

International Law Studies – Volume 5  
International Law Topics and Discussions  
U.S. Naval War College (Editor)

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# INTERNATIONAL LAW TOPICS AND DISCUSSIONS.

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## TOPIC I.

It was voted at the conference at The Hague in 1899 that

“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.”

In view of the above, what regulations should be made in regard to private property at sea in time of war?

## CONCLUSION.

The following regulations should be made in regard to private property at sea in time of war:

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.

## DISCUSSION AND NOTES.

*Attitude of the United States.*—Franklin very early expressed a general principle for which the United States has stood. He said, in a letter to Messrs. D. Wendorp and Thomas Hope Heyhger:

PASSY, 8 June, 1781.

There are three employments which I wish the law of nations would protect, so that they should never be molested or interrupted by enemies even in time of war. I mean farmers, fishermen, and merchants, because their employments are not only innocent, but are for common subsistence and benefit of the human species in general.

As men grow more enlightened, we may hope this will in time be the case. Till then we must submit, as well as we can, to the evils we can not remedy.

Franklin in 1783 sent an article to Richard Oswald, of which he said: "I rather wish than expect that it will be adopted."

## ARTICLE.

If war should hereafter arise between Great Britain and the United States, which God forbid, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance. And all fishermen, all cultivators of the earth, and all artisans or manufacturers unarmed, and inhabiting unfortified towns, villages, or places, who labor for the common subsistence and benefit of mankind and peaceably follow their respective employments, shall be allowed to continue the same, and shall not be molested by the armed force of the enemy in whose power by the events of the war they may happen to fall; but if anything is necessary to be taken from them, for the use of such armed force, the same shall be paid for at a reasonable price. And all merchants or traders with their unarmed vessels employed in commerce, exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to obtain and more general, shall be allowed to pass freely, unmolested. And neither of the powers parties to this treaty shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading ships or interrupt such commerce. (Sparks, *The Works of Franklin*, IX, p. 469.)

The first part of this proposed article is now generally recognized as binding throughout the world. States have been more reluctant to adopt the principles in regard to "merchants or traders with their unarmed vessels." The proposition in regard to privateering has become a generally recognized principle.

The United States has uniformly endeavored to obtain the broadest freedom for commerce in time of war.

Exemption from capture has been extended to the following when innocently employed: To

- (1) vessels engaged in scientific work and in exploration;
- (2) coast-fishing vessels innocently employed;
- (3) cartel ships acting within their permitted sphere;
- (4) hospital and other Red Cross vessels.

The treaty between the United States and Prussia of 1785, in Article XXIII, provided that—

all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to be obtained and more general, shall be allowed to pass free and unmolested; and neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce. (Treaties and Conventions, 1776-1887, pp. 905-906.)

This provision did not, however, reappear in the treaty of 1799, which took the place of the treaty of 1785, which had expired in 1786 by limitation.

It is evident that Franklin's position was the ideal for which the United States was striving. It was fully recognized that it was yet to be attained.

In a long letter to the minister of foreign affairs of the French Republic, of January 27, 1798, signed by Charles C. Pinckney, J. Marshall, and E. Gerry, occurs the following well-considered statement in regard to the relations of ships and goods:

This principle is to be searched for in the law of nations. That law forms, independent of compact, a rule of action by which the sovereignties of the civilized world consent to be governed. It prescribes what one nation may do without giving just cause of war, and what, of consequence, another may and ought to permit without being considered as having sacrificed its honor, its dignity, or its independence.

What, then, is the doctrine of the law of nations on this subject? Do neutral bottoms of right, and independent of particular compact, protect hostile goods? The question is to be considered on its mere right, uninfluenced by the wishes or the interests of a neutral or belligerent power.

It is a general rule that war gives to a belligerent power a right to seize and confiscate the goods of his enemy. However humanity may deplore the application of this principle there is perhaps no one to which man has more universally assented, or to which jurists have more uniformly agreed. Its theory and its practice have unhappily been maintained in all ages. This right, then, may be exercised on the goods of an enemy wherever found unless opposed by some superior right. It yields by common consent to the superior right of a neutral nation to protect, by virtue of its sovereignty, the goods of either of the belligerent powers found within its jurisdiction. But can this right of protection, admitted to be possessed by every govern-

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ment within its mere limits in virtue of its absolute sovereignty, be communicated to a vessel navigating the high seas?

It is supposed that it can not be so communicated, because the ocean being common to all nations no absolute sovereignty can be acquired in it. The rights of all are equal, and must necessarily check, limit, and restrain each other. The superior right, therefore, of absolute sovereignty to protect all property within its own territory ceases to be superior when the property is no longer within its own territory, and may be encountered by the opposing acknowledged right of a belligerent power to seize and confiscate the goods of his enemy. If the belligerent permits the neutral to attempt, without hazard to himself, thus to serve and aid his enemy, yet he does not relinquish the right of defeating that attempt whenever it shall be in his power to defeat it. Thus it is admitted that an armed vessel may stop and search at sea a neutral bottom, and may take out goods which are contraband of war, without giving cause of offense or being supposed in any degree to infringe neutral rights. But this practice could not be permitted within the rivers, harbors, or other places of a neutral where its sovereignty was complete. It follows, then, that the full right of affording protection to all property whatever within its own territory, which is inherent in every government, is not transferred to a vessel navigating the high seas. The right of a belligerent over the goods of his enemy within his reach is as complete as his right over contraband of war; and it seems a position not easily to be refuted that a situation that will not protect the one will not protect the other. A neutral bottom, then, does not, of right, in cases where no compact exists, protect from his enemy the goods of a belligerent power. (Vol. II, American State Papers, Foreign Relations, p. 171.)

The American envoys also affirm that—

The desire of establishing universally the principle that neutral bottoms shall make neutral goods is, perhaps, felt by no nation on earth more strongly than by the United States. Perhaps no nation is more deeply interested in its establishment. It is an object they keep in view, and which, if not forced by violence to abandon it, they will pursue in such manner as their own judgment may dictate as being best calculated to attain it; but the wish to establish a principle is essentially different from a determination that it is already established. The interests of the United States could not fail to produce the wish; their duty forbid them to indulge it when deciding on a mere right. However solicitous America might be to pursue all proper means, tending to obtain for this principle the assent of all or any of the maritime powers of Europe, she never conceived the idea of obtaining that consent by force. (Ibid., p. 172.)

President Monroe's message of December 2, 1823, commenting on the position taken by France in the recent war with Spain, states that instructions have been given to the

United States ministers abroad to make proposals to their respective governments which should look to "the abolition of private war on the sea." The same attitude was also maintained in the message of December 7, 1824. No international agreement was reached, however.

In the message of December 4, 1854, President Pierce, after considerable discussion of the rights of property at sea, says:

Should the leading powers of Europe concur in proposing as a rule of international law to exempt private property on the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground.

The treaty of the United States with Russia, negotiated by Secretary W. L. Marcy in 1854 and still in force, in Article I provides:

The two High Contracting Parties recognise as permanent and immutable the following principles, to wit:

1st. That free ships make free goods, that is to say, that the effects or goods belonging to subjects or citizens of a Power or State at war are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

2d. That the property of neutrals on board an enemy's vessel is not subject to confiscation unless the same be contraband of war. They engage to apply these principles to the commerce and navigation of all such Powers and States as shall consent to adopt them on their part as permanent and immutable.

To the proposition that the United States accede to the Declaration of Paris in 1856, President Pierce, in his message of December 2, 1856, states that the Government is desirous to secure "the immunity of private property on the ocean from hostile capture. To effect this object, it is proposed to add to the declaration that 'privateering is and remains abolished' the following amendment:

and that the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by public armed vessels of the other belligerent except it be contraband."

This proposition was at that time favorably received by several States. Italy, Prussia, and Russia were prepared to accede to the wish of the United States. Some of the leaders in France were similarly inclined. Great Britain was, however, unwilling to give assent.

The following action was recently taken in the United States:

*Resolved by the Senate and House of Representatives in the United States of America in Congress assembled,* That it is the sense of the Congress of the United States that it is desirable, in the interest of uniformity of action by the maritime States of the world in time of war that the President endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents.

Approved April 28, 1904.

The position of the United States in the exemption of private property at sea in time of war is not based on the consideration advanced in certain States, viz, that unless private property is exempt the State may be cut off from supplies. The United States' population could subsist without foreign commerce for a considerable time with little inconvenience.

*Attitude of other powers.*—In the war of 1866 Austria, Italy, and Prussia adopted the principle of immunity of private property at sea. The same principle was not adopted in the Franco-Prussian war of 1870, though Prussia was inclined to urge it on France. The action of Italy in 1866 was in accord with the provisions of her merchant maritime code of 1865, which provided that in time of war enemy property on the sea, except contraband, was inviolable. There have also been certain instances, as in the Chinese troubles of 1860, where exemptions have been made on grounds of expediency. Article XII of the treaty between the United States and Italy of February 26, 1871, provides that—

The High Contracting Parties agree that in the unfortunate event of a war between them the private property of their respective citizens and subjects, 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 either party, it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party. (Compilation of Treaties in Force, 1778-1904, p. 453.)

These are some of the main cases in which the principle of immunity of enemy private property at sea in time of war has been adopted in practice or treaty.

Neither practice or treaty precedent offer sufficient basis for regarding the principle as in any sense a recognized one.

*Opinions on exemption.*—The Institute of International Law in its session of 1877 declared that “Private property, whether neutral or enemy, sailing under enemy flag or neutral flag, is inviolable.”

In a letter of Professor Holland, of Oxford, quoted at the meeting of the International Law Association in 1900, the following statement is made:

The question of immunity seems to me to be rather one for politicians and shipowners than for lawyers. It is probable that immunity would now be in the interest of Great Britain, but, if so, the continental Governments, whatever may be continental legal opinion, are not likely to pledge themselves to it, and, even if they did enter into a general convention to that effect could hardly be relied upon to stand by their bargain. I doubt the expediency of making treaties about lines of conduct which may affect national existence. The strain upon them is likely to be too great for endurance, and one is afraid that one's country might be lulled into security by a paper contract which might be torn up on the outbreak of hostilities.

Sir John Macdonell, in writing of England's position in 1904, said:

It appears to me that more and more the interests of England become those of a neutral state and that it would be to her advantage on the whole that private property on sea were exempt from capture \* \* \*. It is inconceivable that the destruction of commerce at sea of any rival could determine in our favor the issue of a war in which we were engaged; while the systematic harrying of our trade might in certain circumstances be a serious blow to England. (Nineteenth Century, Nov., 1904, p. 699.)

In another place the same writer, treating of private property at sea, says:

For all concerned, but especially for England, which stands to lose most, it would probably have been well if the offer held out last century by Jefferson and Franklin, and repeated by the United States in 1856 and 1870, to exempt such property from capture had been adopted. (Journal Royal United Service Institution, XLII, pt. 2, p. 796.)



In Atlay's recent edition of Wheaton's International Law, a position opposed to exemption of capture of private property on the high seas is assumed. The arguments are stated as follows:

The indiscriminate seizure of private property on land would cause the most terrible hardship without conferring any corresponding advantage on the invader. It can not be effected without in some measure relaxing military discipline and is sure to be accompanied by violence and outrage. On the other hand, the capture of merchant vessels is usually a bloodless act, most merchant vessels being incapable of resisting a ship of war. Again, property on land consists of endless varieties, much of it being absolutely useless for any hostile purpose, while property at sea is almost always purely merchandise and thus is part of the enemy's strength. It is, moreover, embarked voluntarily and with a knowledge of the risk incurred, and its loss can be covered by insurance. An invader on land can levy contributions or a war indemnity from a vanquished country; he can occupy part of its territory and appropriate its rates and taxes, and by these and other methods he can enfeeble the enemy and terminate the war. But in a maritime war a belligerent has none of these resources, and his main instrument of coercion is crippling his enemy's commerce. If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small fleet or with none at all. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation. The United States proposed to add to the declaration of Paris a clause exempting all private property on the high seas from seizure by public armed vessels of the other belligerent, except it be contraband, but this proposal was not acceded to. Nor does it seem likely, for the reasons stated above, that maritime nations will forego their rights in this respect. (Paragraph 355 b).

Edmund Robertson (late civil lord of the Admiralty) summarizes the recent report of the Royal Commission on Supply of Food and Raw Material in Time of War, as follows:

(1) The commission has ascertained the extent of our dependence for supplies of food and raw material on foreign sources. The prime fact is that we import four-fifths of the wheat we consume and that our stocks on hand may run down so low as seven weeks' supply.

(2) The commission was not instructed to deal with exports, but it is true, both of our exports and our imports, that on the sea, when they are the property of British subjects and are carried in British ships, they are liable to seizure and confiscation by an enemy in time of war.

(3) It is quite clear that this condition of things necessitates what is called a strong fleet, and that, even with a strong fleet, trade will be to some extent endangered, supplies to some extent interrupted, prices to some extent increased. To what extent the commission was divided in opinion.

(4) The commission accordingly, or rather various sections of the commission, have suggested various remedies all of which would involve serious public expenditure. But the commission has not found it within its province, as understood by the majority, to deal in any way with the rule of international law, which the report declares to be the cause of all the apprehended dangers.

(5) This rule has been retained in international law mainly by the refusal of Great Britain to consent to its abolition at a time when her economical and even her naval position in relation to other nations was quite unlike what it is now.

(6) The rule has been gradually falling into discredit—partially in this country, generally in most others.

(7) There is good ground for thinking that the right of capture is of no great value to us, and also that it will not, in fact, be exercised to any great extent until the closing stages of the war.

(8) There is also ground for thinking that, apart from the mere question of supplies, the rule, taken in connection with the declaration of Paris, must have the effect of transferring a large portion of our vast carrying trade to neutral flags.

(9) At this very moment the rule has been formally challenged once more by the United States Government in its proposals for the new Hague conference.

*General conclusions as to policy of capture.*—Great Britain has until recently particularly opposed the principle of the exemption of private property on the sea from capture. There now seems to be a tendency on the part of the British to recognize that in modern warfare the capture of private property may be open to question, the opinion of some of the best of the English authorities being that there is little reason for the continuance of the practice.

There is a growing opinion that the reasons for the 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.

Recent wars have shown the course of trade under influence of new conditions.

It has become customary to allow a certain number of days of grace during which the vessels of one belligerent may enter and depart from the ports of the other belligerent. Vessels thus sailing are exempt from capture.

The ease of rapid communication by telegraph and otherwise renders the knowledge of the probable outbreak of war general. Few vessels will be taken by surprise or will start on voyages for ports which will render them liable to capture.

The practical abandonment of privateering makes capture of private property less an object of war.

The abolition of prize money by some States removes one of the stimuli to the capture of private property.

The development of continental carrying trade has made it possible for most States to supply a large portion of their needs by overland carriage. In the early days of capture of property on the sea overland commerce had not received the great impetus due to the development of steam and electricity.

The declaration of Paris of 1856, to the effect that "the neutral flag covers enemy's goods, with the exception of contraband of war," has made possible the transfer of a large portion of the enemy sea commerce to neutral flag in time of war. The absence of risk under neutral flag will also make possible cheaper rates under neutral flags. Under ordinary economic laws commerce would thus go to neutrals in time of war.

In recent wars evidence seems to show that the capture of private property has had little influence on the issue of the war and has stirred up enmity against the captor. In the Franco-Prussian war of 1870 it is reported that not more than eighty German vessels were captured. In the Spanish-American war, in 1898, comparatively little influ-

ence was exerted upon the war by the few captures of private vessels and property, and it would seem that the influence of such capture had been even less in the Russo-Japanese war of 1904-5.

Modern policy seems to show that the capture of private property at sea does not necessarily bring any great military advantage. It may happen that the military strength may be greatly lessened if naval vessels are sent in pursuit of vessels bearing private property. The cost of pursuit, capture, bringing to port, trial, and condemnation may, and often does, exceed the value of the goods and vessel captured.

The British report of the Royal Commission on Supply of Food and Raw Materials in Time of War in 1905 expresses the opinion that "the first and principal object of both sides, in case of future maritime war, will be to obtain the command of the sea," and maintains that concentration of the fleet is necessary to accomplish this purpose.

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 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.

*Treatment of special vessels.*—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, together 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.

*Regulation.*—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.