cited elsewhere herein set forth the discussion of the law of blockade in adjectival phrases such as "belligerent right," etc., and the subject is nowhere considered in any other context than as a portion of the law of war.

65. See Oppenheim, v. II, pp. 144-149 for a representative view of the entire institution.

66. *Ibid.*, chap. II.

67. Oppenheim, p. 771. See also, Charles C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2d ed. (Boston: Little, Brown, 1945), p. 2190.

68. *Declaration of London*, art. 19.

69. *Ibid.*, art. 21.

70. See *Instructions Governing Maritime Warfare, June 1917* (Washington: U.S. Govt. Print. Off., 1918), pp. 16-17.

71. See Hyde, v. III, pp. 2211-2212.

72. Bell, p. 18.

73. Philip C. Jessup, *A Modern Law of Nations* (New York: Macmillan, 1948), p. 1.

74. Oliver J. Lissitzyn, *International Law in a Divided World* (New York: Carnegie Endowment for International Peace, 1963), p. 7.

75. Georg Schwarzenberger, "The Impact of the East-West Rift on International Law," *Grotius Society, Transactions* (Longmans, Green, 1951), v. XXXVI, p. 232.

76. F.I. Kozhevnikov. Quoted by Lissitzyn, p. 16.

77. Articles 12 and 13. See complete text in Charles G. Fenwick, *International Law*, 4th ed. (New York: Appleton-Century-Crofts, 1965), appendix A.

78. See Ruhl J. Bartlett, ed., *The Record of American Diplomacy*, 4th ed. (New York: Knopf, 1964), pp. 520-521.

79. See Fenwick, appendix C.

80. Fenwick, pp. 649-650. Also, under the "Uniting for Peace Resolution" of 1950, the General Assembly may act if the Council defaults on its obligation.

81. Westlake, *International Law*, v. II, p. 2. (Emphasis added)

82. Wolfgang G. Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964), p. 271.

83. Philip C. Jessup, "Should International Law Recognize an Intermediate Status between Peace and War?", *American Journal of International Law*, January 1954, pp. 98-103.

84. Friedmann, p. 271.

85. C.R. Huan, "La Flotte Marchande Sovietique," *La Revue Maritime*, August-September, 1965, pp. 981-1004.

86. Bell, chap. III.

87. H.W. Malkin, "Blockade in Modern Conditions," *British Yearbook of International Law, 1922-1923* (London: Frowde, 1923), pp. 87-88.

88. *Declaration of London*, art. 19. See also Herbert A. Smith, *The Law and Custom of the Sea*, 2d ed. (New York: Praeger, 1950), p. 112.

89. See Fenwick, p. 667 ff.

90. *Ibid.*, p. 727, p. 729 ff.

91. Friedmann, p. 3.

92. *The New York Times*, 26 October 1962, *passim*.

93. Theodore C. Sorensen, *Kennedy* (New York: Harper & Row, 1965), p. 688.

94. Bell, p. 4.

95. Fenwick, p. 511.

96. See Raymond Moley, "Blockade Saves Lives," *Newsweek*, 3 January 1966, p. 60.

97. Bell, p. 5, paraphrases Puffendorf and an anonymous later writer.

98. Raymond Moley, "Freedom of the Seas," *Newsweek*, 27 December 1965, p. 74.

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APPENDIX I  
THE RULE OF 1756 AND THE  
DOCTRINE OF CONTINUOUS VOYAGE

European mercantilist doctrine in the 18th century asserted that colonies existed only to supply the mother country with raw materials and to provide a market for the processed goods of the homeland. In Britain, to prevent encroachment by outsiders in this profitable two-way trade, a series of laws had been enacted to deprive outsiders of participation in colonial trade, in part by requiring that all such trade be carried on in ships of the British flag. France and others had similar regulations for the trade of their colonies. When war broke out among the colonial powers, as it frequently did, belligerent flag ships and their cargoes became lawful prize. Under such circumstances, how was the mother country to continue to supply and be supplied by her overseas colonies?

The answer, of course, was to carry on colonial trade using neutral flag bottoms; but the right of neutral ships to carry enemy goods was itself a source of heated controversy among maritime powers, and even more so when belligerents employed neutral ships only to carry on colonial trade without enduring the risk of confiscation associated with their own flag.<sup>1</sup>

To confound this practice, British prize courts evolved what became known as the Rule of the War, 1756, under which neutrals were prohibited, by confiscation if intercepted, from participating in colonial trade in war if such trade were denied them in peace by the laws of the mother country.<sup>2</sup>

Hoping to evade this rule, neutrals and belligerent shippers conspired to make the colonial voyages in two distinct stages, the first from the colony to a neutral port, and the second from that port to the mother country. Fictitious transfers of ownership and actual or simulated transshipment of the cargo while in the interim port were often resorted to in order to disguise the true character of the voyage from intercepting cruisers. This practice permitted them to claim that captures made during either segment of the voyage were illegal, since neutral trade to and from neutral ports was always allowed.

The prize courts responded with the development of the Doctrine of Continuous Voyage under which cargoes were condemned at any stage in the voyage, disregarding paper transfers and transshipments as "a fraudulent contrivance merely on account of the war to continue the original voyage and cover the goods of the enemy to their destined port."<sup>3</sup>

<sup>1</sup>For a general summary, see Richard Pares, *Colonial Blockade and Neutral Rights, 1739-1763* (Oxford, Eng.: Clarendon Press, 1938), p. 169. The controversy on neutral rights stemmed from a fundamental difference between Continental and British jurists on the sources and character of international law. Pares (pp. 148-162) disagrees with other authorities who assert that the issues were resolved before this time. See *Neutrality: the Origins*, v. I., p. 247.

<sup>2</sup>Pares, pp. 180-204. See also *Neutrality: the Origins*, p. 153, where they describe the Rule as "one of the clearest examples of the economic basis of the law of neutral and belligerent rights. It was a measure adapted . . . to meet a definite economic problem."

<sup>3</sup>Decision in the case of the ship *Young Gertruyde Adriane*, June 1764. Quoted in Pares, p. 221.