

International Law Studies – Volume 13
International Law Topics and Discussions
U.S. Naval War College (Editor)

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TOPIC V.

IMMUNITY OF PRIVATE PROPERTY AT SEA.

Should private property at sea be exempt from capture?

CONCLUSION.

The United States may with propriety abandon the contention for the general exemption of enemy private property at sea and seek agreement upon a certain list of exemptions which meet the approval of the states of the world and which may from time to time be expanded as the sentiment for exemption becomes more general.

NOTES.

Introduction.—A decision as to the treatment of private property at sea in time of war is in certain respects fundamental. A code of rules for the conduct of maritime warfare based on the right to capture private property would be materially modified by the prohibition of this right. The strategy of war would also probably be modified. The attempts to make private property immune from capture have not yet met with success, therefore, any rules drawn up may properly concede the right of capture at sea of enemy private property. The considerations advanced in regard to the exemption of private property at sea should, however, receive attention.

United States proposition at The Hague, 1899.—Under date of June 20, 1899, the American commission at the First Hague Conference presented a communication to the conference stating that they were instructed to place before the conference the following proposition:

The private property of all citizens or subjects of the signatory powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the

armed vessels or by the military forces of any of the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said powers. (Holls, Peace Conference at The Hague, p. 311.)

This was signed by the commission, consisting of Andrew D. White, Seth Low, Stanford Newel, A. T. Mahan, William Crozier, Frederick W. Holls.

The communication of the American commission showed that the attitude of the United States had been favorable to the exemption of private property from capture. The committee of the conference did not feel itself competent to take up the subject, but recommended that it be included in the program of a further conference. In speaking on this subject Mr. White said in behalf of the American commission:

The commission have found several of the delegations ready to accept this proposal, and sundry others whose opinions evidently incline toward its adoption, but we have not succeeded in securing a support sufficiently unanimous to justify us in pressing the matter further during the present conference. (Ibid., 314.)

Mr. White also made quite an extended argument for the exemption, and the proposition was inserted in the form of a wish in the Final Act of the First Hague Conference, as follows:

5. The conference expresses the wish that the proposal, which contemplates the declaration of the inviolability of private property in naval warfare, may be referred to a subsequent conference for consideration. (Ibid., p. 379.)

Capture or destruction of enemy private property at sea.—Topic I considered at the Naval War College Conference in 1905 proposed the question, "What regulations should be made in regard to private property at sea in time of war?"

In the discussion of this topic the attitude of the United States was traced from the early days of the Republic. It was shown that the attitude of the United States had usually been in favor of the exemption of private property at sea from capture.

From the general conclusions as to the policy of capture a few citations may be made.

There is a growing opinion that the reasons for capture of the enemy's private property at sea are economic and political rather than military. The immunity to private property should not, however, be so extended as to interfere with necessary military operations. It would not be reasonable to exempt private property to such an extent as to cause the war to be of necessity prolonged or to result in greater destruction of life. Imperative military necessity, of which the superior officer on the field of action at the time must judge, must override rights of private property. The question of damages may be reserved for subsequent settlement. (International Law Topics and Discussions, 1905, p. 17.)

The equitable practice of days of grace will probably be continued. The use of improved means of communication will be extended. Privateering is abandoned. Prize money is beginning to be abolished. Land commerce is more and more developed. In time of war commerce is more easily transferred to neutral flags. The actual influence of the capture of private property does not seem to be great. The weakening of a naval force in order to pursue and capture private property is of doubtful expediency. Such considerations as these show why the tendency to guarantee the exemption of all private property at sea in time of war by an international agreement has been looked upon with increasing favor.

The proposed exemption, if it extended to all goods and property, would probably make necessary an extension of the list of contraband. Contraband as now used applies only to certain classes of goods carried by or belonging to neutrals. If enemy property is placed on the same basis as neutral property, the doctrine of contraband must be interpreted accordingly and the principles enunciated with this in view. (Ibid., p. 19.)

After lengthy discussion and considerable difference of opinion, it was found necessary in the conference of 1905 to make some special provision in regard to vessels. The brief statement was as follows:

The vessels of the enemy used in commerce may be enemy private property. Certain of these vessels may readily become of great service to the enemy. Vessels of like character, if belonging to a neutral, could not be classed as contraband. Owing to the ease with which many types of commercial vessels may be converted to warlike uses, it seems proper that such agencies of transportation should not be placed under the general exemption.

The degree of exemption to be extended to vessels may properly be left to the belligerents to determine.

Considering the general conditions of modern naval warfare and commercial relations, as well as the trend of opinion, to-

gether with the exceptional character of private vessels belonging to enemy citizens, an attempt to formulate a proper regulation in regard to the exemption of private property at sea may be considered expedient. Of course such exemption does not cover property of contraband nature, property involved in violation of blockade, property involved in unneutral service or otherwise concerned directly in the war. The regulation of exemption should apply, therefore, only to innocent property and ships.

Some such regulation in regard to vessels as the following seems to meet the requirements imposed by the above discussion and conclusions:

Innocent private ships, except belligerent vessels propelled by machinery and capable of keeping the high seas, are not liable to capture.

It may be said that the word "innocent" applies only to such private property or ships as have no direct relation to or share in the hostilities. It may be assumed that innocent belligerent goods or ships may be taken in case of military necessity, and when so taken full remuneration shall be paid, after the analogy of similar action on land. (Ibid., p. 20.)

The proposed regulation in regard to the treatment of private property at sea was:

Innocent neutral goods and ships are not liable to capture.

Innocent enemy goods and ships, except vessels propelled by machinery and capable of keeping the high seas, are not liable to capture. (Ibid., p. 20.)

United States proposition at The Hague, 1907.—In accordance with the vote of the First Hague Conference as expressed in the "wish" of the final act of the Conference, the immunity of private property at sea was included in the program of the Second Hague Conference in 1907. The subject was referred to the fourth committee, and the American proposition was in almost the same words as in 1899.

Mr. Choate, on June 28, 1907, made a long speech reviewing the attitude of the United States upon the question of inviolability of private property at sea. (Deuxième Conférence Internationale de la Paix, Tome III., pp. 750-764.) Mr. Choate, representing the American delegation, speaks of the immunity of private property at sea, saying:

This proposition involves a principle which has been advocated from the beginning by the Government of the United States and

urged by it upon other nations and which is most warmly cherished by the American people, and the President is of opinion that whatever may be the apparent specific interest of our own or of any other country for the time being, the principle thus declared is of such permanent and universal importance that no balancing of the chances of probable loss or gain in the immediate future on the part of any nation should be permitted to outweigh the considerations of common benefit to civilization which call for the adoption of such an agreement. (*Deuxième Conférence Internationale de la Paix, Tome III, p. 766.*)

Mr. Choate also speaks of this doctrine as "our favorite proposition," "the traditional policy of the United States," and at the same time saying, "I ought most frankly to concede that the United States has never been able to put this policy into practical operation." Mr. Choate cites the opinion of statesmen and writers in favor of exemption and argues that the reasons for exemption of private property on land apply to similar property at sea. He urges the exemption—

First, on humanitarian grounds; secondly, we place it on a ground more important still, of the unjustifiable interference with innocent and legitimate commerce, which concerns not alone the nation to which the ship belongs, but the whole civilized world. We insist upon our proposition in the third place as a direct advance toward the limitation of war to its proper province, a contest between the armed forces of the States by land and sea against each other and against the public property of the respective states engaged. And, finally, we object to the old practice and insist upon our demand for its abolition on the ground that it is now no longer necessary, and that it tends to invite war and to provoke new wars as a natural result of its continuance. (*Ibid.*, pp. 774-775.)

Mr. Choate supports his position by arguments, some of which have a bearing upon the military significance of this doctrine of exemption:

Apart from all historical and ethical points of view, it may well be claimed that there is another strong ground in support of the immunity of private property at sea, not needed for military purposes, for which we contend. From economical considerations it is no longer worth the while of maritime nations to construct and maintain ships of war for the purpose of pursuing merchant ships which have nothing to do with the contest. The marked trend of naval warfare among all great maritime nations at the present time is to dispense with armed ships adapted to such

service, and to concentrate their entire resources upon the construction of great battleships whose encounters with those of their adversaries shall decide any contest, thus confining war as it should be, to a test of strength between the armed forces and the financial resources of the combatants on sea and land. It is probable that, if the truth were known, there has been an actual diminution by all the maritime nations in the construction of war vessels adapted to the pursuit of merchantmen, and, indeed, a sale or breaking up of such vessels which had been for some time in service. Indeed, none of the great navies now existing could afford to employ any of their great and costly ships of war or cruisers in the paltry pursuit of merchantmen scattered over the seas. The game would not be worth the candle and the expense would be more than any probable result.

This presents in another form the idea already referred to that war has come to be, as it should be, a contest between the nations engaged and not between either nation and the noncombatant citizens or individuals of the other nation, and it results from it that the noncombatant citizens should be let alone, and that no amount of pressure that can be brought to bear upon them will have any serious effect in shortening the controversy. (*Ibid.*, p. 777.)

Of the proposition that the "most effective way of preventing war is to make it as terrible as possible," Mr. Choate, after showing that the trend of the Geneva and other conventions is in the opposite direction, says:

Of course there is no truth or sanity in such a brutal suggestion. Our duty is not to make war as horrible as possible, but to make it as harmless as possible to all who do not actually take part in it, to prevent as far as we can, to bring it to an end as speedily as we can, to mitigate its evils as far as human ingenuity can accomplish that result, and to limit the engines and instruments of war to their legitimate use—the fighting of battles and the blockading and protection of seacoasts. (*Ibid.*, p. 778.)

Other arguments are also presented, and as these constitute what is regarded as an official statement of the position of the United States, the paragraphs concluding Mr. Choate's address may be cited:

Again, it is urged that the retention of this ancient right of capture and detention is necessary as the only means of bringing war to an end. That when you have destroyed the fleets of your enemy and conquered its armies it has no object in suing for peace as long as its commerce and its communication by transportation with other nations in the way of trade is left undisturbed.

But this seems to us to be a purely fanciful and imaginary proposition. The history of modern wars, and, in fact, of all wars, shows that the decisive victory over an enemy by the destruction of his fleets and the defeat of his armies is sure to bring about peace. The test of strength to which the parties appealed has thereby been decided and there is no further object in continuing the war.

The picking up or destruction of a few harmless and helpless merchantmen upon the sea, will have no appreciable effect in reducing the government and nation to which they belong to subjection, if the defeat of fleets and armies has not accomplished that result. Besides, there is a limit to the legitimate right of even the victor upon the seas for the time being to employ his power for purposes of destruction. Victory in naval battles is one thing, but ownership of the high seas is another. In fact, rightly considered, there is no such thing as ownership of the seas. According to the universal judgment and agreement of nations they have been and are always free seas—free for innocent and unoffending trade and commerce. And in the interest of mankind in general they must always remain so.

Again, it has been urged that the power to strike at the mercantile marine of other nations is a powerful factor in deterring them from war—that the merchants having such great interests involved, liable to be sacrificed by the outbreak of war, will do their utmost to hold their government back from provoking to or engaging in hostilities. But this, we submit, is a very feeble motive. Commerce and trade are always opposed to war, but have little to do with causing or preventing it. The vindication of national honor, accident, passion, the lust of conquest, revenge for supposed affront, are the causes of war, and the commercial interests which would be put in jeopardy by it have seldom, if ever, been persuasive to prevent it.

And as to its continuance or termination, commerce really has nothing to do with it. When the military and financial strength of one side is exhausted the war, according to modern methods, must come to an end, and the noncombatant merchants and traders have no more to do with bringing about the consummation than the clergymen and schoolmasters of a nation.

Once more, it is said that the bloodless capture of merchant ships and their cargoes is the most humane and harmless employment of military force that can be exercised, and that in view of the community of interest in commerce to which we have referred and the practice of insurance in distributing the loss, the effect of such captures upon the general sentiment and feeling of the nation to which they belong is most effective as a means of persuading their government to make peace.

But we reply that bloodless though it be it is still the extreme of oppression and injustice practiced upon unoffending and innocent individuals, and that it has no appreciable effect in reaching or compelling the action of the Government of which the sufferers are subjects.

We appeal, then, to our fellow delegates assembled here from all nations in the interest of peace, for the prevention of war, and the mitigation of its evils to take this important subject into serious consideration, to study the arguments that will be presented for and against this proposition, which has already enlisted the sympathy and support of the people of many nations, to be guided not wholly by the individual interest of the nations that they represent, but to determine what shall be for the best interest of all the nations in general and whether commerce, which is the nurse of peace and international amity, ought not to be preserved and protected, although it may require from a few nations the concession of the remnant of an ancient right, the chief value of which has long since been extinguished.

In the consideration of such a question, the interest of neutrals, who constitute at all times the great majority of the nations, ought to be first considered, and if they will declare on this occasion their adhesion to the humane and beneficent proposition which we have offered, we may rest assured that, although we may fail of unanimous agreement, such an expression of opinion will represent the general judgment of the world and will tend to dissuade those of us who may become belligerents from any further exercise of this right, which is so abhorrent to every principle of justice and fair play. (Ibid., p. 778-779.)

Replies to the American proposition, 1907.—The reception of Mr. Choate's address was most cordial, though not all the delegations were able to accept its conclusions. Some offered reasons of policy, others offered reasoned arguments. While political reasons were not supposed to influence the deliberations, it is evident that national conditions could not be disregarded.

A Colombian delegate concluded a considerable discussion of Mr. Choate's address with the following words:

Pour en finir, Messieurs, nous n'acceptons pas la proposition de M. Choate parce que nos conditions et nos circonstances ne nous permettent pas ce beau luxe en faveur des principes abstraits de la justice et de l'humanité. On peut être apôtre et chercher le martyre individuellement; quand on représente un pays, on a le devoir de défendre ses intérêts; dans le cas présent, il s'agit de politique internationale et non pas de philanthropie. (Deuxième Conférence Internationale de la Paix, Tome III, p. 792.)

M. Renault, of the French delegation, maintained that the analogy between war on land and on sea was not complete, that the disturbance of the economic life of the community by capture of merchant ships was a means of coercion which might prevent war or hasten peace, and one could not say it was in a high degree inhumane. As the ships may easily be converted into war vessels, they may constitute a potential means of defense the loss of which would hasten the close of hostilities. M. Renault was opposed to the ancient idea of prize money. He closes his address as follows :

D'autre part, c'est dans l'intérêt général de l'État en même temps que dans le leur que les armateurs et chargeurs des navires capturés ont continué leurs opérations malgré la guerre. Il ne serait donc pas juste qu'ils subissent seuls les conséquences de la capture. Aussi l'idée que l'État, dans son ensemble, doit subir les conséquences préjudiciables de la guerre non seulement en tant qu'elles se sont produites directement contre l'État lui-même et ses établissements, mais encore en tant qu'elles ont atteint les particuliers, s'affirme de plus en plus ; on peut différer sur les moyens de la réaliser, mais il n'y a guère de doute sur le principe lui-même.

Si ces considérations sont, comme nous le croyons, justes, le droit de capture apparaît comme une mesure dirigée par un État belligérant contre un autre État belligérant, cette mesure faisant partie de l'ensemble des opérations par lesquelles un État s'efforce de réduire son adversaire à composition et n'ayant par elle-même aucun caractère particulier de rigueur. Il n'y a donc pas, suivant nous, de raison suffisante pour y renoncer, tant que l'entente nécessaire à laquelle nous avons fait allusion au début et à la formation de laquelle nous sommes prêts à concourir, ne se sera pas réalisée. (Ibid., p. 794.)

Sir Edward Fry, of the English delegation, said :

Je demande la parole seulement sur un sujet de nos débats. Le Délégué américain que nous venons d'entendre avec tant d'intérêt a beaucoup parlé de la cruauté de l'exercice du droit de capturer la propriété privée. A mon avis c'est un mal-entendu. Il est vrai que dans toutes les opérations de la guerre, il y a quelque chose de barbare, mais de toutes les opérations il n'y en a pas une qui soit aussi humaine que l'exercice de ce droit. Considérez, je vous prie, ces deux cas : l'un, la capture d'un vaisseau marchand sur mer ; l'autre, les opérations d'une armée ennemie. Dans le premier cas, vous voyez une force majeure contre laquelle il est impossible de combattre ; personne n'est tué, même personne n'est

blessé; c'est une affaire pacifique. De l'autre côté, qu'est-ce que vous voyez? Vous voyez le terrain désolé, le bétail détruit, les maisons brûlées, les femmes et les enfants fuyant devant les soldats ennemis et peut-être des horreurs sur lesquelles je voudrais garder le silence. Se plaindre donc de la capture des vaisseaux marchands sur mer, et ne pas interdire la guerre sur terre, c'est choisir le plus grand des deux maux. (Ibid., p. 800.)

The delegate from the Argentine Republic took a similar position. (Ibid, p. 810.)

Position of Netherlands, 1907.—The Netherlands position in the Second Hague Conference was that it shared fully the sentiments and adhered to the principles of inviolability of private property as set forth by the American delegation:

La délégation des Pays-Bas est favorable à toute proposition établissant le principe de l'inviolabilité de la propriété privée sur mer.

Afin que la possibilité de transformer en temps de guerre des navires de commerce en croiseurs auxiliaires ne puisse être un motif pour ne pas accepter ce principe, la délégation soumet aux considérations de la Commission la proposition suivante:

Aucun navire marchand ne peut être capturé par une partie belligérante pour le seul fait de naviguer sous pavillon ennemi s'il est muni d'un passeport délivré par l'autorité compétente de son pays, dans lequel passeport il est déclaré que le navire ne sera pas transformé en vaisseau de guerre ni utilisé comme tel pendant toute la durée de la guerre. (Deuxième Conférence Internationale de la Paix, Tome III, p. 1142.)

Brazil.—The Brazilian delegation was favorable to assimilating the status of private property at sea to the status of private property on land. He refers in his proposition to the articles of The Hague convention relative to the laws and customs of war on land:

B. Lorsque le capitaine d'un navire ou d'une flotte belligérante se trouvera dans la nécessité de réquisitionner, dans le cas prévu à l'article 23, lettre g, de la susmentionnée convention, c'est-à-dire dans le cas où la destruction ou la saisie de ces biens lui sont commandées par les exigences les plus impérieuses de la guerre, un vaisseau de commerce ennemi, sa cargaison, ou une portion quelconque de celle-ci, la réquisition sera constatée par celui qui la fait moyennant des reçus délivrés au capitaine du vaisseau qu'on aura saisi, ou dont on aura saisi les marchandises, avec tous les détails possibles pour assurer aux parties intéressées leur droit à une juste indemnité.

C. Cette clause s'applique aux marchandises neutres, qui se trouveront au bord des vaisseaux marchands ennemis réquisitionnés.

Le capitane du navire ou de la flotte de guerre, qui aura déterminé la réquisition, est tenu de faire mettre à terre, dans un des ports les plus proches, les officiers et l'équipage du bâtiment saisi, avec les ressources nécessaires pour leur retour au pays auquel il appartenait.

Denmark.—Denmark was in favor of exemption if it could be by common agreement.

Belgium.—The Belgian delegate submitted a set of rules which had in view that private vessels of the enemy could be seized and retained by a belligerent, but were to be restored at the close of hostilities. The crews of such vessels were to be liberated on condition that they would take no part in the war.

France.—The French delegation, admitting that war was not for the profit of individuals and that the loss should not be borne by individuals, showed a disposition to accept the American proposition in case of unanimity. The delegation made a reasoned proposition:

Considérant que, si le droit des gens positif admet encore la légitimité du droit de capture appliqué à la propriété privée ennemie sur mer, il est éminemment désirable que, jusqu'à ce que l'entente puisse s'établir entre les États au sujet de sa suppression, l'exercice en soit subordonné à certaines modalités.

Considérant qu'il import au plus haut point que, conformément à la conception moderne de la guerre qui doit être dirigée contre les États et non contre les particuliers, le droit de prise apparaisse uniquement comme un moyen de coercition pratiqué par un État contre un autre état;

Que, dans cet ordre d'idées, tout bénéfice particulier au profit des agents de l'État qui exercent le droit de prise devrait être exclu et que les pertes subies par les particuliers de chef des prises devraient finalement incomber à l'État dont ils relèvent.

La Délégation française a l'honneur de proposer à la Quatrième Commission d'émettre le vœu que les états qui exerceront le droit de capture suppriment les part de prises attribuées aux équipages des bâtiments capteurs et prennent les mesures nécessaires pour que les pertes causées par l'exercice du droit de prise ne restent pas entièrement à la charge des particuliers dont les biens auront été capturés. (*Ibid.*, p. 1148.)

Austria-Hungary.—The Austro-Hungarian delegation proposed amendments to the French form :

Animée du vif désir de voir terminer la discussion de la Quatrième Commission sur l'inviolabilité de la propriété privée ennemie sur mer par une amélioration, si légère fût-elle, de l'état actuel, et estimant que le vœu proposé par la Délégation française renferme des éléments propres à arriver à ces fins, mais tennant compte toutefois de certaines objections que ce vœu lui semble avoir rencontré de la part d'un nombre considérable des membres de cette Commission, la Délégation d'Autriche-Hongrie a l'honneur de proposer les amendements suivants dans le texte émis par la Délégation de France :

(a) mettre après " que les " au lieu de " États qui exerceront le droit de capture " les mots : " Puissances qui maintiennent la faculté de faire des prises " ;

(b) à la place de " prennent les mesures nécessaires " insérer les mots : " s'occupent à chercher un moyen praticable " ; et

(c) au lieu de " du droit de prises " mettre " de cette faculté. "

Résumé of The Hague propositions, 1907.—The president of the commission having the subject of the immunity of private property at sea under consideration at The Hague in 1907 was M. de Martens, a skilled and experienced Russian diplomat. He endeavored to give a résumé of the various propositions and arguments advanced before the commission. At the meeting of July 17, 1907, he spoke to the following effect :

La proposition américaine a suscité beaucoup d'autres propositions ; la question a été posée en 1899, elle a été alors étudiée par la Première Conférence sous bénéfice d'inventaire ; huit années se sont passées depuis, on a donc eu le temps de se préparer sur la question qui semble aujourd'hui épuisée. Il est incontestable, à raison des propositions intermédiaires qui ont été déposées, que l'application du principe de l'inviolabilité de la propriété privée sur mer ne réunit pas l'unanimité des suffrages ; ce n'est pas à la Commission qu'il appartient de discuter les motifs qui peuvent faire valoir les différents Gouvernements, mais il n'en est pas moins vrai que sur cette question on rencontre des hésitations, des scrupules et même des craintes. Les États ont évidemment l'appréhension d'apporter une solution dont les conséquences leur sont inconnues ; d'entrer dans les ténèbres. De nombreux auteurs ont écrit sur le principe de l'inviolabilité de la propriété sur mer ; ils sont loin d'être d'accord entre eux, même s'ils appartiennent au même pays. Le Président rappelle qu'on a cité l'ouvrage qu'il a écrit il y a quarante ans ; il était alors le partisan con-

vaincu de l'inviolabilité, mais depuis cette longue époque il est devenu plus circonspect sur cette question délicate.

Les faits historiques qui viennent à l'appui de la thèse américaine, suggèrent quelques observations. Le traité que la Prusse signa avec les Etats-Unis en 1785 a consacré le principe de l'inviolabilité, mais il faut se rapeller que ce traité fut signé par un Roi philosophe et un Prince parmi les philosophes, qui du reste n'avaient guère d'illusions sur la portée pratique de leur accord, car ils savaient tous les deux qu'une guerre entre leurs deux pays n'était guère probable. On a encore cité une dépêche qui fut adressée en 1824 à M. Mittleton, ministre des États-Unis à Pétersbourg et dans laquelle le Comte Nesselrode exprimait toute sa sympathie pour le principe de l'inviolabilité de la propriété privés sur mer.

Mais il faut prendre aussi en considération la dépêche, datant de la même époque, où le Comte Nesselrode, écrivant au Comte Pozzo di Borgo, ambassadeur de Russie à Paris, exclut l'éventualité d'un engagement ferme dans une question grosse de conséquences qu'on ne pourrait pas aisément calculer. En 1856, le Prince Gortchakoff a également exprimé son énergique sympathie pour l'abolition de la capture, mais, lui aussi, a entrevu les difficultés qu'elle suscitait.

Depuis 1785 jusqu'à aujourd'hui, le principe que discute la Commission n'a été mis qu'une fois en application, pendant la guerre entre la Prusse, l'Italie et l'Autriche en 1866. Ces Puissances ont déclaré au monde qu'il n'y aurait pas de capture des navires de commerce, mais cette guerre a été d'une si courte durée qu'elle ne peut être citée comme un précédent. L'argument le plus concluant que l'on a mis en avant a été la différence du régime qui pendant la guerre régit la propriété sur terre et la propriété sur mer, mais cet argument repose sur un malentendu. La Conférence de 1899 a fondé, pour ainsi dire, une société d'assurances mutuelles contre les abus de la force pendant la guerre sur terre; néanmoins si on les compare avec ceux de la guerre sur mer, ils sont bien plus terribles. Que le territoire soit ou ne soit pas occupé par l'ennemi, quoique le pillage soit aujourd'hui interdit, les nécessités militaires que reconnaissent les articles 47, 48, etc., de la Convention de 1899, pèsent d'un poids très lourd sur le paysan comme sur le propriétaire, elles les infligent non seulement des souffrances morales mais des souffrances matérielles que les conventions ne peuvent pas supprimer au moment où la force prime le droit même. Si l'on n'admet pas le principe de l'inviolabilité de la propriété privée sur mer, les particuliers ont de nombreux moyens pour échapper aux conséquences de la guerre; ils peuvent notamment vendre leurs navires et les reconstruire à la fin des hostilités. Leur situation deviendra bien plus favorable si l'on supprime le droit de capture; elle sera même

privilégiée, puisque leurs affaires augmentèrent et se firent au détriment des entreprises continentales paralysées par l'invasion. C'est à la Commission d'examiner sous tous ses côtés la décision qu'elle va prendre en se conformant aux instructions que les Délégués ont reçues de leurs Gouvernements.

Le Président termine ainsi son discours :

Tel est, Messieurs, l'exposé impartial de toute la question sur laquelle vous allez vous prononcer. En vous présentant cet exposé des faits historiques et des considérations documentées, je n'avais nullement l'intention ni d'influencer votre vote, ni de me prononcer personnellement contre la prise en considération de la proposition (Annexe 10) de la Délégation des États-Unis d'Amérique. Je ne veux nullement prendre parti ni pour ni contre la proposition américaine. Mon devoir de Président de cette Commission m'imposa d'éclaircir le terrain sur lequel nous nous trouvons et de contribuer de mes faibles forces à une complète orientation sur tous les principaux faits et arguments développés devant vous sur cette très intéressante et très compliquée matière. (Ibid., p. 833-834.)

Vote at The Hague, 1907.—The vote taken at The Hague in 1907 upon the question of inviolability of private property at sea shows in a measure the modern attitude upon the subject. The subject was very fully discussed, the delegates were authorized by their Governments, and the matter had been included in the program of the Conference. Of 33 States voting, 21 States voted for the inviolability, 11 against, and 1 abstained from voting.

Those voting for were Germany (under reservations), United States, Austria, Belgium, Brazil, Bulgaria, China, Cuba, Denmark, Ecuador, Greece, Haiti, Italy, Norway, Netherlands, Persia, Roumania, Siam, Sweden, Switzerland, and Turkey.

Those voting against were Colombia, Spain, France, Great Britain, Japan, Mexico, Montenegro, Panama, Portugal, Russia, and Salvador.

Chile abstained from voting. (Ibid., p. 834.)

M. de Martens remarked that the vote was hardly decisive, considering the maritime predominance of some of the powers voting in the negative.

Upon the Brazilian proposition elaborating the assimilation of the treatment of private property at sea

to the treatment of private property on land 13 votes were in favor and 12 opposed.

The Belgian proposition, amended by the Netherlands, looking to the mitigation and definition of warfare on sea, was taken up by a vote of 23 in favor, 3 against (Great Britain, Japan, and Russia), and 2 abstentions. This was subsequently withdrawn from consideration.

The consideration of the French proposition led to no decisive action.

Conclusion as to The Hague discussion, 1907.—At The Hague in 1907 there was undoubtedly a much wider difference of opinion than many had anticipated in regard to inviolability of private property at sea.

This difference is shown in the report of M. Fromageot upon the subject. This report concludes:

Si le maintien de l'état de choses actuel paraît devoir résulter de ceete délibération, il est permis de penser, comme l'a dit l'éminent Premier Délégué de Belgique, S. Exc. M. Beernaert, qu'une entente future n'a rien impossible. (Deuxième Conférence Internationale de la Paix, Tome I, p. 249.)

Thus it may be concluded that the powers of the world were not prepared in 1907 to accept the principle of inviolability of private property at sea.

The Brazilian proposition received some support, however, by embodiment among the wishes of the conference of the statement of the wish "that in any case the powers may apply, as far as possible, to war by sea the principles of the convention relative to the laws and customs of war on land."

From the attitude of the powers in 1907 it is evident that agreement upon the subject of inviolability of private property at sea will not be reached till other matters relating to maritime warfare are settled.

Enemy ships.—If all private property at sea except that of the nature of contraband is to be inviolable, there will be a tendency to extend the list of contraband articles.

It is presumed that the laws governing liability in regard to blockade and unneutral service will still be operative.

If, however, conversion of enemy private ships into ships of war is to be permitted on the high sea, it will be necessary for a belligerent to use great care in his conduct toward his opponent's private vessels. A private vessel of one belligerent which may be met on the high sea by the other belligerent may claim exemption on the ground that it is a private vessel, which may be the fact at the time. Shortly afterwards the private vessel may be converted into a public war vessel. It is now not only liable to capture, but also liable to be destroyed or seized, and its personnel may be made prisoners of war. As there are as yet no rules regulating reconversion, such a vessel may after a time, perhaps when capture may be expected, undergo reconversion into a private vessel and be accordingly exempt as private property.

To include vessels without exception in the exemption making private property at sea inviolable is to give an exemption after war is opened and vessels have sailed with a knowledge thereof, which is not given to vessels in a belligerent port at the outbreak of war or to vessels which have sailed without knowledge of the war bound for a belligerent port. Article V of the convention relative to the status of enemy merchant ships at the outbreak of hostilities provides that—

The present convention does not affect merchant ships whose build shows that they are intended for conversion into war ships.

At the present time few ships are of such construction that they may not, under some circumstances, be of use for war even if not originally constructed for that service. A pleasure yacht may become useful as a scouting vessel, an ordinary privately owned collier may easily be converted into a public collier, etc.

It would seem necessary that if other innocent private property is granted exemption, it would be on the ground that the innocence can be determined from the nature of the property itself.

Goods of the nature of contraband can be determined in most cases from inspection. Whether a vessel is to be converted from private to public can not be determined

by inspection, for the physical character of the vessel may remain the same in private or in public control. The control is the main difference, and this may be transferred by radiotelegraph or even on a certain date by previous agreement, which date may not have arrived at the time when the vessel was met by the belligerent of the other flag.

Prof. Westlake's opinion.—The late Prof. Westlake, of Cambridge, in a note to Latifi's "Effects of War on Property," speaks of the commercial blockade as a war against neutrals.

But if only sentiment can be gratified by limiting the war against the enemy's commercial flag, the war against neutrals is to continue, with the certainty that commercial blockades, when they have become the sole means of paralyzing the enemy's sea trade, will be practically carried as far as audacity can venture to strain or to violate rules.

The name in which this topsy-turvy policy is advocated is that of immunity at sea of private enemy property as such, and this is asserted to be the extension to the sea of a principle admitted on land. In truth, however, the immunity of private enemy property is not admitted anywhere as absolute. It is only admitted so far as it does not interfere with any operations deemed to be useful for putting pressure on the enemy or for defense against him. (Latifi, *Effects of War on Property*, p. 147.)

After a considerable discussion Prof. Westlake says:

Lastly, if it can not be maintained, either legally or as a question of political fact, that individual subjects or citizens are foreign to the wars of their State, there remains the plea urged on the ground of humanity—that they ought to be exempted as far as possible from the consequences of their solidarity. But they have to bear those consequences in land war, and in naval war the risk and loss are far more easily met and spread over the community by insurance and by the increased price of the cargoes which escape the risk.

The conclusion is:

(1) That there is no principle, consistent with the existence and nature of war, on which a belligerent can be required to abstain from trying to suppress his enemy's commerce under his flag.

(2) That between trying by commercial blockades to suppress the enemy's commerce under the neutral flag and allowing it to pass free under his own flag there is a glaring inconsistency.

(3) And that the subject is therefore open to be dealt with on the ground of the probable effects of any change in the law. (Ibid, p. 151.)

Résumé.—The wide consideration that has been given to the subject of immunity of private enemy property at sea shows that there are differences of opinion among different states and even within single states. These differences are supported by arguments which are worthy of careful consideration. It is not proved to the satisfaction of many that the exemption of private enemy property will shorten or even make war more humane. Some maintain with strong arguments that the reverse would be the result. It is certain that not all private enemy property could consistently with the ends of war be exempt from capture. It is probable that in some wars the list of free goods could be extended more than in other wars.

The United States has uniformly striven for the principle of exemption of private property at sea in time of war. The other states of the world have not been willing to adopt this principle. The United States has therefore been obliged to shape its policy in recent years accordingly and to accept the fact that other nations were not prepared to agree to exemption of private property at sea.

There are many who maintain that in war, under present conditions of fleets, the capture of private property could not be resorted to as a means of injuring the enemy, as it would be more to the disadvantage of the captor than to the belligerent from whom capture is made.

It is certain that the capture of private enemy property at sea as an object of war has become of much less importance than formerly, and the United States may regard the question as much less vital than before the twentieth century. Certain private property at sea could certainly be seized under restrictions similar to those governing seizure on land even if the doctrine of inviolability was approved. This, in fact, would result in treatment which would be about all that could be demanded if war upon the sea is to exist. There would

therefore arise, in case of the adoption of the principle of inviolability, a doctrine in regard to exception of certain classes of property from the inviolability. On the other hand, the same result is gradually being brought about by the agreement not to interfere with or not to capture certain classes of vessels or property in time of war on the sea. Perhaps the gradual enlargement of the list of exemptions may be more easy to obtain and more in accord with rational procedure than a sweeping prohibition which would be accompanied with a large list of exceptions of classes of property which would be liable to capture. The United States can consistently indorse either method of harmonizing maritime warfare with the principles of humanity, for one method of procedure may reach the goal sought as quickly as the other, and the gradual development of a list of property free from capture may be practicable with the minimum of friction and difficulty.

Conclusion.—The United States may with propriety abandon the contention for the general exemption of enemy private property at sea and seek agreement upon a certain list of exemptions which meet the approval of the states of the world and which may from time to time be expended as the sentiment for exemption becomes more general.