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THE LAW OF WAR AND NEUTRALITY AT SEA

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THE LAW OF WAR AND NEUTRALITY AT SEA

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FOREWORD

Any inquiry into the present status of the law of war and neutrality at sea is confronted with the difficult task of seeking to evaluate the cumulative effect of two World Wars upon the so-called "traditional law." It has become abundantly clear that it is no longer possible to look upon the events that followed the outbreak of hostilities in 1914 and in 1939 as little more than one long manifestation of "lawlessness" on the part of belligerents (and, during World War II, of neutrals as well). Yet it would appear only slightly less misplaced to accept indiscriminately these same events as "law creating" in character. But where to draw the line in each concrete instance between belligerent behavior that has succeeded in replacing the traditional law and behavior that remains unlawful is a problem that frequently seems almost insoluble. It may well be asserted that the continued validity of law is dependent upon at least a minimum degree of effectiveness, and that this relationship between validity and effectiveness is particularly compelling with respect to the rules regulating the conduct of war. However, as will be seen, there is a deceptive simplicity about the test of effectiveness when stated in general terms that becomes fully apparent only when applied to concrete cases. Whatever its intrinsic utility, this test must encounter serious obstacles in the course of its application.

Nor can these obstacles be readily surmounted by an analysis which intends to lay bare the developments that have led belligerents in this century apparently to abandon so many of the restraints they had formerly accepted. It is one thing to inquire into the causes of state behavior and quite another thing to determine whether or not this behavior has actually resulted in invalidating a given rule—or rules. There is the further consideration that even as an instrument for prediction an inquiry into the determinants of belligerent behavior is not without grave pitfalls. No satisfactory method has been devised that would enable the observer to distinguish accurately between developments of a merely transient nature and developments that may rightly be regarded as irreversible. Of course, developments in technology may be considered as irreversible. However, the recurrence of total war in the twentieth century is not primarily the result of technological advance—though this advance has contributed greatly to the ease by which total war may be waged—but rather of social and political developments. The latter are the product of human interests and as such are rarely—if indeed ever—irreversible. It is for this reason

that the possibility cannot be excluded that men might once again find it in their common interests to return to a form of limited warfare, to wars that are limited not only in the number of participants and in the purposes for which they are fought but also in the weapons and methods that are employed against an opponent. Admittedly, this possibility depends upon a certain optimism that men may learn something from past experience, and over this one cannot be at all certain.

It should be made quite clear, therefore, that as matters presently stand no writer can hope to speak on the law of naval warfare with the assurance and precision that readers might expect. Although this fact cannot fail to be a source of dissatisfaction, it ought not to serve as a deterrent against emphasizing those areas of the traditional law in which a substantial measure of uncertainty prevails. In the present study the attempt has been made to provide such emphasis. While the traditional law generally has been maintained as the starting point for further discussion, the attention of the reader is directed principally to the recent period and to the numerous problems which this period has raised.[1]

The broad survey that is undertaken in the following pages of this volume lays no claim to completeness even in what it does attempt to do. It is particularly limited in two respects, however, and these limitations perhaps require some explanatory remarks.

In the first instance, no effort has been directed towards providing a detailed analysis of recent prize decisions, although the rules determining both the substantive grounds for capture and the procedure of visit, search, and capture have been adequately reviewed. In defense of this omission it may be pointed out that the second World War added very little in the way of substantive developments to the law of prize. Almost all of the important—and still disputed—developments in prize law that have occurred since the nineteenth century resulted from the events of World War I, and they have received thorough treatment in a number of competent monographs. The prize cases resulting from World War II were concerned—for the most part—either with refining further the substantive grounds for capture or with developing rules of a largely procedural character. They are, therefore, quite technical in character and their exposition in a general survey of the conduct of maritime war would have little, if any, place. It is also worthy of note that World War II witnessed a clearly discernible shift away from the former emphasis upon prize court adjudication toward more flexible and less time-consuming methods of

[1] In this connection it may be noted that the contemporary challenge to the traditional system is not solely the result of persistent belligerent—and neutral—departures from rules once quite effective. In part this challenge is also a consequence of the change that has occurred in the legal position of war itself, particularly as a result of the Charter of the United Nations. For this reason it has appeared desirable to treat at some length the problem of the effects that the change in the legal position of war may have upon the operation of the law regulating war's conduct.

disposing of vessels and cargoes seized as prize. The results frequently have been to the mutual advantage of belligerent and neutral. Finally, mention must be made of the fact that the courts of the United States have made no contribution in this century to the law of prize.

The second limitation relates to the material to be found in the notes. No attempt has been made to give extensive bibliographical references in support of, or relating to, points discussed in the test. Instead, the references given are selective and have been chosen either for illustrative purposes or because they are considered to represent a point of view thought to bear some significance. Wherever possible, care has been exercised to choose the more recent materials (whether documents, general treatises or articles), though here again the careful reader may observe some omissions. It is always tempting for a writer to believe that there is a definite logic to, and a readily apparent consistency in, the materials he has chosen to cite. Unfortunately, this is only rarely the case, and what is readily apparent to the writer is seldom altogether obvious even to the sympathetic reader. What may be said of the notes in the present study is that while a good deal of license has been taken with them they have been designed to be of immediate use and interest to the reader.

There is one "source material" frequently referred to in the notes that deserves special mention. In the appendix to this volume the official United States Navy manual entitled *Law of Naval Warfare* has been reproduced. Issued in 1955 by the Chief of Naval Operations, this manual is prepared for the information and guidance of the naval service. In the preparation of this latest manual the Naval War College once again performed a task it has undertaken on several occasions over the past half century.

It is a pleasant duty to acknowledge the assistance I received in the preparation of this volume. Professor Josef L. Kunz and Professor Julius Stone were kind enough to read the manuscript and to offer helpful suggestions and needed criticism. Appreciation must also be expressed to Miss Barbara Johnson, Mr. Michael Jaworskj and Mr. Arnold Simkin for their willing performance of various essential tasks.

I am particularly indebted to Rear Admiral Thomas H. Robbins, Jr., President of the Naval War College, whose wise and understanding assistance has been of the greatest value.

PREFACE

The publication of this series was inaugurated by the Naval War College in 1894. This is the fiftieth volume in the series as numbered for index purposes. The titles have varied slightly from year to year. The preceding volume is entitled "*International Law Studies, 1954*, Collective Security under International Law," by Professor Hans Kelsen.

The Naval War College has maintained a continuing interest in the law of war and neutrality at sea. The present volume, prepared by Professor Robert W. Tucker, is the first complete study of the subject undertaken by the Naval War College since the Second World War.

The opinions expressed in this volume are not necessarily those of the U. S. Navy or the Naval War College.

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