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THE LAW OF WAR AND NEUTRALITY AT SEA

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X. BLOCKADE

A. CONCEPT OF BLOCKADE

Whereas the law of contraband regulates the extent to which a belligerent can prevent an enemy from receiving goods useful in the conduct of war, the law of blockade deals with the belligerent right—and limits thereto—to prevent the vessels (and aircraft) of all states from entering and leaving either the whole or a part of an enemy's coast.¹

In its origin,² blockade was conceived as a measure analogous to that of siege in land warfare, and the attempt to bar the sea approaches to an enemy port was considered legitimate only when carried out in conjunction with military operations on land. Even when dissociated from siege by land blockade remained a measure designed to reduce certain ports of an enemy into submission through "investment by sea." In the pursuit of this objective a belligerent was considered as justified in prohibiting all neutral intercourse with the besieged or blocked up port. However, during the course of the nineteenth century the practice arose of using a blockade principally to cut off an enemy's sea-borne trade, and thereby to deprive him of the resources for waging war, rather than simply to force

¹ *Law of Naval Warfare*, Article 632a.—This, at least, represents the traditional concept of blockade, though it must be added that in the light of recent developments—to be reviewed shortly—blockade is now frequently considered to relate as well to the belligerent right to prevent the cargoes of vessels and aircraft from reaching the blockaded area whatever the route and method of conveyance. On the issues to which this extended concept of blockade gives rise, see pp. 310–12, 316–17.—In the following pages attention will be directed to the problem of blockades by sea. The extension of blockades to include the air space over the high seas remains a development for the future. It is next to impossible to declare with any degree of assurance what procedures may govern blockade by air. Certainly, there are grave difficulties in assuming that the practices of naval blockade can be applied readily, by analogy, to aerial blockades.

² "In its origin," implying when once conceived as a distinct and separate measure of naval warfare. Prior to such emergence it was, as Jessup and Déak point out, "closely tied up with contraband. The common root from which both doctrines sprang is the total prohibition of commerce with an enemy. This type of belligerent pretension was much in vogue from very early times, still flourishing in the early seventeenth century, and has reappeared in various guises at intervals ever since. In the face of neutral protests, and the growing strength of the law of neutral rights in general, the belligerents receded from their insistence on total prohibitions by two types of compromise or concession, one geographical and the other categorical; geographically, the ban, instead of extending to the entire country of the enemy, was confined to certain ports which were besieged or blocked up; categorically, the ban was limited to certain categories of goods such as arms and munitions which came to be known as contraband of war."

The Origins (Vol. I, *Neutrality, Its History, Economics and Law*, 1935), p. 104.

him to abandon further military resistance in a limited area. At the time, opposition to the developing practice of so-called "commercial" blockades was considerable, and even today it has not entirely disappeared. The basis for opposition can be attributed largely to the conviction that in this development the original purpose—and hence the justification—of blockade had been abandoned; that from a military measure designed to permit belligerents to conduct effective siege by sea, unimpeded by neutral efforts to relieve an enemy made the object of attack, blockade had become a measure whose significance was economic rather than military. As such it was questioned, if only from the conviction that an enemy's economy could not of itself form a legitimate military objective, particularly if this implied striking at an opponent primarily through action immediately directed against neutral trade.³

Nevertheless, the attitude and practice of states during the half century preceding World War I provided little support for this opinion. The 1856 Declaration of Paris had laid down the principle that blockades, in order to be binding, must be effectively maintained, but beyond this had furnished no indication that commercial blockades were forbidden. Nor did the provisions of the 1909 Declaration of London, dealing with blockade, contain any stipulation that could be interpreted as limiting this belligerent measure to any well-defined purpose. If anything, the period under review indicated acceptance of the notion that blockade could serve purposes other than the narrowly construed military operation that had provided its earlier justification.

Since 1914 the controversy over the legitimate purposes of a blockade has lost its former significance. In both World Wars the belligerents considered the economy of an enemy not only a legitimate, but a principal, military objective. "Economic warfare," in the words of the British

³ Thus John Westlake in an essay written during the period of the American Civil War, declared that "commercial blockades ought to be abolished from motives both of justice and policy." The burden of the argument ran as follows: "A neutral cannot be touched by a belligerent unless he has in some way identified himself with the enemy. Actual mixing in the hostilities is such an identification, and to relieve a place which is the actual object of attack at the time, whether such attack be conducted only by sea, or by land also, is actually to mix in the hostilities; therefore blockade in the case of siege is justifiable. To ship a cargo to or from a country with which the shipper is at peace, that cargo being neither contraband nor destined for the supply of a besieged place, is neither an actual mixing in the hostilities, nor in any way an identification of the shipper with the enemy; therefore blockade except in the case of siege is unjustifiable." *The Collected Papers of John Westlake On Public International Law*, pp. 342-3. Westlake quoted with approval the opinion expressed by the American Secretary of State Cass, in 1859, that 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, and from its very nature against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which is difficult to reconcile with reason or with the opinions of modern times." Within four years the American Government was to declare one of the most important "commercial blockades" of the nineteenth century.

Ministry of Economic Warfare, "is a military operation, comparable to the operation of the three Services in that its object is the defeat of the enemy, and complementary to them in that its function is to deprive the enemy of the material means of resistance."⁴ In warfare at sea the pursuit of this objective has led to a determined effort on the part of each belligerent to achieve the complete economic isolation of an opponent; to prevent any imports to or exports from the territory of an enemy. Not infrequently the term blockade has been used to indicate this belligerent effort.

This use of the term blockade to comprehend the most varied of belligerent measures designed to cut off the whole of an enemy's sea-borne trade undoubtedly has served to introduce an element of ambiguity. In part, so-called "measures of blockade" came to include those developments in the law of contraband that have already received consideration. In part, however, they referred to actions whose justification was alleged to rest upon the right of reprisal, and it is this latter category of measures that will form one of the principal concerns of the present chapter. Admittedly, these belligerent reprisal measures bear—at best—only a faint resemblance to the blockades envisaged by the traditional law. Nor did they conform to the customary rules governing blockade, though the degree to which the respective belligerents departed from the customary law varied considerably. Nevertheless, it is abundantly clear that these measures of reprisal were intended, in almost every instance, to achieve the purpose of blockade as presently conceived. At the same time, the frequency of belligerent reprisal measures stands in marked contrast to the disuse into which the traditional blockade, conducted in accordance with the customary rules governing blockade, has fallen.⁵

The explanation of this seemingly anomalous situation is as easy to discern as a satisfactory solution is difficult to reach. It is by now a commonplace that the customary rules regulating blockades have been found by belligerents to be unduly restrictive—or, more accurately, almost impossible of application—under modern conditions. The customary law in force at the outbreak of World War I was at once the product of, and designed to regulate, "in-shore" or "close" blockades—i. e., blockades maintained by a line of vessels stationed in the immediate vicinity of the blockaded coast. But developments in the weapons of war have made the close blockade a feasible operation today only in the most exceptional of circum-

⁴ Cited in Medlicott, *op. cit.*, p. 17.

⁵ During World War I several blockades were imposed which did conform to the customary rules, but they were all of distinctly limited importance. These blockades, and the prize decisions to which they gave rise, are reviewed by Garner, *Prize Law During The World War*, pp. 621–30. During World War II the Russian declaration of a blockade of the Finnish coast, proclaimed in January 1940, furnishes perhaps the only known instance of what was alleged to be a blockade in the traditional sense. However, the Soviet Union denied being at war with Finland, and the latter asserted that the alleged blockade was completely ineffective.

stances. The difficulty, however, has not been that the customary law forbade so-called "long-distance" blockades, as such, but that it required the latter to conform to rules established for close blockades. And this proved to be an impossible task.

To the foregoing must be added the further consideration that the very intensity of the belligerent's desire to effect the complete economic isolation of an enemy has been a factor of importance in preventing the adaptation of the law governing blockade to changed conditions. For this intense desire to cut off the whole of an enemy's sea-borne trade is itself one of the changed conditions, along with the changes that have occurred in the means for conducting naval hostilities; and it has meant that belligerents have been more than content to rest their so-called "blockade" measures upon the right of retaliation rather than to insist that this branch of the law—as all others—cannot be frozen into a mold no longer suitable to modern conditions. No doubt it is true that neutral intransigence to change has contributed to the belligerent decision to take retaliatory measures rather than to argue on behalf of the legitimacy of altering the established law. It is equally true, however, that belligerents have not been unwilling—on the whole—to avoid posing a clear and direct challenge to the continued validity of the customary rules governing the operation of blockade, and this unwillingness may be attributed largely to the recognition that reprisal measures provided the opportunity of pleading for greater freedom of action than could reasonably be justified on any other grounds.⁶

⁶ In a word, reprisal action furnished the pretext for belligerents to claim the right to do what they wanted—which in both World Wars was nothing less than the complete stoppage of enemy trade with the least possible commitment of surface naval forces—whereas the claim that the customary rules were obsolescent under modern conditions probably would have led—at best—only to modifications of the traditional law. This is apparent in the case of Germany, whose methods of "blockading" Great Britain necessitated not only the abandonment of the rules heretofore governing blockade but, in addition, the abandonment of the most fundamental rules applicable to any form of belligerent interference with neutral trade. On the other hand, the case of Great Britain is more complex. It will presently be submitted that at least a very large part of the British reprisals system in both World Wars may well be regarded as a reasonable adaptation of the customary law to changed conditions. At least this is considered true with respect to the reprisal Orders in Council of March 11, 1915 and November 27, 1939 (see pp. 305-6, 312), and during World War I Great Britain herself so argued (see pp. 308-10). On the whole, however, Great Britain sought the method of reprisals and avoided contending for clear legal change. Nor does it appear sufficient to explain this behavior by a fear that the British Prize Court would have refused to justify action on any other grounds. Instead, British reluctance to seek the path of legal change may also be attributed to a desire to retain an undefined—and undefinable—freedom of action, a desire admirably served by the doctrine of reprisals. In this connection, however, it has been observed that: "Both for political and for legal reasons it is unfortunate that so important a part of British economic warfare should have so unstable a foundation as the doctrine of retaliation. Politically it implies uncertainty, prior to the event, whether the regulations will be introduced." S. W. D. Rowson, "Modern Blockade: Some Legal Aspects," *B. Y. I. L.*, 23 (1946), p. 351. But this "instability" has its virtues (from the belligerents point of view), not the least of which is the retention of a "free hand." This is true not only for future conflicts in which Great Britain may again find herself a bellig-

The net result has been a growing tension between the customary law and belligerent practice. But to what extent recent belligerent practice, though assuming the form of reprisals, may now be regarded as having succeeded in replacing the traditional law assuredly remains an unsettled issue. Before turning to this issue it will be useful both to restate in summary manner the customary law governing blockade and to review the various recent measures taken by belligerents which served the purposes of blockade, though departing from the rules traditionally governing its form and operation.

B. THE CUSTOMARY RULES GOVERNING BLOCKADE

i. *Establishment and Notification.*

The formal requirements of a blockade concern the manner by which it must be established and its existence made known. The authority to establish a blockade rests solely with the belligerent government. For this reason a declaration of blockade will generally be made direct by the blockading state, though it may be made by the naval commander instituting the blockade, who thereby acts on behalf of his government. In either case the necessity for a declaration containing the date a blockade will begin, and its geographical limits, is clear. Equally settled is the requirement that a belligerent must grant a certain period of grace to neutral vessels in order that the latter may be able to leave ports included within the blockaded area.⁷

erent (and in a position approximately the same as in the two World Wars). It is equally true for future conflicts in which Great Britain may occupy the position of a non-participant. In the latter instance, the admittedly vague and controversial character of "reprisal" measures bearing upon neutral rights at sea would leave Great Britain free to deny the legitimacy of measures analogous to those she herself has resorted to in two wars.

⁷ *Law of Naval Warfare*, Article 632b.—The length of the period of grace granted neutral vessels to leave the blockaded area is dependent—in principle—upon the discretion of the state establishing the blockade. The only clear requirement is that allowance must be made for such departure.—Distinguish blockades as a regular measure of naval warfare between belligerents from so-called "pacific blockades," as well as from the act of a parent state in closing its ports during a period of insurrection or "insurgency." The legality of "pacific blockades" is very doubtful today in view of the obligations imposed upon states Members of the United Nations. In any event, "pacific blockades" are not belligerent measures, but actions directed by one state against another with which it is at peace. While involving the ships of the state being "blockaded," the vessels of third states cannot be interfered with. At least this has always been the position taken by the United States. More disputed is the right of a parent government to close waters and ports to the vessels of third states when such waters and ports are held by insurgent forces. Although the legal position here is far from clear, it does seem settled that acts of closure cannot be made effective by measures which extend beyond territorial waters. In the absence of a recognized condition of belligerency neither the parent government nor insurgents can exercise belligerent rights against the vessels of third states on the high seas. On the other hand, it is generally recognized that: "Within territorial waters both parties may prevent supplies from reaching their opponent. This right of barring access gives no authority to seize or destroy foreign ships." *U. S. Naval War College, International Law Situations, 1938*,

Since knowledge of the existence of a blockade is deemed essential to the offenses of breach and attempted breach of blockade, it is customary that neutral governments be notified by the blockading state of the establishment of a blockade and that the local authorities within the blockaded area receive similar notification from the commander of the blockading forces.⁸ But although neutral vessels are certainly entitled to notification of a blockade before they can be made prize for its attempted breach, it is doubtful whether formal notification is required by law. Thus according to Anglo-American practice the precise character such notification may take is not considered material.⁹

2. Effectiveness

Once a blockade has been properly declared and its existence made known it must satisfy three conditions in order to be considered binding: it must be effectively maintained, it must not bar access to neutral ports and coasts, and finally, it must be applied impartially. Each of these customary requirements require further elaboration.

The obvious intent of the requirement of effectiveness is to prevent belligerent resort to so-called "paper" blockades, that is, to the practice of declaring blockades when the naval power available is utterly inadequate to the task of enforcement. On the other hand, a blockade is effectively maintained when all—or nearly all—of the vessels attempting to enter or to depart from a blockaded area are prevented from so doing by the blockading force. Between these two situations doubt may well arise as to whether in a concrete instance a blockade has succeeded in meeting the test of effectiveness, and it would appear that the most satisfactory formula is that the degree of effectiveness required must be such as to render ingress to or egress from the blockaded area dangerous—hence seizure for breach of blockade probable.¹⁰

pp. 92–3. An excellent review and analysis of this question is given in H. W. Briggs, *The Law of Nations* (2nd ed., 1953), pp. 1000–4. A recent example of the attempted closure of ports during a period of civil war occurred in June 1949, when the Chinese Nationalist Government sought to close certain waters and ports held by the Communists. The incident is reviewed by L. H. Woolsey, "Closure of Ports by the Chinese Nationalist Government," *A. J. I. L.*, 44 (1950), pp. 350–6.

⁸ *Law of Naval Warfare*, Article 632c. Any change in the conditions of a blockade—e. g., an extension of its geographical limits—will require fresh notification.

⁹ Notification may therefore be actual, as by a vessel of the blockading forces, or constructive, as by proclamation, or by belligerent notice, or a matter of common notoriety. However, Articles 11 and 16 of the Declaration of London accepted the practice of the continental European states by requiring that a declaration of blockade be formally notified to neutral governments as well as to the local authorities of the blockaded area. Given the present state of communications the matter of notification no longer constitutes the problem it once did (see pp. 292–3).

¹⁰ *Law of Naval Warfare*, Article 632d. Uncertainty over the application of the rule regarding effectiveness is of long standing. The 1856 Declaration of Paris, in laying down the requirement of effectiveness, defined an effective blockade as one "maintained by a force sufficient really to prevent access to the coast of the enemy." Article 2 of the Declaration of London repeated this formula and added—in Article 3—that the question whether a blockade is effec-

It is implicit in the customary rule of effectiveness, but should be given special emphasis in view of more recent developments,¹¹ that the means a belligerent may use in maintaining a blockade are not unlimited. More specifically, the effectiveness required of valid blockades cannot be secured by means violative of other firmly established rules. The element of danger associated with an effective blockade is therefore to be understood in terms of a liability to seizure and eventual condemnation, though not in terms of a liability to destruction upon entrance into the forbidden area.¹² But there is nothing in the traditional law preventing the use either of submarines or of aircraft in maintaining a naval blockade, so long as their employment does not thereby result in a violation of the rules applicable to surface vessels.¹³

3. Area of Blockade

It is a settled rule of the customary law governing blockade that a blockading force must not bar access to neutral ports and coasts.¹⁴ As

tive is a question of fact." The formula "sufficient really to prevent access to the enemy coast" has never been regarded as very satisfactory, if for no other reason than that a literal interpretation might appear to require the prevention of any vessel from breaching a blockade—certainly no requirement of law. Nor is the question whether or not a blockade is properly effective merely a "question of fact." As Stone (*op. cit.*, pp. 495-6) well points out: "The degree of effectiveness reached in a particular case is a question of fact; but whether that degree satisfies the legal standard is a question of law." Inevitably, this question of law is one in which a substantial measure of discretion may be exercised, thus raising the possibility of controversy between neutral and belligerent. The formulation contained in Article 632d, *Law of Naval Warfare*, follows the wording of previous instructions to the U. S. Navy, and is in accord with the opinion expressed by the Supreme Court in the *The Olinde Rodriguez* (1899), 174 U. S. 510. In this respect there is a close correspondence between the traditional American and British views on the rule of effectiveness.

¹¹ See pp. 296-305.

¹² Unless, of course, the vessel attempting to breach blockade either persistently refuses to stop upon being duly summoned by a surface warship or offers active resistance to visit and search.

¹³ In any event, at least one belligerent warship would be required to carry out the functions of visit, search and seizure. Beyond this minimum the number of surface vessels will vary according to circumstances, and one of these circumstances may be the degree of support a surface force receives from submarines and aircraft, particularly the latter. The problems arising from the use of mines as an instrument of blockade may be deferred for discussion in relation to more recent developments (see pp. 303-5). Here it may be observed, however, that it is very doubtful that the traditional law could be considered as having sanctioned the use of mines, even as an auxiliary means for enforcing a blockade. See, for example, *U. S. Naval War College, International Law Topics*, 1905, pp. 152-3. Finally, it should be observed in passing that the effectiveness of a naval blockade is not endangered by virtue of the fact that a belligerent does not render passage in the air over the blockaded area dangerous. At the same time, it is true that a blockade "maintained by surface vessels only without means of preventing or rendering dangerous the passage of aircraft . . . would be a 'paper blockade' insofar as such craft were concerned even though proclaimed to include these." *U. S. Naval War College, International Law Situations*, 1935, p. 89.

¹⁴ *Law of Naval Warfare*, Article 632c. Restrictions upon the belligerent extension of a blockade to certain rivers, straits and canals constitute the more detailed application of this general principle. For a discussion of these restrictions, see Oppenheim-Lauterpacht, *op. cit.*, pp. 771-5.

applied to "close" or "in-shore" blockades the intent of the rule is to prevent a belligerent from deploying a blockading force in such a manner as to require vessels destined to neutral ports to pass through the line of blockade, thereupon being seized and condemned for breach of blockade. The extent to which the rule operated in the past to restrict belligerent behavior depended largely upon the circumstances of geography. Normally, however, the danger of barring access to neutral territory was reduced to a minimum in the case of close blockades. Conversely, it has been generally contended—though the accuracy of this contention must be closely examined—that the possibility of conforming to the rule in question necessarily decreases the farther a blockading force is stationed from an enemy coast.

Even prior to World War I the military feasibility of a close blockade was seriously questioned. As already noted, the traditional law did not require close blockade, and opposition to the "long distance" blockade maintained by Great Britain during the first World War merely for the reason that the blockading force was stationed at a considerable distance from the enemy's coast was scarcely decisive. Indeed, as a neutral the United States had conceded in the early stages of that conflict that "the form of 'close' blockade with its cordon of ships in the immediate offing of the blockaded ports is no longer practicable in the face of an enemy possessing the means and opportunity to make an effective defense by the use of submarines, mines and aircraft . . ." ¹⁵ Nor was it disputed that the necessities imposed by geography might even render imperative that a blockading cordon be drawn across the sea approaches common to both neutral and enemy ports. But if that contingency arose, it was declared that a blockading belligerent would nevertheless remain obliged "to comply with the well-recognized and reasonable prohibition of international law against the blockading of neutral ports, by according free admission and exit to all lawful traffic with neutral ports through the blockading cordon. This traffic would, of course, include all outward-bound traffic from the neutral country and all inward-bound traffic to the neutral country except contraband in transit to the enemy."¹⁶

What clearly emerges from the above statement is the contention that whatever the ultimate destination or origin of goods carried by a neutral vessel, seizure of the latter for breach of blockade (though not, of course, for carriage of contraband) is justified only if the vessel itself is bound to or

¹⁵ The statements quoted in the text above form a part of the correspondence between the United States and Great Britain, and were occasioned by the British Order in Council of March 11, 1915. For a further discussion of this correspondence, together with references, see pp. 308-10.

¹⁶ To which was added the further observation that: "Such procedure need not conflict in any respect with the rights of the belligerent maintaining the blockade since the right would remain with the blockading vessels to visit and search all ships either on entering or leaving the neutral territory which they were in fact, but not of right, investing."

from a blockaded port.¹⁷ There can be little question that, in principle, this position formed an accurate statement of the customary law as it stood at the outbreak of war in 1914.

4. Application of Blockade

The third substantive principle governing the operation of a blockade is that it must be applied impartially to the vessels of all states—including the vessels of the blockading belligerent.¹⁸ The purpose of this rule is to prevent a blockading belligerent from taking advantage of his position in order to discriminate in the treatment accorded to different countries. Thus a belligerent would violate the principle of impartiality if he allowed the vessels of certain states to pass through the blockaded area while excluding the vessels of other states. However, impartiality in the treatment of the vessels of all states refers only to the standard of behavior demanded of the blockading belligerent within the area that is being blockaded. More precisely, the rule applies only with respect to the vessels of all states attempting either to enter or to depart from the blockaded ports or coast by sea.¹⁹ There is no requirement that a blockade must bear with equal severity upon the trade of neutral states. It may be that despite the blockade some neutrals will be able to continue to trade with blockaded ports by means of inland waterways. It may also be that by choosing to blockade only some of the ports of an enemy, while leaving others open, a blockade will bear more heavily upon the trade of one neutral than of another. In either case the neutral whose trade suffers as a result will have no ground for complaining that the blockading belligerent has failed to conform to the principle of impartiality.

Nor is the obligation of impartiality violated if the commander of a blockading force allows neutral warships to enter and subsequently to depart from a blockaded port. But it is within the discretion of the commander of the blockading force to decide whether or not he will permit such entrance and departure, and under what conditions permission will be granted.²⁰ Finally, merchant vessels in evident distress may be permitted to enter and subsequently to leave a blockaded port.²¹ Whether such permission may be demanded as a matter of right is unsettled though.

¹⁷ Though it should be made clear that by 1914 there was ample authority for seizing a vessel immediately bound for a neutral port if it could be clearly established that after touching at the neutral port the vessel intended to go on to a blockaded port. (See pp. 293-5).

¹⁸ *Law of Naval Warfare*, Article 632f. Article 5 of the Declaration of London stated that: "A blockade must be applied impartially to the ships of all nations."

¹⁹ And it should be added that impartiality is quite compatible with a blockade that merely forbids the ingress of vessels or, conversely, the egress. There is no requirement that a belligerent forbid both ingress to and egress from the blockaded area. He may choose the one, or the other, or—as will generally be the case—both. Whatever his choice the blockade once established must then be applied impartially.

²⁰ *Law of Naval Warfare*, Article 632h (1).

²¹ *Law of Naval Warfare*, Article 632h (2).

In any event, a vessel accorded the privilege of entry and departure must neither receive nor discharge any cargo in the blockaded port.²²

5. *Termination of Blockade*

A blockade may be terminated, or raised, at any time by declaration of the blockading state, or by the commander of the blockading forces acting on behalf of his government. It is customary on such occasions for the blockading state to notify all neutral governments. Apart from formal notice neutral states may regard a blockade as raised once it is no longer maintained with the minimum degree of effectiveness required by law. For reasons already pointed out, the question as to when a blockade is no longer effective can hardly be regarded as self-evident, and on this question the opinion of neutral states may therefore meet with resistance on the part of a belligerent that has sought to establish—and claims to have established—an effective blockade. At the very least, however, it is clear that if a blockading force is driven off by an enemy the blockade has come to an end. Still further, in the event a blockading force leaves the area for reasons unconnected with the blockade the latter must be regarded as suspended.²³

6. *Breach of Blockade*

It has already been observed that knowledge of the existence of a blockade forms an essential condition for the offenses of breach and attempted breach of blockade. At one time this requirement gave rise to a marked diversity in state practice, since the slowness of communications frequently made it difficult to determine whether or not a vessel (i. e., the owner or master) had the requisite knowledge. Today, however, the problem has lost much of its former importance, due to the rapidity with which a blockade's existence may be made known. There is at present general agreement that knowledge may be presumed in all instances where a vessel has sailed from the port of a neutral state whose government has already

²² Article 7 of the Declaration of London provided that: "In circumstances of distress, acknowledged by an authority of the blockading forces, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there." And as Higgins and Colombos (*op. cit.*, p. 546) observe: "In every case, the exemption based on distress must be one of uncontrollable necessity, which admits of no compromise, and cannot be resisted."

²³ Article 30 of the 1941 *U. S. Navy Instructions* declared that: "If the blockading vessels be driven away by stress of weather and return thereafter without delay to their station, the continuity of the blockade is not thereby broken. The blockade ceases to be effective if the blockading vessels are driven away by the enemy or if they voluntarily leave their stations, except for a reason connected with the blockade; as, for instance, the chase of a blockade runner." The factor of weather is no longer likely to play any role in the task of maintaining a blockade. More important, the entire problem of determining when a blockade has ceased to be effective can no longer be regarded merely by reference to the conditions characterizing close blockades. The "stations" for future blockading forces are likely to cover vast areas of the high seas, and it will prove as difficult to determine when vessels have "left their stations" as it will be to judge when they have been "driven away" by an enemy.

received notification of the blockade. And even in the absence of such formal notification a presumption of knowledge will arise—at least according to American and British practice—if the existence of the blockade is nevertheless considered to be a matter of common notoriety.²⁴

Breach of blockade therefore occurs—according to the customary law—when a vessel knowing, or presumed to know, of a blockade passes through the forbidden area. In addition, according to the traditional view of the United States and Great Britain the liability to seizure of a blockade runner extended throughout the duration of her voyage. Hence if a vessel sailed from her home port with the clear intent to evade the blockade, liability to seizure (for attempted breach of blockade) began from the time the vessel first appeared on the open seas. Conversely, if a vessel once succeeded in breaking out of a blockaded port, liability to seizure continued until completion of the voyage.²⁵

On the other hand, the position taken by a number of European states²⁶

²⁴ With respect to breach of blockade by ingress Article 15 of the Declaration of London provided that: "Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade made in sufficient time to the Power to which such port belongs." Article 16 went on to state that if a vessel did not know or could not be presumed to know of the blockade "notification must be made to the vessel itself by an officer of one of the ships of the blockading force." In effect, these provisions narrowed considerably the differences formerly existing between Anglo-American and continental practices, since notice by direct warning was restricted—by Article 16—to relatively infrequent cases.

With respect to breach of blockade by egress Article 16 went on to declare that: "A neutral vessel which leaves a blockaded port must be allowed to pass free if, through the negligence of the officer commanding the blockading force, no declaration has been notified to the local authorities, or, if, in the declaration, as notified, no delay has been indicated." But this provision was at variance with American and British practice, which always presumed knowledge on the part of vessels within blockaded ports.

²⁵ Thus paragraph 31 of the U. S. Navy's 1917 *Instructions* declared that the liability of a blockade runner to capture and condemnation "begins and terminates with her voyage. If there is good evidence that she sailed with intent to evade the blockade, she is liable to capture from the moment she appears upon the high seas. If a vessel has succeeded in escaping from a blockaded port, she is liable to capture at any time before she completes her voyage. But with the termination of the voyage the offense ends." Article 44 of the U. S. Naval War Code, 1900, made a substantially similar provision. The traditional British position has been summarized as follows: "Liability to capture, according to British practice, in the case of a ship which breaks out continues from the time of sailing until the whole voyage is completed, and is not discarded by touching at some intermediate port on the way to the final destination. Similarly in the case of breaking in the liability commences from the moment the vessel sails with the formed intention of breaking the blockade, and continues until the blockade has been raised or the intention has been clearly and voluntarily abandoned. But this change of intention must be complete. A ship is not permitted to proceed to a neighboring port with a view to making inquiries as to the chances of running in from there, and with the intention of taking those chances if they appear reasonable but abandoning the intention if force of circumstances and the vigilance of the blockading squadron make it inadvisable to persist. A ship must have a clear and innocent programme from the outset." J. A. Hall, *Law of Naval Warfare*, pp. 205-6.

²⁶ E. g., France, Italy, Germany and the Netherlands.

had been to insist that a vessel could be seized for blockade running only within the immediate area of operation of the blockading forces. Furthermore, liability to seizure followed—in this view—only from overt action on the part of a vessel to break through the lines of blockade.²⁷ In the 1909 Declaration of London the attempt was made to resolve these divergent views.²⁸ Accordingly, that instrument provided that the seizure of neutral vessels for violation of blockade could be undertaken "only within the radius of action of the ships of war assigned to maintain an effective blockade."²⁹ A further provision laid down that "whatever may be the ulterior destination of the vessel or of her cargo the evidence of violation of blockade is not sufficiently conclusive to authorize the seizure of the vessel if she is at the time bound toward an unblockaded port."³⁰

It must be emphasized that in blockade it is the destination of the vessel—not of the cargo—that forms the decisive consideration. At least this was true prior to 1914. However, the Anglo-American view had been that liability for blockade running could not be avoided simply for the reason that a vessel intended to touch at an intermediate neutral port prior to making for a blockaded port. To this very limited extent the doctrine of continuous voyage may be said to have been applicable to the offense of attempting to break blockade, and for this reason Article 19 of the Declaration of London may not be regarded as providing an accurate statement of the position heretofore taken by the United States and Great Britain. But in providing that a vessel was not liable to seizure if encountered bound for a neutral port, simply because the cargo carried on board was ultimately

²⁷ The one exception being that seizure was considered permissible outside this area in the case of a blockade runner actively pursued by a vessel of the blockading forces.

²⁸ It is true that in practice these differences were not as great as might otherwise appear, and Higgins and Colombos (*op. cit.*, p. 552) point out that "there is no case in actual practice in which a vessel has been condemned for breach of blockade except when she was found actually close to or directly approaching the blockaded port." Nevertheless, there are a number of instances in which courts did give careful attention to the ultimate destination of vessels encountered some distance from the blockading forces, and even purportedly bound for neutral ports. Besides, this practice refers to close blockades. It is clear that in a long-distance blockade—considered as such—the standards regarding evidence of intention that were formerly applied to close blockades would necessarily present easy opportunity for evasion. Nor is it reasonable to expect belligerents to adhere to these former standards in operating long-distance blockades. In this respect belligerent practice in the two World Wars is likely to provide more accurate guidance for the future (see pp. 308–15).

²⁹ Article 17. This provision was viewed at the time as a compromise between the Anglo-American and the continental view, the term "area of operations" (*rayon d'action*) being regarded as a formula whose elasticity was sufficiently great to provide reasonable adaptation to the developing weapons of naval warfare. In reality, though, Article 17 left the old dispute very nearly where it found it, since the continental powers urged that the "area of operations" be rather strictly confined whereas the British and American delegations pressed for the right of the blockading belligerent to fix the radius of action, depending upon the circumstances governing each case.

³⁰ Article 19.

destined for the blockaded area, Article 19 did give expression to the consensus of the major naval powers. It is true that during the American Civil War there were several cases that could possibly be interpreted as extending liability to seizure for blockade breach to vessels sailing for neutral ports, with no ulterior destination, though carrying cargoes ultimately destined to pass through the blockade. But whatever the interpretation given these cases it is reasonably clear that prior to World War I they had not been considered either by the United States or by Great Britain—and certainly not by any other maritime powers—as having come to represent a part of the established law governing liability for breach of blockade.³¹

7. Penalty for Breach of Blockade

The penalty for breach—or attempted breach—of blockade is the confiscation of the vessel and cargo. As an exception, if the owners of (non-contraband) cargo can establish ignorance either of the existence of a blockade at the time they put their goods on board the blockade runner or of the intention of the vessel to violate the blockade such goods will not be condemned.³²

³¹ Nearly all of the Civil War cases were ambiguous in this respect since they also involved the carriage of contraband, and seizure (as well as condemnation) could have followed on this ground alone. It is Hyde's opinion (*op. cit.*, p. 2212) that "attentive examination of certain important American cases oftentimes regarded by the commentators as indicating an unfortunate invocation of the doctrine of continuous voyage to establish breach of blockade, reveals the fact that there were in almost every instance other grounds for decision. Hence numerous *dicta* in relation to blockade running lack the significance frequently attached to them." It should be added that these cases involved instances where either the ultimate destination of both vessel and cargo was the blockaded area or where the cargo alone was destined to pass through the lines of blockade (being carried on a different vessel). In the case of cargo destined for the blockaded area by a route other than by way of the forbidden passage there was a clear refusal to consider liability for breach of blockade as arising.

It is believed to be of some importance to emphasize the position held by the United States prior to 1914 with respect to the application of the doctrine of continuous voyage to blockade. In retrospect, a number of writers have ventured to attribute to this earlier position a character that would appear altogether unwarranted. Apart from a small number of rather obscure and controversial Civil War decisions, there is no indication that in the period prior to World War I the United States had ever endorsed the application of the principle of continuous voyage to blockade, save in the very restricted sense already referred to in the text. There is a considerable difference, however, between applying the principle of continuous voyage to a *vessel* and applying the same principle to *cargo carried by a vessel*. Whereas the former application had been clearly endorsed by this country the latter had not. Nor did any change occur in this respect in either the 1917 or the 1941 *Instructions*. But see *Law of Naval Warfare*, Article 632g (3), for a limited change from the earlier position in the light of belligerent practice during the two World Wars. And see pp. 305–17 for a discussion of recent belligerent practice and the problems to which this practice has given rise.

³² Either possibility is highly unlikely. Besides, the exception does not apply to goods owned by those who also own the vessel, since in the latter instance the master of the vessel is considered to be the agent of the shipowners.

C. BELLIGERENT "BLOCKADE" MEASURES IN THE TWO WORLD WARS

1. *Claims to Restrict Neutral Navigation Through the Establishment of Special Zones*

The effective maintenance of a lawful blockade of any magnitude necessarily requires an appreciable commitment of surface naval forces.³³ Recent experience has indicated, however, that if belligerents are determined to isolate an enemy the temptation will prove strong to achieve the purposes of a blockade though without conforming to the established principles regulating this form of belligerent interference with neutral commerce. Since 1914 one of the principal devices for accomplishing the purposes of a blockade has been the establishment of special areas or zones, variously described,³⁴ within which belligerents have claimed the right either to restrict neutral freedom of navigation or to forbid such navigation altogether.

At the very least, the belligerent in proclaiming these special zones—which frequently covered vast tracts of the high seas—has assumed the competence to render the waters included therein dangerous to neutral shipping through the laying of mines. Neutral vessels have been warned

³³ This remains true even though the use of aircraft as an auxiliary arm of blockade may reduce considerably the need for surface vessels to patrol large areas—as in the case of blockades maintained at great distances from an enemy's coasts. For the necessity to effect lawful seizure of blockade runners remains.

³⁴ The varied terminology used in reference to these areas (e. g., "operational zones," "war zones," "barred areas," "military areas," "areas dangerous to shipping") forms a possible source of confusion. On the one hand, different terms have frequently been used to refer to areas in which substantially similar measures were employed. (E. g., the German distinction between *kriegsgebiet* and *sperrgebiet*, the former indicating a "military area" or "war zone" in which the use of arms is to be expected at any time and the latter signifying a "barred" or "forbidden" zone in which every merchant ship—enemy or neutral—may expect to be treated as an enemy warship. But from the point of view of the actual measures taken against neutral vessels the differentiation between *kriegsgebiet* and *sperrgebiet* (or *seesperre*) appears only to have resulted in a distinction without a difference). On the other hand, the same term has occasionally been used in reference to areas in which quite different measures were taken by belligerents. It remains true, however, that despite differences in the specific measures taken by belligerents within these zones the common intent has been to limit neutral freedom of navigation through the resort to methods that avoid the commitment of surface forces otherwise required in maintaining a lawful blockade (or, for that matter, in maintaining a system of contraband control conforming to the traditional law). This decisive point is clearly recognized by Stone (*op. cit.*, p. 572), who writes: "While its (i. e., "barred" or "war" zones) uses may vary, its function is essentially to reduce the belligerents required commitment of surface vessels in naval operations of economic warfare, whether defensive or offensive, and whether covering ports or coast line, or hundreds of miles therefrom. Such economies have been made possible by the invention of new methods and weapons such as submarines, contact mines, magnetic and acoustic mines, and radio-telegraphy. By such means, great areas of the high seas may be rendered so dangerous for navigation that they do not need surface patrols."

that if entering these areas the belligerent could not insure their safety—or accept responsibility in the event of their destruction by mines—unless the vessels followed prescribed routes and submitted to certain further controls laid down by the belligerent.³⁵ The more extreme measures taken by belligerents sought to prohibit the entrance of neutral vessels into barred zones by threatening to deprive entering vessels of all safeguards normally accorded peaceful shipping. Thus the German war zone declarations of January 31, 1917 and August 17, 1940 stated that neutral vessels persisting in entering forbidden areas would thereby become liable to destruction at sight by submarines and aircraft.³⁶

³⁵ Thus on November 3, 1914, Great Britain declared that the whole of the North Sea would thereafter be considered a "military area." The declaration went on to state that within this area "merchant shipping of all kinds, traders of all countries, fishing craft, and all other vessels, will be exposed to the gravest dangers from mines which it has been necessary to lay and from warships searching vigilantly by night and day for suspicious craft." *U. S. Naval War College, International Law Documents, 1943*, p. 52. The action was taken as a defensive "counter measure" against what was alleged to be the German policy of using merchant vessels (flying neutral flags) to lay mines indiscriminately on the high seas, and particularly along the ordinary trade routes, in violation of the provisions of Hague Convention VII (1907). In declaring the "military area" instructions were given to neutral vessels, intending to trade with Northern European and Dutch ports, to follow certain prescribed routes. Provided this was done, and other minor controls were adhered to, Great Britain accepted responsibility for insuring the safety of neutral traffic. One of the immediate effects of the measure was to bring neutral shipping using this area under the close scrutiny of the British contraband controls. The United States refrained from joining other neutrals in entering a strong protest against the measure, and upon entering the hostilities itself cooperated—in 1918—with the British in laying a mine field extending across the North Sea. See E. Burlington, *op. cit.*, pp. 36-48.

On the outbreak of war in September 1939, the British Government notified neutrals that mines were being laid in restricted areas off the British coast as well as in specified regions off the German coast. In December 1939, the Admiralty gave notice of its intention to lay extensive minefields in the North Sea off the east coast of England and Scotland. In April 1940, it was announced that minefields had been, or would be, laid in the North Sea from the proximity of the Dutch coast to the Norwegian coast, in the Skaggerak (except for a twenty mile wide channel), in the whole of the Kattegat, and in the Southern Baltic. Later, still further minefields were declared. Once again, Great Britain accepted the responsibility of providing for the safety of legitimate neutral shipping passing through some (though not all) of these mine fields. Neutral vessels found inside the areas were subject to removal by British warships and, if found making use of communication facilities contrary to zoning orders, even to seizure for unneutral service. Nor did Great Britain appear to have attempted to justify these measures as acts of a retaliatory character.

³⁶ The German declaration of February 4, 1915, in which the waters surrounding Great Britain and Ireland were proclaimed a "theatre of war," was not expressly intended—at least not on paper—to interdict neutral vessels. Instead, it was stated that enemy merchant vessels would be sunk without warning and neutral ships would navigate at their peril ". . . for even though the German naval forces have instructions to avoid violence to neutral ships in so far as they are recognizable, in view of the misuse of neutral flags ordered by the British Government and the contingencies of naval warfare their becoming victims of torpedoes directed against enemy ships cannot always be avoided. . . ." *U. S. Naval War College, International Law Documents, 1943*, p. 53. On the other hand, the declaration of January 31, 1917 broadened

It need hardly be pointed out that these belligerent measures cannot be regarded as conforming to the customary requirements laid down for lawful blockades. Even if completely effective in preventing all neutral traffic with an enemy, and this possibility can no longer be excluded,³⁷ the methods that have characterized war zone operations would not warrant serious consideration in this respect, for the degree of effective danger that is to attend the attempt to break blockade must be a lawful danger. There is no basis for the belief that the requirement of effectiveness, demanded of lawful blockades, can be met simply by using any means in order to render dangerous the passage of neutral vessels through areas of the high seas declared to be "blockaded."³⁸

The foregoing considerations admittedly are not conclusive in judging whether the belligerent establishment of war zones may be regarded as legitimate methods of warfare at sea. The fact that they cannot be regarded as forming lawful measures of blockade does not prevent their possible justification on quite different grounds. In a sense it may even prove somewhat misleading to deal with these special zones in connection with the general problem of blockade, and the only reason for doing so—as already noted—is that they have been largely intended to accomplish the same purposes as blockade. Even so, the central question remains: Have belligerents any right either to restrict or to exclude altogether

considerably this earlier area (now termed a "war zone," and even a "blockade area") and extended the unrestricted submarine warfare to neutral vessels as well. In both declarations the measures were described as retaliatory, and a response to the allegedly unlawful behavior of the Allies.

In World War II the German Government announced, on August 17, 1940, a "total blockade" of Great Britain. Alleging that England had acted increasingly in violation of the rules regulating belligerent behavior at sea, thus justifying German retaliatory measures, the announcement concluded:

"Germany, having repeatedly warned these [neutral] States not to send their ships into the waters around the British Isles, has now again requested, in a note, these governments to forbid their ships from entering the Anglo-German war zones. It is in the interest of these States themselves to accede to this German request as soon as possible.

The Reich Government wishes to emphasize the following fact: The naval war in the waters around the British Isles is in full progress.

The whole area has been mined.

German planes attack every vessel. Any neutral ship which in the future enters these waters is liable to be destroyed." *U. S. Naval War College, International Law Documents, 1940*, pp. 46-50.

³⁷ Developments in submarines and aircraft alone make this possibility a very real one today.

³⁸ It is primarily for this reason that it has always been doubtful whether a belligerent is permitted to use mines as a supplementary means for enforcing an otherwise lawful blockade (and not so much for the reason, generally advanced, that Article 2 of Hague VII forbids the laying of automatic contact mines "off the coasts and ports of the enemy, with the sole object of interrupting commercial shipping"). By establishing a blockade a belligerent is not thereby granted the special license to subject neutral vessels and aircraft to grave hazards that are otherwise forbidden by law (see p. 289).

neutral vessels³⁹ from navigating within certain areas of the high seas by rendering these areas dangerous to shipping?⁴⁰ In addition, what is the extent of this belligerent right—assuming such right to exist—and the obligations that accompany its exercise?

It is reasonably well established, to begin with, that a belligerent is permitted to place restrictions upon, and even to forbid altogether, neutral navigation in two quite distinct—and limited—areas. In the first, the practice of states has sanctioned belligerent efforts to acquire a greater measure of security through according belligerents the right to exercise control over neutral vessels within a restricted area of the high seas adjacent

³⁹ It should be pointed out that in considering the legal issues raised by the belligerent establishment of war zones most writers have emphasized only the effect of such zones on neutral—though not enemy—merchant vessels, despite the fact that the zones have operated equally against both. Thus Stone (*op. cit.*, p. 572) writes that as “between the belligerents *inter se* this belligerent assertion of extended control raises no problems.” In still another treatise it is observed that: “As between the belligerents only, provided that the war zone is enforced by the use of means, whether submarine contact mines, or surface or submarine craft, which comply with the laws of maritime warfare, both customary and conventional, there can be no doubt of the lawfulness of the practice.” Oppenheim-Lauterpacht, *op. cit.*, p. 682. In reality, these statements, and particularly the latter, would appear an evasion of the issue. Insofar as operational zones “comply with the laws of maritime warfare” they are quite superfluous, at least if by this the traditional law is understood. Save as a measure of reprisal against an enemy, the mere fact that a belligerent has declared a war zone does not serve to confer upon him greater discretion in the measures taken against enemy merchant vessels. On the other hand, if it is assumed that as between belligerents the declaration of war zones “raises no problems,” this can be so only for the reason that by such declaration the powers of a belligerent with respect to enemy merchant vessels are not substantially increased. This assumption, implying as it does a belligerent license to destroy enemy merchant vessels without first removing passengers and crew to a place of safety, cannot yet be accepted. But it is quite true that given the circumstances in which warfare at sea is now carried on (see pp. 67–70), as between belligerents the declaration of special zones in which merchant vessels are not accorded the immunities demanded by the traditional law may add very little to the measures a belligerent may in any event take against enemy shipping. And it is for this reason that the legal issues raised by war zones have related primarily to neutral shipping. However, should belligerents refrain in future hostilities from integrating their merchant vessels into the military effort at sea there would be no justification for the policy of destruction on sight. Nor, for that matter, would a belligerent be justified in introducing such a policy through the device of proclaiming war zones.

⁴⁰ To what extent the issues involved in the declaration of war zones at sea apply to aerial zones above the high seas—barred to neutral civil aircraft—is difficult to say. There would appear to be no difficulty in accepting the position taken by Spaight (*op. cit.*, pp. 400–1), that belligerents may forbid neutral aircraft from entering zones where military operations are in progress (a point that will be discussed shortly). But this claim is clearly a modest one, being limited to the immediate area of operations (naval or aerial). The real question, however, is not whether belligerent license in the air is as great as at sea, but whether it is greater—in view of the formative character of the law of aerial warfare. Nevertheless, it must be admitted that it is impossible to state with any real precision the present limits of the controls permitted to belligerents over neutral aircraft in the airspace above the high seas (and see pp. 354–6).

to territorial waters.⁴¹ Within these waters belligerents may lay mine fields and take other measures designed to insure the defense of coastal regions. It does not appear possible at the present time, however, to state with any degree of precision either the extent these areas may take or the intensity of the controls that may be exercised within them. It does seem fairly clear that the general criteria to be used in judging the legitimacy of a particular defensive area must be the reasonableness of its extent, in terms of its essentially defensive function, as well as the ability of the belligerent to exercise a close and effective control over the area. But beyond this little more can be said.

Altogether different, yet equally well established in practice, is the right of a belligerent to control the movements of neutral vessels and aircraft within the immediate area of naval operations. If necessary, a belligerent commander can order such vessels and aircraft to depart from these areas. If allowed to remain within the vicinity where forces are operating they must obey such orders as are given to them (e. g., with respect to the use of radio), and any failure to do so—or to depart from the area when so ordered—will render offending vessels and aircraft liable to being fired upon or captured.⁴² Nor can vessels complain if, while remaining within the near vicinity of belligerent operations, they are made subject to the incidental hazards invariably attending the conduct of such operations.

It should be emphasized, though, that the immediate area of naval operations refers to an area within which naval hostilities are taking place or within which belligerent forces are actually operating. As such it

⁴¹ See pp. 224–6 for a discussion of similar measures undertaken by neutrals. In large measure, the considerations introduced in this previous discussion are equally applicable to belligerents. Apparently, the first instance of "defensive sea areas" proclaimed by a belligerent occurred during the Russo-Japanese War, when Japan proclaimed that within certain coastal zones neutral shipping would be subject to special restrictions. *U. S. Naval War College, International Law Topics*, 1912, p. 122. In both World Wars the United States, as a belligerent, established several "defensive sea areas" and "maritime control areas," which included territorial waters as well as a very limited area beyond these waters.

⁴² *Law of Naval Warfare*, Articles 430b and 520a. Recognition of the right of belligerents to control the activities of neutral vessels and aircraft within the immediate vicinity of naval operations may be found in the naval manuals of a number of states. In Article 7 of the unratified Rules for the Control of Radio in Time of War, which formed Part I of the 1923 Rules drafted by the Commission of Jurists at the Hague, a belligerent commanding officer, considering the success of his operation to be prejudiced by the presence of vessels or aircraft equipped with radio installation, was authorized to order such vessels and aircraft to depart from the area or—if remaining—not to make use of their radio apparatus while within the vicinity of belligerent forces. Failure to conform with the orders given was held to result in liability to capture or to the risk of being fired upon. Finally, Article 30 of the 1923 Rules of Aerial Warfare declared that: "In case a belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of his forces or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions . . . may be fired upon."

must be clearly distinguished from those special areas or zones of indefinite extent not made the scene of naval hostilities and entrance into which is forbidden to neutral vessels for substantial periods of time. The claim to control neutral vessels and aircraft within the immediate vicinity of operating forces is essentially a limited and transient one and is based not only upon the right of a belligerent to insure the security of his forces but upon the right to attack and to defend himself without interference from neutrals.⁴³

Neither of the preceding examples represent serious restrictions upon neutral freedom of navigation on the high seas. Both types of areas are related to belligerent requirements of a narrowly defensive character, and the controls belligerents may exercise within them are generally recognized as outweighing the limited inconvenience caused to neutrals. However, in the belligerent establishment of war zones there may be found a serious—and perhaps even a fatal—blow to the traditional law. This threat arises only in part from the fact that, in principle, war zones have had no clearly discernible limits, whether in their geographical extent or in their duration. Equally important is the central purpose they are designed to serve, which is to avoid committing large surface forces to the task of cutting off an enemy's sea borne commerce through adherence to methods sanctioned by the traditional law.

Nor may it be of more than limited relevance that the measures taken by belligerents in the establishment of war zones were based, at least in the 1914 war, almost entirely upon the right to retaliate against the allegedly unlawful behavior of an opponent. Even during the second World War belligerents retained in a number of instances the form of reprisals when establishing war zones, thereby acknowledging that the measures contemplated against neutral shipping were in normal circumstances without justification in law. Yet by the close of the 1939 war the persistent and widespread resort to war zones had undeniably served to raise the question whether the act of establishing such zones was any longer in need of the plea of reprisals,⁴⁴ a plea that had admittedly taken on a rather perfunctory

⁴³ It is only to be expected that belligerents will attempt—and have attempted—to assimilate the two types of areas into one category, the purpose being to justify war zones by an appeal to grounds properly reserved for immediate areas of naval operations. Occasionally, writers also fail to make the distinction emphasized above, with the result that the essential differences between these two areas are obscured.

⁴⁴ During the inter-war period a number of German writers had already concluded that the belligerent establishment of barred zones stood in no need of the special justification of reprisals. Instead, it was contended that neutral vessels must suffer the consequences (i. e., destruction) if they persist upon entering areas declared as forbidden or barred by the belligerent. The belligerent is obligated—from this point of view—only to make known to neutrals the exact position of the barred zone; having once proclaimed the extent of the zone and the measures to be taken therein against neutral vessels he is relieved of further responsibility (e. g., E. Schmitz, "Sperrgebiete im Seekrieg," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 8 (1938), pp. 641-71. And for a more recent—and seemingly sympathetic—view by a

character and that on occasion was simply omitted altogether. And even if the latter question must still be answered affirmatively, the consideration remains that for all practical purposes there may be little difference between permitting war zones to be established only as retaliatory measures and according belligerents the competence to resort to these measures as a matter of legal right, quite apart from reprisal. In either event the consequences for neutral commerce may be very nearly the same, particularly if the resort to reprisals becomes—as it has become in recent naval hostilities—a permanent feature of warfare at sea.

Nevertheless, while a legal analysis cannot be unmindful of current—and persistent—realities it cannot make so easy an identification of legal right with belligerent practices. Not only have the more extreme of these practices failed to receive the acquiescence of a majority of states, they have been made the object of general condemnation even when resorted to under the guise of reprisals. Thus, it is at least clear that the measures Germany sought to take within war zones—against neutral vessels—have not received approval, whatever the justification urged on their behalf.⁴⁵

Swiss writer, see H. E. Duttwyler, *Der Seekrieg und die Wirtschaftspolitik des Neutralen Staates* (1945), pp. 38–41). The novelty of this theory must be found in the contention that the principal requirement for almost any belligerent measure against neutral shipping—regardless of the degree to which such measure may depart from established law—is prior notice on the part of the belligerent. It need hardly be pointed out, however, that no legality attaches to a belligerent measure merely for the reason that neutrals have been given prior warning. Nor is there any merit in the equally novel argument that the effectiveness of the belligerent measures taken within barred zones provides a basis for asserting the lawful character of such measures.—Not infrequently, however, these arguments have been further obscured by identifying “barred zones” with what are in reality “immediate areas of operations,” the apparent intent being to justify the attack upon neutral vessels that have allegedly interfered with “belligerent operations.” The wholly unwarranted basis for this latter identification has been noted in the preceding discussion.

⁴⁵ As already noted, the essential feature of this practice has been the claim that the declaration of war zones provides a sufficient justification—particularly when taken as a reprisal—for barring all neutral shipping from a defined area, and for making neutral vessels entering the area after notification liable to destruction at sight by submarines or aircraft. In considering this practice the International Military Tribunal at Nuremberg declared:

“ . . . the proclamation of operational zones and the sinking of neutral merchant vessels which enter these zones presents a different question. This practice was employed in the war of 1914–18 by Germany and adopted in retaliation by Great Britain. The Washington Conference of 1922, the London Naval Agreement of 1930, and the protocol of 1936 were entered into with full knowledge that such zones had been employed in the first World War. Yet the protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the protocol.” For text of judgment, *U. S. Naval War College, International Law Documents, 1946–47*, p. 300.

Although the Tribunal did not expressly so state, the implication is reasonably clear that the sinking of neutral vessels within operational zones was not justified even as a measure of reprisal. Nevertheless, the Tribunal did not pronounce sentence on the accused (Admiral Doenitz) for his breaches of the international law governing the conduct of submarine warfare,

This same broad consensus appears lacking in the evaluation of belligerent claims to establish barred areas of indefinite extent on the open seas through the laying of mine fields. Indeed, the severe condemnation of war zones from which neutral shipping is barred under threat of destruction from submarines and aircraft has not infrequently been accompanied by the acquiescence to zones from which neutral shipping is barred by means almost equally destructive. In large measure, the source of this extraordinary position may be attributed to a convention—Hague Convention VIII (1907)—that has been described, and not inaccurately, as worthless.⁴⁶ Although the avowed purpose of Hague Convention VIII is to provide for the security of "peaceful shipping," the effect of that instrument has been to invite the abandonment by belligerents of any substantial restraints upon the use of mines. According to a literal reading of Article 2 a belligerent has only to proclaim that his "sole" intention is not to intercept peaceful shipping in order to lay automatic contact mines off the ports and coasts of an enemy. In addition, Article 3 allows the implication that, within the terms of the Convention, belligerents may sew anchored automatic contact mines anywhere upon the high seas. Nor is a belligerent even placed under a strict obligation to notify third states of the precise location and extent of mine fields once laid. Instead, the obligation is only "to notify the danger zones as soon as military exigencies permit." Hence the interpretation is allowed that it is only mine laying of an openly indiscriminate character that is prohibited—i. e., mines sewn without regard to any definite military operation save that of endangering all peaceful shipping, and without any reasonable assurance of control or surveillance.⁴⁷ The experience of World Wars I and II has shown that no appreciable amount of ingenuity is required

"in view of all the facts proved and in particular of an order of the British Admiralty announced on May 8, 1940, according to which all vessels should be sunk at sight in the Skaggerak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war. . . ." It may be of some relevance to observe that the unrestricted warfare carried on in the Pacific Ocean by the United States was directed against Japanese merchant vessels, though not against neutral shipping (which was, by this time, almost non-existent). The British order in the Skaggerak, though certainly affecting neutral shipping, was given during the period following upon the German invasion of Norway. At that time the Skaggerak came very close to resembling an "immediate area of naval operations." For these reasons, it is difficult to see how the "facts" cited by the Tribunal could be considered as offsetting the measures taken by Germany within operational zones against neutral shipping.

⁴⁶ "As an instrument of control," H. A. Smith (*op. cit.*, p. 95) writes of Hague VIII, "the convention is quite worthless and does not merit detailed examination." In fact, it is somewhat worse than worthless in that it has provided belligerents with arguments that would otherwise find no justification. A useful review of the problem, as seen from the viewpoint of the customary law, is given in *U. S. Naval War College, International Law Topics*, 1914, pp. 100-38.

⁴⁷ See *Law of Naval Warfare*, Article 611, for the text of Hague VIII. According to Article 1 of the Convention the laying of unanchored automatic contact mines is forbidden except when so constructed as to become harmless one hour after the person laying them ceases to control them.

of a belligerent to reconcile almost any use of mines with the requirements laid down in these provisions.⁴⁸

It may be suggested, however, that the provisions of Hague Convention VIII need not—and, indeed, should not—be considered as exhausting the scope of a belligerent's obligations. The general principle that the burden of proving the legitimacy of any particular form of interference with neutral vessels rests squarely upon the belligerent asserting it is as applicable—in the case of war zones—to the use of mines⁴⁹ as it is to the use of submarines.⁵⁰ There is no apparent reason for considering the one instrument less hazardous to neutral merchant vessels than the other. Nor is it easy to see why the destruction of neutral vessels through mines is somehow less violative of the rule forbidding the sinking of such vessels before first removing passengers and crew to a place of safety than is the same act of destruction when performed by submarines. Finally, if the mere act of declaring that within a certain area neutral vessels will thereafter be destroyed by submarines cannot serve to render such destruction lawful, how can a similar declaration notifying the extent of a minefield—entrance into which is accompanied by the risk of destruction—make the latter measure lawful? In either case neutral vessels may be confronted with the alternatives of avoiding the barred areas or entering it at the risk of destruction.⁵¹

⁴⁸ Thus in the initial stages of the 1939 war Great Britain charged that Germany—as in 1914—had violated the provisions of Hague VIII by the indiscriminate laying of mines along the paths of the principal trade routes, by failure to notify peaceful shipping of the precise extent of the minefields, and by laying mines off the English coasts for the sole purpose of interrupting neutral shipping. Germany denied these charges, asserting that the notification of minefields depended upon military considerations which Germany alone could judge and that the purpose of laying minefields off the English coasts was not for the "sole purpose of intercepting commercial shipping." See Hackworth, *op. cit.*, Vol. VI, pp. 509-12.

⁴⁹ A principle that appears equally applicable to the belligerent use of magnetic and acoustic mines (whether laid by surface vessels or aircraft), even though Hague VIII refers only to automatic contact mines.

⁵⁰ And this is particularly so when such belligerent claims to restrict neutral commerce as war zones represent are carried out by methods violative of other established rules of law.

⁵¹ The above considerations may appear—when once they have been made—as almost self-evident. Yet it is surprising how frequently they have been neglected by writers who look upon the submarine with critical eyes, though viewing the use of mines with what approaches equanimity. And it is for this reason that some writers—particularly German publicists—have suggested that the belligerent measure of proclaiming barred areas, in which neutral vessels thereafter entering incur the risk of attack from submarine, does not essentially differ from the establishment of minefields from which neutral vessels are also barred. In considering the latter argument, Stone (*op. cit.*, p. 574) observes that: "Retaliation apart, the belligerent case may rest on the argument that neutrals cannot complain of the laying of individual mines of a lawful type, at particular places on the high seas, and that a 'barred zone' is after all merely a systematic disposition over a wide area of mines lawfully sown at each point within it.. This argument on principle would, however, still afford no legal warrant for attaching any legal liabilities, such as liability to be sunk at sea, to the neutral's trespass into that zone." But this is surely an obscure position. A barred zone may be as much "enforced" by mines as by submarines, and in both instances there is an attempt to attach a "legal liability" in the event of forbidden entrance.

In brief, it is difficult to avoid the conclusion that there is no greater legitimacy attached to the use of mines as a means for establishing war zones on the high seas than there is in the use of other means (e. g., submarines) in order to realize the same purpose. Still further, it does not appear possible to assert that—apart from reprisal—belligerents have at present the right to restrict the movement of neutral vessels within vast tracts of the open seas merely by proclaiming that these areas have been rendered dangerous—in one form or another—to neutral shipping. Hence, despite belligerent practices in two wars the establishment of war zones forms a lawful measure only when taken in response to the persistent misconduct of an enemy.⁵² Even then, belligerents have not yet been conceded the right to bar altogether such areas to the use of innocent neutral traffic.⁵³ Instead, the right to restrict the freedom of movement of neutral vessels implies the belligerent obligation to indicate certain routes by which neutral traffic may pass through the declared war zones with a reasonable assurance of safety.⁵⁴

2. *The Allied "Blockades" of Germany*

Although the practice of interdicting neutral intercourse with an enemy through the establishment of special areas or zones was not confined to any one belligerent it is properly associated—particularly in its more extreme manifestations—primarily with the German conduct of warfare at sea. Very different in character were the measures upon which Great Britain and her allies relied in both World Wars for effecting the economic isolation of Germany.⁵⁵

What is frequently referred to as the British "long-distance blockade" of Germany in World War I rested largely upon two Orders in Council that were expressly justified as measures of retaliation. In the first of these orders, issued March 11, 1915, the declared intent was to prevent goods of

⁵² Particularly enemy misconduct equally affecting belligerent and neutral rights at sea, but which neutral states are either unwilling or unable to prevent (see pp. 253-8).

⁵³ It was this feature—i. e., the attempt at total prohibition—that succeeded in arousing as much of the opposition to German war zones as the fact that these zones were partially enforced through the threat of destruction from submarines. On the other hand, the British war zone declarations were generally not total prohibitions, but the assertion of a right to control the movement of neutral traffic subject to the designation of lanes through which the mine fields could be passed in safety. The importance of this difference in the practice of the two states ought not to be underestimated.

⁵⁴ However, in reference to the British barred zones of World War II it has been stated that: "These developments tended in the direction of a successful assertion of the right of the belligerent to lay mine-fields on the high seas irrespective of reprisals but subject to the duty to insure the relative safety of neutral traffic." Oppenheim-Lauterpacht, *op. cit.*, p. 683n (1). In practice, the difference between this opinion and the opinion expressed in the text above is not likely to prove very great.

⁵⁵ Very different in character not merely for the reason that they were much more effective than the German war zone declarations in cutting off neutral commerce, but for the far more important reason that they were applied without unlawfully endangering neutral lives.

any kind from reaching or leaving Germany.⁵⁶ According to its terms no merchant vessel was to be permitted to proceed to or from Germany carrying goods destined to or laden in the ports of the enemy. Intercepted vessels were subject to compulsory deviation to a British or Allied port and required to discharge cargo having an enemy origin or destination. In addition, merchant vessels though proceeding to or from neutral ports could nevertheless be intercepted and required to discharge such goods as were found to be of enemy origin, ownership, or destination. The disposition finally made of goods discharged in British or Allied ports varied, but in all instances not involving contraband (which, of course, was in any event liable to condemnation) it fell short of confiscation. Nor was any penalty attached to a vessel in respect to the carriage of goods found—either upon calling voluntarily at an Allied port or upon being intercepted and escorted in to port—to be non-contraband in character. However, the severity of this earlier measure was increased by a later Order in Council of February 16, 1917, which, in addition to providing for the capture and condemnation of any vessel carrying goods with an enemy destination or of enemy origin, declared that any vessel "encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or Allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court."⁵⁷ This presumption, which if not displaced resulted in condemnation of both vessel and cargo, could be avoided only by calling for examination at an appointed port. Even then, cargo found to be of enemy origin or destination was liable to condemnation.

As retaliatory measures taken in response to Germany's unlawful conduct of submarine warfare these two Orders need never have raised controversial questions relating to the scope of the belligerent right of blockade. Of course, the measures could be—and were—challenged by neutrals on the ground that reprisals taken by one belligerent against an enemy, for the alleged misconduct of the latter, could not be used as a basis for encroaching upon otherwise recognized neutral rights. In the absence of a lawful blockade it was therefore held that neutral vessels carrying non-contraband cargo—whether neutral or enemy owned—must be considered exempt from belligerent interference. Apart from the question of reprisals, the latter

⁵⁶ The German decree of February 4, 1915, proclaiming the waters around Great Britain a war zone in which enemy merchant vessels would be sunk without warning and neutral vessels would enter only at grave peril, provided the basis for this retaliatory order.

⁵⁷ Cited in Hackworth, *op. cit.*, Vol. VII, pp. 137–8. The justification given for the order of February 16, 1917 was declared to be the German war zone declaration of January 31, 1917, extending the area of previous war zones and applying measures of unrestricted submarine warfare to neutral vessels found within the prohibited zone.

contention was certainly supported by the traditional law.⁵⁸ But this admission cannot be considered as necessarily relevant in determining the legality of belligerent measures which—though departing from normal rules regulating the actions permitted against neutral commerce—are taken in response to enemy misconduct directed against both belligerent and neutral, and which neutral states are either unwilling or unable to prevent. Despite the admitted hazards and possible abuse implicit in these measures it has been earlier submitted that, in principle, their legitimacy may be upheld.⁵⁹

On the other hand, it is a different question to ask whether the specific measures taken by Great Britain and her allies were justified by reason of the circumstances in which they were invoked and in view of the attendant hardships they imposed upon neutrals. The fact that before the British Prize Court the retaliatory measures taken during World War I were considered to be legitimate acts of reprisals,⁶⁰ and not imposing unreasonable hardships upon neutrals, cannot of itself be regarded as conclusively establishing the legality of the measures under international law. In general, the status of retaliatory measures bearing adversely upon the normally recognized rights of neutrals is necessarily one of uncertainty.⁶¹

⁵⁸ To this extent the reprisal measures went beyond the established law in the following respects. First, by ordering the detention—and finally the condemnation—of all goods having an enemy destination, even though not confiscable as contraband. In practice, the benefits received from this extension of belligerent right were not appreciable, considering the extent of belligerent contraband lists. Second, by ordering the detention—and finally the condemnation—of all goods having an enemy origin. Apart from reprisal, there was no other warrant for such action, since the seizure of goods carried on neutral vessels and bearing an enemy origin was justified only in case of blockade. Third, the condemnation of vessels—under the Order of February 16, 1917—for carrying goods of enemy destination or origin also went beyond the existing law, which provided for condemnation—in the absence of blockade—only in certain cases involving carriage of contraband (see pp. 276-7). Fourth, in laying down—again under the Order of February 16, 1917—that a vessel bound to or from a neutral port providing means of access to an enemy would be presumed to be carrying goods of enemy destination or origin if failing to call at a British or Allied port for inspection of the cargo. The effect of this presumption, even though rebuttable, was to permit the seizure of vessels merely for the failure to call at a British or Allied port, and to place the burden of establishing innocence of the cargo upon the neutral claimant. On the other hand, the compulsory diversion of neutral vessels to British or Allied ports for inspection of the cargo—allowed under the Order of March 11, 1915—may be considered independently from these issues (see pp. 338-44).

⁵⁹ See pp. 256-8.

⁶⁰ As a means of reprisal, the legitimacy of the Order in Council of March 11, 1915 was upheld in *The Stigstad* [1916], 5 *Lloyd's Prize Cases*, p. 361; the Order of February 16, 1917 in *The Leonora and Other Vessels* [1919], 7 *Lloyd's Prize Cases*, pp. 357-63.

⁶¹ This is particularly so when the facts that are alleged to provide the basis for reprisal orders are themselves a matter of grave uncertainty. (And it should be noted once again that before the British Prize Court these facts are not made the subject of inquiry, the Court contenting itself to accept the statement of facts given by the Executive.) During World War I reprisal orders were based upon enemy acts that were, in turn, claimed to be retaliatory measures. Who initiated the endless series of reprisals by first resorting to unlawful behavior even now forms the subject of considerable controversy.

Probably for this reason Great Britain, though rejecting the neutral claim of immunity from the effects of belligerent "reprisal orders," was not unwilling to contend that in its operation at least the retaliatory system thus established did not depart from the essential principles demanded of a lawful blockade.

On this basis⁶² the principal objections made by the United States against the British "long-distance blockade" were three in number.⁶³ The Order of March 11, 1915 was enforced largely by the presence of a British cruiser squadron in the North Atlantic, operating some 1000 miles from German ports. From this vantage point the British warships were in a position not only to intercept vessels bound to and from German ports by way of the principal Atlantic trade routes, but also to intercept vessels bound to and from northern European neutral ports that provided access to Germany. At the same time, trade between these neutral ports and Germany—being "inside" the "blockade"—remained open. In seizing vessels carrying goods suspected of having an ultimate enemy destination or origin, though bound at the time to or from a neutral port, it was contended that the so-called "blockade" measures thereby violated the principle requiring that blockades not bar access to neutral ports.⁶⁴ Still further, it was noted that since the measures in question did not have the effect of intercepting trade carried on directly between Scandinavian and German Baltic ports they did not bear with equal severity upon all neutrals and therefore lacked an impartial character. Finally, and in close connection with the preceding point, it was observed that in failing to close off trade between German and Scandinavian ports the "blockade" measures did not satisfy the requirement of effectiveness.

In reply to these objections the British Government asserted that while the measures taken ought not to be judged by strict reference to the letter of the rules applicable to blockade, they were in substantial conformity with the spirit of these rules and should be regarded as a reasonable adap-

⁶² I. e., on the basis of whether the retaliatory measures in question conformed to the essential principles governing lawful blockade. Needless to say, there could be no question of the fulfillment of the formal requirements of blockade (declaration or notification).

⁶³ The immediate and following paragraphs consist of a brief summary of the American notes of March 30, 1915 and October 21, 1915, as well as the British notes of July 23, 1915 and April 24, 1916. Convenient texts may be found in *A. J. I. L.*, 9 (1915), *Spec. Supp.*, pp. 117, 157 and 10 (1916) *Spec. Supp.*, pp. 72, 134.—This controversy, it should be clearly understood, dealt only with the earlier order of March 11, 1915, and the measures taken by Great Britain to carry it out. By the time of the second—and more stringent—Order in Council of February 16, 1917 the United States was on the verge of becoming a participant in the conflict, and with its entrance into hostilities the mainstay of neutral resistance collapsed. Similarly, in World War II the British reprisal order of July 30, 1940 came at a time when neutral resistance, though still appreciable, had begun to diminish in strength. These facts should be kept in mind when considering the possible significance of the British retaliatory systems on future developments.

⁶⁴ Though no objection was made either to the long distances maintained between the "blockading" force and German ports or to the fact that the cruiser cordon was drawn across the sea approaches to neutral ports (see p. 290).

tation of the latter to the peculiar circumstances in which the "blockade" of Germany had to be conducted. The charge that neutral ports were being blockaded was therefore denied by the contention that a belligerent did not violate any "fundamental principle of international law by applying a blockade in such a way as to cut off the enemy's commerce with foreign countries through neutral ports if the circumstances render such an application of the principles of blockade the only means of making it effective." It was claimed that every effort was being made to distinguish between cargo consigned to neutral ports with a genuine neutral destination and goods ultimately destined to an enemy.⁶⁵ As against the charge that the "blockade" measures were partial in their application it was observed that "the passage of commerce to a blockaded area across a land frontier or across an inland sea has never been held to interfere with the effectiveness of the blockade. If the right to intercept commerce on its way to or from a belligerent country, even though it may enter that country through a neutral port, be granted, it is difficult to see why the interposition of a few miles of sea as well should make any difference. If the doctrine of continuous voyage may rightly be applied to goods going to Germany through Rotterdam, on what ground can it be contended that it is not equally applicable to goods with a similar destination passing through some Swedish port and across the Baltic or even through neutral waters only?"⁶⁶

⁶⁵ To which the further argument was added that "we have tempered the severity with which our measures might press upon neutrals by not applying the rule which was invariable in the old form of blockade that ships and goods on their way to or from the blockaded area are liable to condemnation." This was quite true—at least until the Order of February 16, 1917—but could only serve to justify the measures in question as a legitimate reprisal (since not bearing too harshly upon neutrals), not as a legitimate blockade conducted in conformity with the customary law governing this belligerent measure. For that law, as earlier observed, permitted the seizure of vessels (and cargoes) only if the latter were found to be destined to a blockaded port—whether directly or after touching at an intermediate neutral port. The claim that vessels could be seized for blockade breach on the grounds that the cargo carried was ultimately destined to the blockaded area—the essence of the British position—simply could not be regarded as sanctioned by the customary law of blockade. Nor was this claim strengthened by the consideration that goods, upon reaching a neutral port, might be transshipped to another vessel and then pass through the forbidden area, since the decisive consideration was the ultimate destination of the vessel, not the cargo. That circumstances, as Great Britain pointed out, justified the extension of the concept of destination applicable in blockade to cargoes as well might be true (and, indeed, this position is subscribed to in the following pages). Nevertheless, this quite different consideration ought not to obscure the fact that the British position marked a departure from the strict letter of the traditional law.

⁶⁶ It is difficult to see the relevance of this reply to the charge of partiality, since instead of attempting to deal with this charge it makes the quite different point that the application of the doctrine of continuous voyage to blockade is justified. It was not disputed, however, that trade between Scandinavian and German ports was not being intercepted. Yet the order of March 11, 1915 purportedly applied to *all* neutral trade with *all* German ports. In this connection, Stone (*op. cit.*, pp. 502-3) declares—following a number of other writers—that the objection to the alleged partiality of the blockade was hardly critical, since "a blockade need not cover every approach to the blockaded port's coast. The fact that intra-Baltic traffic was beyond British reach seems to put the matter on no different basis; it was an objection to eco-

Finally, it was claimed that as measured by actual results the "blockade" was extremely effective.⁶⁷

As judged by the accepted practice of states during the period prior to World War I there was indeed little basis for contending that the "long distance blockade" of Germany in World War I conformed to the essential principles governing the traditional blockade. Nevertheless, it is a curious fact that while allegedly novel circumstances have been generally considered as justifying far-reaching changes in the law of contraband, the circumstances that admittedly render a close blockade either impossible, or largely futile even if possible, have still to be generally accepted as sanctioning similar changes in the law governing blockade.⁶⁸ Acceptance of the principle of ultimate enemy destination with respect to contraband has been accompanied by a pronounced reluctance to apply the same principle to blockade. Yet if in the case of contraband neutral territory is no longer

nomic rather than naval effectiveness." But a blockade—at least according to the customary rules—must cover all the sea approaches to the ports or coasts declared under blockade. This the British "long-distance blockade" did not—and could not—do.

It should also be noted that the "impartiality" of the British "blockade" was open to question by reason of the large volume of British exports to Scandinavian and Netherlands ports. Although the United States did not press this point it did attach some significance to the fact that: "Great Britain exports and re-exports large quantities of merchandise to Norway, Sweden, Denmark, and Holland, whose ports, so far as American commerce is concerned, she regards as blockaded." Great Britain replied, in part, by pointing out that the volume of American exports to Northern Europe nevertheless showed a greater rate of increase than did British exports, and that American traders had made profits equal to or greater than the profits of British traders. This response was quite irrelevant from a legal point of view, since the traditional rules governing blockade required the blockading state to apply the blockade to its own trade as well as to the trade of neutrals. Of course, Great Britain could contend, and did contend, that British exports to neutral ports within the "blockaded" area were destined solely for neutral consumption, though there was at the time substantial question as to the validity of this contention. But even if true it did not do away with the charge that Great Britain was using the "blockade" in order to advance her commercial interests.

⁶⁷ With respect to the sea approaches in the North Atlantic, through which lines of control could be drawn, this was true enough. A different conclusion must be reached with respect to intra-Baltic traffic. Trade between Germany and the Scandinavian countries did of course decline as the war progressed. But this was due largely to Allied rationing policies imposed upon neutral states, which form little or no relation to the issues at controversy.

⁶⁸ Nor is it altogether relevant to argue that whereas by 1914 ample precedent existed for applying the principle of ultimate destination to contraband carriage there was very little—if any—authority for its application to blockade. Indeed, this contrast is itself misleading, since the application of this principle to contraband clearly hung by a very slender reed up to 1914. Despite the decisions of American prize courts during the Civil War, opposition to acceptance of the principle of ultimate enemy destination in any form remained very strong. And quite apart from this hostility, it will hardly be argued that these earlier decisions sanctioned the remarkable application given the principle after 1914, in building up what amounted to a new law of contraband. Besides, if belligerent practice during the middle of the nineteenth century could introduce precedents of a far-reaching character why was the same attribute denied to belligerent practice a half century later? There is, in fact, no apparent reason for admitting legal change—in order to meet changed conditions—in the one case (contraband) and denying it in the other (blockade).

to be regarded as a safe emporium for goods whose ultimate destination is to an enemy it is difficult to understand the continued insistence upon just this point in the case of blockade.⁶⁹ The exercise of contraband controls, labelled as such, can surely prove quite as effective in barring access to neutral ports as a blockade in which the principle of ultimate enemy destination is considered applicable to the offense of blockade breach. Still further, the distinction between goods consigned to a neutral port, and having a genuinely neutral destination, and goods whose ultimate destination is to an enemy is just as possible (or perhaps more accurately: no more difficult) to make in the case of blockade as in the case of contraband.⁷⁰

It is true that given the abandonment in recent hostilities of the distinction between absolute and conditional contraband, and the gradual dis-

⁶⁹ One of the best arguments to this effect remains J. W. Garner's *International Law and the World War* (1920), Vol. II, pp. 327 ff. Also H. W. Malkin, "Blockade in Modern Conditions," *B. Y. I. L.*, (1922-23), pp. 87-98. And Hyde (*op. cit.*, p. 2199) writes that: "If the doctrine of continuous voyage may be fairly applied to a neutral ship ostensibly bound for a neutral port solely because of the fact that the vessel is ultimately bound for a blockaded enemy port, does it follow that non-contraband neutral cargoes may be likewise seized when bound for neutral ports, if further transportation by land or sea to the territory of the belligerent whose coast is blockaded is in reality sought to be effected? It is believed to be difficult to find a convincing negative answer, although it may be maintained with assurance that maritime states had not yielded so broad a right when World War I was initiated."—A limited concession to the application of the principle of ultimate enemy destination to blockade may be found in the position (which now enjoys a certain support from states, see p. 316) that the doctrine of continuous voyage may apply to blockade where both laps of the voyage are by sea and the goods (though not necessarily the vessel) are intended to reach the blockaded area by way of the forbidden route. But on this view goods intended, after reaching a neutral port, to be forwarded to the blockaded area by a route (land or inland waterway) that does not involve crossing the "lines of blockade" are exempt from seizure for blockade breach. The difficulty with this view is that while it does not follow the customary law, which fastened attention upon the final destination of the vessel and not of the goods, it fails to resolve the problem of destination given the conditions under which blockade normally must now be conducted. For it would fail to apply to goods destined to or originating from a blockaded area other than by way of the forbidden route. This in itself could render a blockade largely futile in modern conditions. Furthermore, in the case of blockades maintained at great distances from an enemy's coasts the blockade runner—in a sense—passes through the "lines" of the blockading forces on his way to a neutral port. Once in the neutral port the vessel might then sail for an enemy port without—in a strict sense—again passing through the forbidden area. These considerations suggest the difficulties involved in attempting to apply the traditional law in modern conditions. They also imply that a partial modification of the customary law governing destination in the case of blockade may prove to be no solution at all.

⁷⁰ Undoubtedly it is this consideration that has been a primary factor in the opposition to applying, in the case of blockade, the principle of ultimate enemy destination to cargoes as well as to vessels. In brief, the argument has been that once the destination of the ship is no longer conclusive in determining the destination of the cargo—as it is under the traditional rules governing breach of blockade—the way is opened to mere opinion and conjecture. In this process, it is contended, goods with a genuine neutral destination are seized and belligerents are left free to interfere with innocent neutral traffic. At the same time, it will hardly be denied that the conjecture that would admittedly accompany this application of the principle of ultimate enemy destination to blockade breach already characterizes the procedure

appearance of the category of free goods, the practical difference between contraband and blockade controls cannot be very great so far as enemy imports are concerned.⁷¹ One important difference must necessarily remain, however, since seizure for carriage of contraband can apply only to goods having an enemy destination, whereas seizure for blockade breach may apply equally to exports from the blockaded area. Even so, the application of what has been termed the principle of ultimate enemy origin appears no less justified in the case of blockade than does the principle of ultimate enemy destination when applied to the carriage of contraband.⁷²

In any event, World War II witnessed a repetition—though not without certain significant modifications—of the “blockade” measures adopted in the preceding conflict, and once again the legal basis for these measures was asserted to be the right of retaliation against the enemy’s misconduct. Thus in response to what were alleged to be illegal German acts of submarine and mine warfare, an Order in Council of November 27, 1939 provided that any vessel sailing from a German port, or a port in territory under enemy occupation, after December 4, 1939 might be intercepted and required to discharge in a British or Allied port that part of its cargo as was laden in an enemy port. Vessels sailing from non-enemy ports and found to be carrying goods of enemy origin or ownership might also be required to discharge such goods in a British or Allied port. The disposition to be made of goods so discharged and placed in the custody of the marshal of the prize court varied, but—in principle—these goods could either be requisitioned by the government or sold under direction of the prize court with proceeds of the sale to be paid to the owners after the conclusion of peace under circumstances the court considered just.⁷³

for determining destination in the case of contraband carriage. The unfortunate truth is that such conjecture is an inevitable result of the acceptance of the principle of ultimate enemy destination in any form. To say this, however, is not to justify the belligerent attempt to attach a legal liability to seizure of vessels and cargoes that have failed to obtain belligerent clearance prior to departure from neutral ports—a matter to be dealt with shortly.

⁷¹ Assuming, of course, that the principle of ultimate enemy destination is applicable to both.

⁷² And experience indicates that there is less uncertainty—and less conjecture—involved in the attempt to determine the enemy origin of goods than in determining enemy destination.

⁷³ The text of the November 27th Order in Council, with later changes, is given in Hackworth, *op. cit.*, Vol. VII, pp. 138–40. (A French decree of November 28th substantially followed the British Order). A detailed account of the events leading up to the November 27th Order, as well as its operation, is given by Medlicott, *op. cit.*, pp. 112–24. Considerable neutral protest was raised against the measure, and numerous modifications were made to its operation. The measure was administered mainly by use of “certificates of origin and interest.” These certificates, as Medlicott points out, “were issued in the form of a statement by the consular officer at the port of loading that he was satisfied that the merchandise in question had not been produced in enemy territory, and that no enemy person or firm, or firm on the Statutory list, had any interest in it. Separate certificates were required for each consignment, except in certain exceptional circumstances. . . .” Vessels outward bound from adjacent neutral ports were allowed to proceed if carrying cargoes covered by export passes. Vessels carrying cargoes not so covered were diverted to a contraband control base where a period of detention followed and inquiry was made into the origin and ownership of the goods.

The Order of November 27th served only as a prelude, however, to the later Order in Council of July 31, 1940. The relevant provisions of this later retaliatory Order read as follows:

2. Any vessel on her way to or from a port through which goods might reach or come from enemy territory or the enemy armed forces, not being provided with a Ship Navicert valid for the voyage on which she is engaged, shall, until the contrary is established, be deemed to be carrying contraband or goods of enemy origin or ownership, and shall be liable to seizure as Prize; provided that a vessel, other than a vessel which sailed from or has called at an enemy port, shall not be liable to seizure under the provisions of this Article unless she sailed from or could have called at a port at which she would, if duly qualified, have obtained a Ship Navicert.

3. (1) Goods consigned to any port or place from which they might reach enemy territory or the enemy armed forces, and not covered by a valid Cargo Navicert or, in the case of goods shipped from a British or Allied port, by a valid Export or Transshipment Licence, where such Licence is required, shall, until the contrary is established, be deemed to have an enemy destination.

(2) Goods shipped from any port from which goods of enemy origin or ownership might have been shipped, and not covered by a valid Certificate of Origin and Interest, shall, until the contrary is established, be deemed to be of enemy origin or ownership.

4. Goods of enemy origin or ownership shall be liable to condemnation.

5. Any vessel seized under Article 2 hereof and carrying contraband or goods of enemy origin or ownership shall be liable to condemnation in respect of such carriage.⁷⁴

⁷⁴ Statutory Rules and Orders, 1940, No. 1436. In the Preamble to the Order it was declared that "for the convenience of traders and for the avoidance of risks and delays inseparable from the diversion of ships into port in the exercise of belligerent rights against commerce at sea, a system has been instituted whereby passes can be obtained for approved cargoes and for ships which carry none but approved cargoes." Paragraph 1 of the Order contained the following definitions:

"the term 'Cargo Navicert' means a pass issuable by the appropriate British or Allied authority in the neutral country of shipment in respect of goods consigned to any port or place from which they might reach the enemy, to the effect that, so far as is known at the date of issue, there is no objection to the consignment . . .

"the term 'Certificate of Origin and Interest' means a pass issuable by the appropriate British or Allied authority in the neutral country

"The term 'Ship Navicert' means a pass issuable to a vessel in respect of a given voyage by the appropriate British or Allied authority at all British, Allied or neutral ports, if that authority is satisfied that the vessel is duly qualified to receive it."

The principle, and novel, feature of the system of control thus introduced⁷⁵ may be found in the consequences attending the failure on the part of neutrals to obtain the belligerent's prior approval for voyages undertaken, and cargo shipped, to or from any port providing access to the enemy. By the terms of the Order liability to seizure was—in any event—justified when a vessel failed to carry a Ship Navicert or goods were not fully covered by Cargo Navicerts or Certificates of Origin and Interest. The presumptions held to arise as a result of such failure were sufficient—if not clearly rebutted—to warrant condemnation either of vessel or of cargo or of both. To these legal liabilities were added measures the exercise of which demanded no legal justification but whose effect in inducing neutral shipowners and traders to participate in the Allied control system was nevertheless very considerable. Thus the refusal on the part of neutral shipowners to undertake full compliance with Allied regulations entailed the deprivation of access to all British controlled facilities, e. g., bunkers, drydocking, repairing and insurance.⁷⁶

⁷⁵ The background of the Order of July 31, 1940 deserves a few words. By July 1940, German conquests in Europe had rendered almost unworkable the system of contraband and enemy export controls heretofore exercised. Instead of patrolling only the supply routes leading to and from the principal ports of once adjacent neutrals, measures were now required to maintain close and direct control over practically the whole of the European coastline. To attempt this task through the use of naval patrols—which would continue to intercept neutral vessels—was evidently impossible in view of the coastline to be patrolled and the vessels of the Royal Navy available. Medlicott (*op. cit.*, pp. 416-7) has pointed out that even before the defeat of France "a complete naval blockade of German Europe was impossible . . . The result . . . was that a great extension of control at source . . . became imperative. The naval blockade—the actual interception of blockade runners by ships of the Royal Navy—had, in other words, to be supplemented and, as far as possible, replaced by export control in all overseas territories from which these supplies could reach Europe." In brief, the former threat of interception and detention had to be replaced by other deterrents which would prove even more effective.

⁷⁶ A clear and detailed picture of the system of controls emerging from the Order of July 31, 1940 is given by Medlicott, *op. cit.*, pp. 422-62. In principle, this system rested upon three devices: compulsory navicerting, "ships warrants," and the rationing of neutrals. The nature of the first measure had already been indicated. "Ships warrants" were documents issued to each vessel whose owner agreed to comply with British regulations. In the absence of this document none of the British controlled facilities would be made available to the vessel. In addition, if even one vessel attempted to evade these regulations by carrying unnavigated cargo all ships belonging to the same line might be denied a ship warrant. The rationing of neutrals implied the fixing of import quotas to be allowed neutral states, which were supposedly adequate for domestic consumption though not for re-export. The close interdependence of these three devices is made clear by Medlicott in the following passage: "The withholding of access to British-controlled facilities throughout the world supplied . . . an effective means of inducing neutral shipowners to compel traders to make the applications for navicerts which constituted the so-called compulsory system. It is also true that the compulsory navicert system was necessary to the success of the ship-warrant scheme. The scheme as a blockade weapon could be of full value only where there was machinery for the approval of cargoes and voyages, that is, where the navicert system was in operation. The success of the government's plans for the general control of neutral shipping in the interests of the Allies likewise depended to a considerable extent on the control of cargoes and the rationing of neutrals . . . as this would

In design, therefore, as in actual effect, the Order of July 31, 1940 imposed an almost complete control over neutral commerce, and did so by methods that bore little resemblance to the traditional law. Provided that neutrals submitted to this system of control, it is true that the Order made possible the avoidance of the risks and delays attendant upon the diversion of vessels into ports. This fact may be of relevance in judging the legitimacy of the Order as a measure of retaliation, but apart from retaliation the legal relevance of these "concessions" to neutral convenience must be doubted. Normally, a belligerent has no right to regulate neutral trade through the device of subjecting this trade to a legal liability to seizure merely for the reason that the neutral trader has not obtained the belligerent's prior approval.⁷⁷ Nor may neutrals safely expect that an enemy will fail to treat such compliance with one belligerent's regulations—even though made "compulsory"—as an act of unneutral service.⁷⁸

D. CONCLUSIONS

The difficulties that frequently have been noted elsewhere in this study when attempting to evaluate the effect of recent belligerent practice upon the traditional law appear even more pronounced in the case of blockade.

enable the Ministry of Shipping to forecast accurately the amount of shipping required for the trade of a particular neutral. The rationing of the imports of adjacent neutrals was, in turn, almost indispensable as a basis for the compulsory navicert arrangements," (pp. 431-2). It may be noted that up to this point not only had navicerts been "voluntary" in character—insofar as their absence was no cause for seizure—but that neutral rationing had been attempted either by voluntary agreements (war trade agreements) with neutral states or by agreement with neutral shipping lines.

⁷⁷ In the case of the Order of July 31, 1940, the legal liability imposed was—as already noted—a liability to seizure and to eventual condemnation if the presumptions thus held to arise were not successfully rebutted. Sir G. G. Fitzmaurice (*op. cit.*, p. 87) points out that the Order "did not (and clearly could not), any more than was previously the case, *compel* shippers to take out navicerts as a precondition of effecting shipment. There was still no *legal* bar to shipment without a navicert . . . The real changes effected by it were, it would seem, that for the first time a legal *liability* to seizure was created, arising from the mere fact of the absence of a navicert, coupled with a legal presumption (unless and until rebutted) that unnavigated goods had an enemy destination." But it is difficult to see why Fitzmaurice insists that shippers were not "compelled" to take out navicerts or why he cavils against describing the Order as establishing a "compulsory" navicert system. Admittedly, condemnation did not follow from the mere fact of the absence of a navicert, and in this particular sense the Order was not compulsory. But it is only in this sense true. From the point of view of subjecting unnavigated vessels and cargoes to seizure—with a legal presumption of enemy destination—it certainly was compulsory. Besides, as a measure of reprisal the very purpose of the Order was, as Fitzmaurice himself points out, "to enlarge the normal legal powers of the Crown in the matter of effecting seizures and obtaining condemnations, for otherwise there would have been no point in it."—On the other hand, the opinion of S. W. D. Rowson, ("Prize Law During the Second World War," pp. 196-7), that the Order merely contains rules of a "procedural character" which are within the scope of a belligerent's normal legal powers, hardly seems acceptable.

⁷⁸ See pp. 322-3 for a brief comment on the navicert system—both in its voluntary and compulsory forms—in relation to unneutral service.

Undoubtedly, the principal reason for this added difficulty may be attributed to the almost uniform insistence of belligerents in justifying as reprisals measures designed to accomplish the purpose of blockade—as presently conceived—though without conforming to the traditional rules governing this belligerent measure.⁷⁹ In consequence, there is room for asserting that from the standpoint of a formal legal analysis it is unnecessary to go beyond an examination of the legitimacy of the measures reviewed in preceding pages, *as measures of reprisal*; that whatever judgment is made concerning the legitimacy of these measures, as measures of reprisal, it cannot affect the continued validity of the law governing blockade. If this position is adopted it would appear that the traditional law remains—on the whole—unchanged, with perhaps the one exception that breach of blockade may now be considered as extending to instances where either vessel or cargo is destined ultimately to a blockaded port (though immediately bound for a neutral port at the time of visit) by a route that requires passing through the blockaded area.⁸⁰

At the same time, acceptance of this view entails at least the admission that in the circumstances characterizing recent naval hostilities the traditional blockade, and therefore a number of the rules governing its operation, have become largely irrelevant. If, however, recent belligerent practice is looked upon as a thinly veiled endeavor to replace the traditional law through the instrument of reprisals, and this would seem to represent the more realistic view, then the question of legal change must be squarely faced. It has already been pointed out that if the principle of ultimate

⁷⁹ In this connection note may be taken of the fact that, in contrast to World War I, there was no repeated attempt made by Great Britain in 1939 and 1940 to provide further justification for the reprisal measures taken against Germany by contending that the latter conformed, in substance at least if not in form, to the rules laid down for the traditional blockade. It would appear that one of the major reasons for this silence was the absence of firm protest against the British reprisal measures on the part of the United States.

⁸⁰ See *Law of Naval Warfare*, Article 632g (3). It will be apparent that the formulation presented above does not imply an unqualified application to blockade of the principle of ultimate enemy destination. On the contrary, it is only when vessel or cargo are destined to reach a blockaded port by way of the forbidden route that breach of blockade may arise. It would not apply, however, to goods ultimately destined to enemy territory under blockade if the goods are to reach their destination by a route that would not involve crossing the "lines of blockade." The difficulties that could easily arise in applying this qualified extension of the principle of ultimate enemy destination to blockade have already been noted (see p. 311 (n)). Nevertheless, it is not altogether clear that states have accepted even this limited change. Despite the assertion of Colombos (*op. cit.*, p. 256) and Stone (*op. cit.*, p. 498), that application of continuous voyage to blockade may now be considered an established principle of international law, there remains some question as to the general acceptance of this limited application of the principle with respect to cargoes, since the official position of a majority of naval powers has stopped short of a clear and unequivocal endorsement. Nor is it likely that there will be any attempt toward clarification, in view of recent developments in the law of contraband and the ready use that may be made of the instrument of reprisals in order to render enemy exports liable to seizure.

enemy destination is applicable to contraband there is no apparent reason for continuing to deny its unqualified application to blockade. On this basis, the further admission of the principle of ultimate enemy origin to blockade would appear as a necessary corollary.⁸¹ Nevertheless, it would still remain necessary to insist that there is no warrant for asserting that other criteria used in determining the lawfulness of blockade measures have lost their validity. Blockades, in order to be binding, would still have to be effectively maintained, and the element of danger associated with an effective blockade would still have to be understood in terms of a liability to seizure—not to destruction upon entrance into the forbidden area.⁸²

⁸¹ The substance of this change, if endorsed, would involve the acceptance of the British reprisal measures of March 1915 and November 1939 (though not the measures of February 1917 and August 1940)—at least to the extent these measures implied the desirability of extending the principles of ultimate enemy destination and origin to blockades which are otherwise conducted in conformity with the traditional rules.

⁸² Thus a belligerent could not argue that the necessity for patrolling vast areas of the high seas thereby excused him from meeting the traditional requirement of effectiveness. Nor could a belligerent—apart from reprisal—impose upon neutral vessels a liability to seizure and—possibly—to condemnation, unless neutral traders submitted to a system of control which thereby permitted the belligerent to ease his burden of assigning large surface forces to the task of intercepting blockade runners. The British reprisal Order of July 31, 1940 would still have to find its justification as a reprisal. Certainly, when judged by the traditional law it could have no other justification than as a reprisal.