
INTERNATIONAL LAW STUDIES

— *Published Since 1895* —

Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law

Andrew Clapham

97 INT'L L. STUD. 1200 (2021)

Volume 97



2021

Published by the Stockton Center for International Law

ISSN 2375-2831

Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law

*Andrew Clapham**

CONTENTS

I.	Introduction.....	1201
II.	Booty	1207
III.	Bounty	1212
IV.	Prize	1215
	A. Reprisals, Letters of Marque, Prize, and the Distribution of Prize Money.....	1216
	B. Contraband of War as Prize.....	1223
	C. Attacks on Merchant Vessels.....	1225
	D. Modern Prize Court Legislation	1227
V.	Blockade	1234
	A. Is Blockade Limited to a State of War (in the legal sense)?..	1236
	B. Do the Belligerent Rights in Blockade Apply Beyond Inter-State Armed Conflicts?	1241
	C. The Impact of Blockade	1243
	D. The Israeli Prize Court Adjudication over the Protest Ships attempting to Reach Gaza	1245
	E. Final Thoughts on Blockade.....	1248
VI.	Some Suggestions for Reform	1250
	A. Seizure for Breach of Blockade	1255
	B. Interference with Neutral Shipping and Seizure of Contraband Goods and Neutral Ships	1258
	C. Seizure of Enemy Merchant Ships, Aircraft, and Cargo.....	1263

* Professor of Public International Law, Graduate Institute of International and Development Studies, Geneva, Switzerland. This is an abridged and adapted version of a chapter in the author's recent book, *War*, published by Oxford University Press (2021).

The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

This article reflects on the continuing ways in which old ideas of what is permitted in time of War continue to play a role when it comes to the use of force against merchant shipping and seizing such ships and their cargo on the high seas.¹

Prize courts are central to this story. Stephen Neff traces prize courts to the unilateral measures taken by England in the thirteenth century and by France in 1400; they were essentially courts set up by the sovereign to adjudicate captures at sea. “The original function of prize courts was to compile an official inventory of captured goods, to ensure that the government received its full share of any booty.”²

Such jurisdiction in more recent centuries has, in the United Kingdom, been dependent on a specific declared War. The last time it was used followed the 1939 Order issued by King George VI authorizing prize court jurisdiction over seized German property. That Order was authorized by powers under the 1894 Prize Courts Act, which states that the prize court shall act only upon a “proclamation” that War has “broken out.”³ The earlier Order in Council authorizing the commissioners to apply prize law for the First World War refers to “a state of war between this Country and the German Empire.”⁴

King George VI’s Order of September 5, 1939, contains only two operative paragraphs and might helpfully be reproduced here in part (not least because it was quite tricky to find) in order to get a flavor of what it means to trigger the law of prize and prize court jurisdiction. The text essentially states that, because of the State of War, the United Kingdom can, in the context of naval warfare, lawfully seize everything belonging to the enemy State, its nationals, and inhabitants. It then establishes prize court jurisdiction to adjudicate these matters:

WHEREAS a state of war now exists between this Country and the German Reich so that His Majesty’s Fleets, Ships and Aircraft may lawfully

1. In order to distinguish between armed conflicts in general and situations that can be considered as constituting a State of War under national and international law, this article distinguishes between war with a small “w” and War with a capital “W.”

2. STEPHEN NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS* 24–5 (2000).

3. Prize Courts Act 1894, 57 & 58 Vict. c. 39, § 2(1)–(3).

4. MAXWELL H. ANDERSON, *THE NAVY AND PRIZE: AN ESSAY* 16 (1917).

seize all ships, vessels, aircraft and goods belonging to the said German Reich or to the Citizens and Subjects thereof, or other persons inhabiting within any of the countries, territories, or dominions of the said German Reich, and bring the same to judgment in any such Courts as shall be duly commissioned to take cognizance thereof

We do hereby authorize and enjoin you . . . to take cognizance of and judicially proceed upon all and all manner of captures, recaptures, seizures, prizes and reprisals of all ships, vessels, aircraft, and goods already seized and taken, and which hereafter shall be seized and taken, and to hear and determine the same, and according to the course of Admiralty and Law of Nations, and Statutes, Rules, and Regulations for the time being in force in that behalf, and goods as shall belong to the said German Reich or to the Citizens or Subjects thereof, or to any other persons inhabiting within any of the countries, territories, or dominions of the said German Reich or which are otherwise condemnable as Prize.⁵

In a separate proclamation on the same day the King specified what the United Kingdom would treat as “Contraband of War”:

Whereas a state of War exists between Us, on the one hand, and Germany on the other:

And Whereas it is necessary to specify the Articles which it is our intention to treat as Contraband of War:

. . . the Articles in Schedule I hereto will be treated as Absolute Contraband [arms, ammunition, fuel, means of transportation and components thereof, all means of communication, currency, metal, machinery, etc.] the Articles in Schedule II hereto will be treated as Conditional Contraband . . . All kinds of food, foodstuffs, feed, forage, and clothing and articles and materials used in their production.⁶

The key controversies in the law on contraband and prize are covered by customary international law and are not likely to be dealt with in any new treaty-making process. Natalino Ronzitti’s evaluation from the 1980s remains realistic:

5. 2 STATUTORY RULES AND ORDERS 3605 (1939).

6. *Id.* at 3605–06.

Modernization is, however, a difficult task. The great maritime Powers seem to be happy to live with the old law rather than embark on a process of revision which would involve States with insignificant navies and even land-locked countries.⁷

While there is some existing treaty law and there have even been prosecutions for breaches of the rules of naval warfare amounting to war crimes,⁸ the contemporary law with regard to seizure of enemy merchant shipping and goods, seizure of neutral merchant ships, seizure of enemy state-owned military equipment, the operation of prize courts, and the rights of neutral shipping, is in all cases relatively uncertain and contested. Moreover, just because certain action was accepted as legal as recently as the last two World

7. Natalino Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflict at Sea and the Need for Revision*, in *THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES* 51 (Natalino Ronzitti ed., 1988). See more recently, making the same point, J. Ashley Roach, *Submarine Warfare*, *MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW* ¶ 34 (updated Mar. 2017), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e412?rskey=DBRymj&result=1&prd=MPIL> (“Such a conference would presumably be open to representatives from all nations and non-governmental organizations who would not, for the most part, have significant interests as potential participants and would have little or no practical experience in the conduct they would seek to regulate. Of the more than 150 coastal and island States, only a small fraction have a significant naval capacity or experience in naval warfare. Another 40 States are landlocked. Consequently, unless the rules of procedure of such a conference provided for all decisions, particularly on matters of substance, to be taken by consensus, or unless the conference could be limited to significant naval powers, those States without significant interests at stake would probably have the votes to decide matters of vital importance to naval powers without their consent.”). Heintschel von Heinegg suggested that some of the necessary updating to the rules could be accomplished through a meeting of experts to revise the San Remo Manual. Wolff Heintschel von Heinegg, *The Development of the Law of Naval Warfare from the Nineteenth to the Twenty-First Century—Some Selected Issues*, 30 *YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW* 69 (2014). Such an exercise started in 2019. *U.S. Naval War College Hosts Conference on Revisions to Legal Manual Regarding Armed Conflict at Sea* (Dec. 31, 2019), <https://usnwc.edu/News-and-Events/News/US-Naval-War-College-Hosts-Conference-on-Revisions-to-Legal-Manual-Regarding-Armed-Conflict-at-Sea>. James Kraska has made the point that “some of the concepts and provisions in the regime are aging; others are rather opaque. Uncertainty in the regime and inconsistency in its application push the door ajar to disagreement and heightened tension.” James Kraska, *Military Operations*, in *OXFORD HANDBOOK OF THE LAW OF THE SEA* 866, 866 (Donald Rothwell et al. eds., 2015).

8. For a look at some of the war crimes trials in the twentieth century, see William Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 29 *CANADIAN YEARBOOK OF INTERNATIONAL LAW* 238, 244–55 (1991).

Wars does not necessarily mean that we should automatically accept that the same rules continue to apply to all armed conflicts today.⁹

Unlike the contemporary law on land warfare, the practice of maritime warfare in international armed conflicts (and most would agree that the law of naval economic warfare is limited to international armed conflicts¹⁰) would at first glance seem to involve some pretty draconian rights for belligerent States with regard to merchant (civilian) ships, their crews, and the property of foreigners. In part, this is sometimes explained by the idea that land warfare takes place “within the territory of some state, whereas naval warfare is very largely carried on in the ‘no man’s land’ of the high seas.”¹¹

The history of the thinking on these topics considers a “right to fight” alongside a competing “right to trade.” As Herbert Smith explained in 1948, “At bottom it is the question of trying to reconcile two conflicting rights, each in itself quite legitimate—the right of the belligerent to defeat his enemy and the right of the neutral to carry on his normal trade.”¹²

The questions we will be asking in this article are these: is it legitimate in the twenty-first century for a State that has decided to go to war (or initiate an international armed conflict) to continue to claim such “Belligerent Rights,” based on a “right” to defeat an enemy State, so that the rights or expectations of neutrals or “enemy nationals” to trade in goods unrelated to direct military action are extinguished? Should a belligerent State be entitled

9. There are almost no treaties in force that cover these areas. Past initiatives that sought to codify and develop the law include Institut de droit international, *Règlement international des prises maritimes* (1897); Institut de droit international, *Manual of the Laws of Naval War* (1913); Declaration Concerning the Laws of Maritime War, Feb. 26, 1909, 208 Consol. T.S. 338, *reprinted in* THE DECLARATION OF LONDON, FEBRUARY 26, 1909, at 112 (James B. Scott ed., 1919) [hereinafter *The London Declaration*] (an unratified treaty signed by ten naval powers); and the Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, 33 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 175 (1939). More recently, see SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald Beck ed., 1995) (hereinafter *SAN REMO MANUAL*); and PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2010) (hereinafter *HARVARD MANUAL ON AIR WARFARE*).

10. *See, e.g.*, WILLIAM BOOTHBY & WOLFF HEINTSCHEL VON HEINEGG, *THE LAW OF WAR: A DETAILED ASSESSMENT OF THE US DEPARTMENT OF DEFENSE LAW OF WAR MANUAL* 326 (2018).

11. HERBERT SMITH, *THE LAW AND CUSTOM OF THE SEA* 64 (1948).

12. *Id.*

to acquire property rights over every enemy ship and plane (along with its enemy cargo) just because this belligerent State has the capacity to capture them?

The idea of Belligerent Rights in naval warfare includes capturing enemy ships and their cargoes on the high seas. The idea is that the property rights in the vessels and the cargo are then acquired by the capturing belligerent State after condemnation (also known as a confiscation) in a Prize Court.¹³ No one now accepts that one can seize private enemy property on land, so what rationale remains for seizing on the high seas private enemy ships and their cargo, while also retaining the right to intern their crew as prisoners of war?¹⁴

It may be that in the past it was accepted that the Law of Nations entitled the aggrieved side to retake in reprisal (repriser) what is owed to them. And it was once accepted that States authorized privateers (private individuals in charge of private ships) in time of War to seize those enemy goods by using their merchant ships and crew.¹⁵ But today such authorization of private force against foreign ships is outlawed for such purposes. The State can no longer, since the Paris Declaration of 1856, authorize privateers to carry out such seizures. Moreover, at least since the UN Charter in 1945, the State itself is no longer entitled to engage in forceful reprisals to right a wrong.¹⁶

It may also be that historically it was considered that all merchant sailors could be easily redeployed to the armed forces, and that merchant ships could potentially easily be requisitioned for the war effort, but can such rationales for capturing merchant ships still stand? And does not this blurring of the distinction between military and civilian objects hinder rather than

13. *See, e.g.*, UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶¶ 13.99–13.104 (2004) [hereinafter UK MANUAL]; SAN REMO MANUAL, *supra* note 9, ¶¶ 135–40.

14. For a traditional statement of the law, see C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 49 (6th ed. 1967) (“All private property on land, enemy and neutral, is free from confiscation, but all is equally subject to requisition. On the other hand, enemy merchant ships and goods at sea are liable to capture.” He then explains the “ancient principle” regarding interning enemy merchant crew as prisoners of war. Compare this law of naval warfare customary rule with Article 105 of the UN Convention on the Law of the Sea (1982) with regard to seizure in the context of piracy.)

15. For detailed study in one particular context, see FAYE KERT, PRIZE AND PREJUDICE: PRIVATEERING AND NAVAL PRIZE IN ATLANTIC CANADA IN THE WAR OF 1812 (1997).

16. *See* ANDREW CLAPHAM, WAR ch. 4.1 (2021).

help uphold modern international humanitarian law, which starts out by stressing the need to distinguish between combatants and civilians?

Challenging the idea of these Belligerent Rights derived from War need not throw into chaos the whole of the laws of war. We could confine ourselves at this stage to rethinking some of the rules related to traditional maritime warfare as they relate to capture of enemy and neutral ships. My complaint with the traditional law as currently understood is that we cannot reward the aggressor State with Belligerent Rights that States have accumulated under the old legal institution of War.

I will not, however, be suggesting that such Belligerent Rights cannot be claimed by the aggressor but should remain unaffected for the State acting in self-defense. As is well known, all States claim to be acting in self-defense or for some other legitimate cause. What I will suggest is that, with regard to private property, no seizure or capture rights for any belligerents should flow merely from the fact of being in a State of War or in an international armed conflict. This focus on private property at sea may seem to be a rather niche preoccupation, but the idea that a belligerent State is entitled to seize the private property of the enemy at sea, and the vessels of neutrals accused of breaching blockade or carrying contraband, has significant knock-on effects.

For example, refusing visit or capture exposes merchant ships to attack. Moreover, the rules that are said to allow for capture also allow for the destruction of enemy civilian aircraft and neutral merchant ships where capture and adjudication for prize are not feasible.¹⁷ Perhaps the time has come to remove the idea that, in war, the high seas involve a battle for private property and the means to strangle the enemy's economy. To continue to countenance such old rules related to the capture of merchant ships in a State of War is to encourage a state of mind whereby the enemy is much more than the military forces one faces in battle.

To the extent that navies resort to inspection, interception, diversion, capture, seizure, confiscation, or acquisition against private ships on the high seas, I would suggest that the legal basis for such action ought to be confined to the international law covering self-defense, and not ancient traditions

17. For the rules proposed relating to destruction as an "exceptional measure," see SAN REMO MANUAL, *supra* note 9, ¶ 151 (for neutral vessels) and Rule 135 of the HARVARD MANUAL ON AIR WARFARE, *supra* note 9 (for captured enemy civilian aircraft).

dressed up as “Belligerent Rights,” even if the thinking that attempts to justify such rights goes back centuries.¹⁸

Henry Maine, Whewell Professor of International Law at the University of Cambridge, sought in his lectures in 1887 on international law to explain the rationale for an international law right for a belligerent State to seize private enemy property on the high seas. His reasoning traces the idea back to Roman law:

The elements of the subject are simple. When two states go to war, the ships, public and private, of one are, relatively to the other, so many articles of movable property floating on the sea. The capture of one of them by a ship of the other belligerent is prima facie regulated by the same principle as the seizure on land of a valuable movable by a soldier or body of soldiers. The law on the subject descends to us directly from the Roman Law. The property of an enemy is one of those things which the Roman Law in one of its oldest portions considers to be *res nullius* – no man’s property. It may be taken just as a wild bird or wild animal is taken, by seizing it with the intention to keep it¹⁹

I wonder if today a lecturer could really explain the right to seize private property by analogy to the Roman law right to seize wild animals. But today the law books and manuals see no need to explain this ancient Belligerent Right. The Belligerent Right to capture enemy property on the high seas apparently continues, carried over each time a law of war manual is updated.²⁰

II. BOOTY

The concept of war booty is as old as recorded history. It has developed over a period of many centuries from the ancient practice by which the individual soldier was considered to be entitled to take whatever he could

18. One might also inquire if such rights ever had any credible foundation as a matter of morality or universal law. Neff’s conclusion is clear: “The concept of belligerents’ rights is a delusion.” Stephen C. Neff, *The Prerogatives of Violence – In Search of the Conceptual Foundations of Belligerents’ Rights*, 38 GERMAN YEARBOOK OF INTERNATIONAL LAW 41, 71 (1995).

19. HENRY MAINE, INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE, 1887, at 94–95 (1888).

20. See, e.g., UK MANUAL, *supra* note 13, ¶¶ 12.91–12.96, 13.99–13.104; SAN REMO MANUAL, *supra* note 9, ¶¶ 135–145; HARVARD MANUAL ON AIR WARFARE, *supra* note 9, r. 49, r. 134.

find and carry away, to the modern rule under which only the state is entitled to seize property as war booty.²¹

In naval warfare, in the past “everything above the gun deck was the property of the captors, aught else had to be brought into the Prize Court.”²²

The contemporary law of war foresees, in treaty law dating from 1907, that in an inter-State armed conflict, an “army of occupation” can take possession of the cash, movable property, arms, means of transport and supplies that belong to the enemy State “which may be used for military operations.”²³ Transport vehicles, weapons, and munitions, as well as appliances for the transmission of news, belonging to private persons “may be seized,”

21. William Downey, *Captured Enemy Property: Booty of War and Seized Enemy Property*, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW 488, 490 (1950). For an interpretation of Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Article 18, concerning the obligation to protect the shipwrecked from pillage, see INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE SECOND GENEVA CONVENTION ¶ 1669 (2d ed. 2017), which states that “there is a recognized right in international armed conflict to capture as war booty any movable property belonging to the enemy State. Booty of war covers all types of enemy movable public property that can be used for military operations, such as arms and munitions. If individuals were to take these types of public goods from a wounded or sick person in a situation of armed conflict at sea, it might not amount to pillage if it is handed over to the State. If such goods are taken for private use, however, that would constitute pillage and would contravene the prohibition in Article 18.” The COMMENTARY also suggests that a civilian aircraft temporarily used for exclusively medical purposes could be taken by the enemy State through condemnation through prize court, while a military aircraft in the same situation could be captured as “booty of war.” *Id.* ¶ 2621.

22. ANDERSON, *supra* note 4, at 28. This right was abolished in favor of a share for the captors. “The practice of pillage, however, led to great abuse and was abolished by an Act passed in the reign of William and Mary.” *Id.* at 5. For the rule relating to the sailors’ right to everything above the gundeck, see Rule 10 in the ancient *Black Book of the Admiralty* (“In the case of any ship or vessel of the enemy being taken as prize by any ship of our fleet, then the captors shall have for their own use all manner of goods and furniture found above the hatches, or the fore-castle or the poop of the said vessels, saving always the ancient customs and usages of the sea.”).

23. Regulations Respecting the Laws and Customs of War on Land art. 53, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Regulations]. See also Anicée Van Engeland, *Protection of Public Property*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1545–46 (Andrew Clapham et al. eds., 2015).

but “they must be restored and compensation fixed when peace is made.”²⁴ The old law of war institution of “booty” has been mostly overtaken by these treaty rules, but the concept of booty is still used in military manuals to outline the rules applicable to property seized on the battlefield (and not as part of an occupation). In particular, booty of war is used with regard to certain property found on prisoners of war.²⁵ So the UK Manual refers to “booty of war” when explaining that personnel who find sums of money belonging to the enemy State on a prisoner of war have to hand over the money to the capturing government. Such money becomes “booty of war” and the property of the capturing government.²⁶ Battlefield booty is arguably not constrained by the rule that the property “may be used for military purposes.”²⁷ But the uniforms, articles for personal use, and private property of prisoners of war are protected,²⁸ as is other enemy private property (with the possible exception of privately-owned weapons, etc.).²⁹

24. Hague Regulations, *supra* note 23, art. 53. For a detailed look at the relationship between this provision and “cases governed by naval law,” see Marco Longobardo, *The Occupation of Maritime Territory under International Humanitarian Law*, 95 INTERNATIONAL LAW STUDIES 322, 355–61 (2019). See also Hague Regulations, art. 52 for requisitions; Zutaka Arai-Takahashi, *Protection of Private Property*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1521–24, *supra* note 23.

25. Some manuals still refer to State property seized by an occupying army as “booty of war.” See FEDERAL MINISTRY OF DEFENCE (Germany), ZDV 15/2, LAW OF ARMED CONFLICT MANUAL ¶ 553 (2013) [hereinafter GERMAN MANUAL].

26. UK MANUAL, *supra* note 13, ¶ 8.25(g).

27. See 2 OPPENHEIM’S INTERNATIONAL LAW: A TREATISE ¶ 139 (Hersch Lauterpacht ed., 7th ed. 1952). See also *id.* at ¶ 144 for private property.

28. See Convention (III) Relative to the Treatment of Prisoners of War art. 18, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Hague Regulations, *supra* note 23, art. 4; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field arts. 15–16, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea arts. 18–19, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, for property on the wounded, sick, and dead in the field, and on the shipwrecked.

29. The U.S. *Law of War Manual* states: “In general, enemy private movable property on the battlefield may be seized if the property is susceptible to direct military use, i.e., it is necessary and indispensable for the conduct of war. This includes arms, ammunition, military papers, or property that can be used as military equipment (e.g., as a means of transportation or communication).” OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 5.17.3 (rev. ed. Dec. 2016) (footnote omitted) [hereinafter U.S. LAW OF WAR MANUAL]. The French *Manuel de droit des conflits armés* (2012) allows for “butin de guerre” taken from private persons where this constitutes “matériel de guerre.”

More significantly, it is understood under customary international law that warships, military aircraft, and other vessels (including their cargo) belonging to the State can be captured by the enemy State, and ownership passes immediately to the capturing State. Some authorities still refer to such captures as “booty of war.”³⁰ The property can be sold, and the only exception to capture in this context would be cultural property.³¹ This customary rule is stated in the International Committee of the Red Cross study on customary international humanitarian law as Rule 49: “The parties to the conflict may seize military equipment belonging to an adverse party as war booty.”³² It should be stressed that the customary rules that entitle parties to seize and take ownership of “war booty” are confined to international armed conflicts—conflicts between States.³³ So property belonging to the other side always refers to State property.

Interestingly, various government manuals, and even the International Committee of the Red Cross study on customary international humanitarian law, refer to such property as “war booty” or “booty of war,” or “butin de guerre” in French. On reflection, this makes some sense; one needs the concept of war here to help justify the rule, with its associated idea that the winner takes it all, or at least as much as is necessary to continue to wage war and pay for the occupation. One can hardly derive such a rule from principles

See also Yoram Dinstein, *Booty in Warfare*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW ¶ 8 (updated Sept. 2015), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e256?rskey=r2j804&result=1&prd=MPIL>. The latest New Zealand Manual of Armed Forces Law excludes, however, all private property from being considered booty. 4 NEW ZEALAND DEFENCE FORCE, DM (2 ed), MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT §§ 8.10.35, 12.3.17 (2019).

30. GERMAN MANUAL, *supra* note 25, ¶¶ 1025, 1129; U.S. LAW OF WAR MANUAL, *supra* note 29, §§ 13.4.3, 14.3.1.

31. *See* Yue Zhang, *Customary International Law and the Rule Against Taking Cultural Property as Spoils of War*, 17 CHINESE JOURNAL OF INTERNATIONAL LAW 943–89 (2018); Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

32. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 174 (2005) (“With respect to non-international armed conflicts, no rule could be identified which would allow, according to international law, the seizure of military equipment belonging to an adverse party, nor was a rule found which would prohibit such seizure under international law.”).

33. DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS ch. 10, ¶ 2.8 (2016) (“A party to a conflict in IAC may lawfully seize and confiscate war booty.” “Confiscation of war booty in NIACs is not clearly authorised in international law.”).

of humanity or some humanitarian imperative. The rule must derive from ancient practices in war; but having outlawed going to war, alongside the institution of War, how can States retain such Belligerent Rights? The idea of booty of war forces us to ask ourselves today, with the outlawry of war and the criminalization of aggression, why does the same international legal order authorize either State to acquire and keep such war booty?

Having outlawed recourse to war and rendered illegitimate the legal acquisition of territory through force, it seems anomalous that States can still acquire ownership of the movable property of the enemy State through the institution of “war booty.” This not only covers military equipment, arms, and ammunition, but also can include cash, securities, and even horses considered part of the army. In 1945, the U.S. Army famously took over one hundred Hungarian thoroughbred horses, “captured in combat” from the German Army, who had in turn captured the horses in Hungary and removed them to Germany. The horses were then shipped in a stormy Atlantic crossing to the United States for a U.S. Army breeding program. A request from Hungary for their return was heard in a special subcommittee of the U.S. Senate, and the thoroughbred horses were understood as a matter of law to be war booty.³⁴ One might also mention French wine vats seized by the German Army in the Second World War and sold to a private buyer,³⁵ and even the two million cigars destined for the German Army, along with tobacco leaf for four million more cigars.³⁶

While there may have been a case that the courts recognized such seizure as lawful after the Second World War, even for the unlawful belligerent,³⁷

34. The full details emerge from the hearings before the U.S. Senate Subcommittee on Determining the Basis of the Contemplated Return to Hungary of Certain Horses Said to Have Been Brought to the United States as Captured War Matériel, Dec. 3–23, 1947 (1948). The total number of horses was higher than the one hundred or so Hungarian horses mentioned above. The details are to be found at page 12 of the Senate Hearings; *see also* Downey, *Captured Enemy Property*, *supra* note 21, at 497, 503–04; *Besseney v. Commissioner of Internal Revenue*, 45 T.C. 261 (1965); ELIZABETH LETTS, *THE PERFECT HORSE: THE DARING US MISSION TO RESCUE THE PRICELESS STALLIONS KIDNAPPED BY THE NAZIS* ch. 27 (2016).

35. *Etat français v Etat Monmousseau*, 37 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 311–15 (1948).

36. Herbert Smith, *Booty of War*, 23 BRITISH YEAR BOOK OF INTERNATIONAL LAW 227, 233 (1946) (“in this case both the manufactured cigars and the leaf were clearly booty of war”); Downey, *Captured Enemy Property*, *supra* note 21.

37. Richard Baxter, *The Definition of War*, 16 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 1, 9 (1960).

there is a very good case that we should no longer consider that the law on such war booty is good law.³⁸ The time has surely come to move beyond the idea that war should be allowed to legalize theft by States.³⁹

III. BOUNTY

Another familiar term related to wartime is “bounty.” This refers to the money paid to the officers and crew present on a warship successful in battle. It was calculated according to the number of enemy sailors on a warship that had been captured, burned, destroyed, or sunk (and in earlier times this included “private ships of war” with letters of marque). Elaborate procedures

38. In *Kuwait Airways Corporation v. Iraqi Airways Company and Republic of Iraq*, [1995] 1 Lloyd’s Rep. 25 (CA), Leggatt L.J. stated: “From earliest times the concept of plunder, booty and the spoils of war has been amongst the most basic. The seizure by one state of goods belonging to another represents an act of conversion as obvious as it is flagrant.” Such a seizure could be covered by war risks insurance, which covers seizure in this context as a Prize. See *Kuwait Airways Corporation v. Kuwait Insurance Company*, [1999] 1 Lloyd’s Rep. 803, HL (per Lord Hobhouse). But the English courts would not recognize as legal the Iraqi seizure of the Kuwaiti planes on grounds of public policy: “Iraq’s invasion of Kuwait and seizure of its assets were a gross violation of established rules of international law of fundamental importance. . . . Such a fundamental breach of international law can properly cause the courts of this country to say that, like the confiscatory decree of the Nazi government of Germany in 1941, a law depriving those whose property has been plundered of the ownership of their property in favour of the aggressor’s own citizens will not be enforced or recognised in proceedings in this country. Enforcement or recognition of this law would be manifestly contrary to the public policy of English law. . . . International law, for its part, recognises that a national court may properly decline to give effect to legislative and other acts of foreign states which are in violation of international law.” *Kuwait Airways Corporation v. Iraqi Airways Company*, [2002] UKHL 19 [29] (per Lord Nicholls). In this situation the illegality of Iraq’s action was also based on the binding nature of the relevant Security Council resolutions.

39. See also the suggestion by Hersch Lauterpacht that “a state waging an unlawful war does not obtain or validly transmit title with respect to property acquired in connexion with the conduct of war regardless of whether such title is otherwise acquired in accordance with the law of war.” Hersch Lauterpacht, *The Problem with the Revision of the Law of War*, 29 BRITISH YEAR BOOK OF INTERNATIONAL LAW 360, 378 n.2 (1952); Baxter, *supra* note 37, at 9 n.38, claimed that Lauterpacht back-peddled from this view as a description of the actual law, referencing Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRITISH YEAR BOOK OF INTERNATIONAL LAW 206, 233 (1953). To be clear, I am suggesting that today neither side ought to be able to permanently acquire booty of war, even if there is obviously a case that military equipment need not be immediately returned to the adversary during the armed conflict.

determined what counted as evidence for calculating the number of personnel on board the sunken or captured ship.⁴⁰ It has been said that bounty was intended to encourage “personal gallantry and enterprise.”⁴¹

In the United States, this bounty money meant that the crew could expect, for a ship that had been destroyed or sunk, \$100 per enemy sailor if the American naval power was superior, and \$200 if the American force was smaller or equal to that of the enemy. For a captured warship ordered to be destroyed, the bounty was \$50 per enemy head on board at the time of capture. Arnold Knauth provides some examples, such as the Battle of Manila Bay in 1898, where the American force won with superior armaments, leading to an award of \$191,400 based on destroyed vessels that had 1,914 crew members.⁴² The admiral’s share in turn was 5 percent of the total, and the rest shared according to a scale fixed in prize law. The actual provision, which was abolished in 1899, gives us a flavor of the complexities of the reward structure, and reads in part:

A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy’s vessel was of inferior force, and of two hundred-dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize-money; . . . and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture.⁴³

40. For example, the numbers were in the first instance “proved by the oaths of three or more of the chief officers or men belonging to the said hostile ship or ships of war or privateers.” These oaths were to be sworn before a British mayor or, if in a neutral port, before a British consul or vice-consul. See THOMAS HORNE, COMPENDIUM OF THE STATUTE LAWS, AND REGULATIONS OF THE COURT OF ADMIRALTY RELATIVE TO SHIPS OF WAR, PRIVATEERS, PRIZES, RE-CAPTURES, AND PRIZE MONEY ch. 7, at 89–90 (1803).

41. ANDERSON, *supra* note 4, at 27.

42. For further detail and examples, see Arnold Knauth, *Prize Law Reconsidered*, 46 COLUMBIA LAW REVIEW 69, 70 (1946).

43. 54 Rev. Stat. § 4635 (1873) (U.S. Prize Statute).

In the United Kingdom, an equivalent provision provided for payment of £5 sterling and read as follows, until it was repealed in 1948:

If, in relation to any war, Her Majesty is pleased to declare, by proclamation or Order in Council, Her intention to grant Prize bounty to the officers and crews of Her ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of Her Majesty's enemies shall be entitled to have distributed among them as Prize Bounty a sum calculated at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement.⁴⁴

Awards during the First World War to British Naval Service personnel ran to quite large sums, which could be the equivalent of three years' salary for an able seaman.⁴⁵ In the absence of hard evidence, the awards of bounty handled by the courts would sometimes estimate upwards the number of enemy crew on a destroyed battleship.⁴⁶

While such bounty or "head money" is no longer paid under the U.S. or UK legislation, and no other States are known to have awarded such bounty,⁴⁷ the implications for the development of naval warfare may have

44. Naval Prize Act 1864, 27 & 28 Vict. c. 25, § 42 (1864), repealed by the Prize Act 1948, 12, 13 & 14 Geo. 6, c. 9, § 9(2) (1948).

45. For some detail of head money of £5 a head paid in 1916 to British submarine crew, see IAIN BALLANTYNE, *THE DEADLY TRADE: THE COMPLETE HISTORY OF SUBMARINE WARFARE FROM ARCHIMEDES TO THE PRESENT* 115 (2018), where it is recorded that the crew of the *B11* received £3,500, meaning that an able seaman, after deduction of the prize agent's fee and apportionment, would receive "£120 6s 1d. the equivalent of three years' pay." For the detail of some of the bounty money awarded during the First World War, see *THE THIRD GREAT WAR NUMBER OF THE FLEET ANNUAL AND NAVAL YEAR BOOK* 71 (1917), <https://archive.org/details/fleetannualnaval00coveuoft>.

46. The crew of the *B11* benefitted from Sir Samuel Evans rounding up the size of the crew on the enemy battleship to seven hundred. In his award of July 24, 1916, Sir Evans stated "I declare the officers and crew of submarine B 11 are entitled to prize bounty as being the only vessel present that brought about the destruction of the Turkish battleship 'Mesudieh,' and I think I am justified in adding a percentage to the complement ordinarily carried by that battleship. I declare the number on board to be 700. Nobody can say I am wrong, and I hope I am right. The prize bounty awarded will be £3,500." *THE THIRD GREAT WAR NUMBER OF THE FLEET ANNUAL AND NAVAL YEAR BOOK* *supra* note 45, at 16.

47. See ANDERSON, *supra* note 4, at 57. For the history of bounty, see *id.* at 27–39. For salvage and recapture, see *id.* at 40–53.

been quite far-ranging. Seen from the perspective of incentives, some scholars have speculated that the system of rewards might have meant that commanders selected their battles and the way they fought in order to maximize not just bounty, but also the prize money that would be shared according to the values of the captured ship and cargo. Prize money (as opposed to “head money” or bounty) was calculated according to the value of the warship, merchant ship, and relevant cargo. Restraint in attack in order to ensure a more valuable prize could explain some tactics in limited wars until prize money was no longer distributed between the capturing State and the naval personnel. Douglas Allen’s study of incentives in the British Navy in the eighteenth century age of sail highlights how such rewards were essential not only for the lower ranks, but also for admirals. “At a time when an admiral of the fleet might earn £3,000 per year, some admirals amassed £300,000.”⁴⁸ Let us look at the concept of prize law more closely.

IV. PRIZE

In addition to the Belligerent’s Right to capture and keep enemy property, such as warships (booty of war), maritime warfare has traditionally included a Belligerent Right to capture enemy merchant (civilian) ships and aircraft. Property passes to the capturing State after adjudication by a prize court. The origins of the idea of prize law are related to the idea of seizing enemy property; as James Kraska explains, the “English word ‘prize’ or French ‘prise’ is derived from the Latin verb ‘prehendere,’ which means to seize.”⁴⁹ Grotius opined in his *Commentary on the Law of Prize and Booty* (1603) that the idea of seizing and acquiring enemy property goes to the very purpose and rationale of just war:

But war is just for the very reason that it tends toward the attainment of rights; and in seizing prize or booty, we are attaining through war that which is rightfully ours. Consequently, I believe those authorities to be entirely correct who hold that the essential characteristic of just wars consists above all in the fact that the things captured in such wars become the property of the captors: a conclusion borne out both by the German word for war, [krieg from Middle High German krieg(g), which means “exertion,”

48. Douglas Iain Allen, *The British Navy Rules: Monitoring and Incompatible Incentives in the Age of Fighting Sail*, 39 *EXPLORATIONS IN ECONOMIC HISTORY* 204, 213 (2002).

49. James Kraska, *Prize Law*, *MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW* ¶ 1 (updated Dec. 2009), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e383?rskey=yIunG9&result=1&prd=MPIL>.

“endeavour to obtain something,”) and by the Greek word for Mars, since Ἄρης, [“Ares,” i.e., “Mars,”) is apparently ἀπὸ τοῦ αἶρεῖν, “derived from αἶρεῖν,” [which means “to take away,” “to seize”]. Therefore, the seizure of spoils of war is necessarily just on some occasions; and furthermore, it must be just in regard to the same persons and by that same criterion of all law, embraced in our demonstration of the justice of war.⁵⁰

A. Reprisals, Letters of Marque, Prize, and the Distribution of Prize Money

One way into understanding prize law is to consider and contrast the history of reprisals. In the Middle Ages reprisals were the chosen method for righting a wrong done to a national by a foreigner or foreign government. As Stephen Neff explains: “When a person was injured by a foreigner and was unable for some good reason, to obtain compensation from the very person who committed the wrong, satisfaction could be had, as a last resort, by seizing property belonging to any fellow-national of the wrong-doer.”⁵¹

The victim would need a “letter of reprisal” from their sovereign and, should the reprisal be effected against innocent fellow nationals, they would, in theory, be “entitled to be indemnified by the original wrongdoer.”⁵² These private or particular wars look more like law enforcement until they relate to action abroad. At this point they start to look more like war, and the letters were known as “letters of marque,” letters of reprisal being considered an authorization to seize goods within the jurisdiction, whereas letters of marque “permitted such capture beyond the borders.”⁵³ Only the letters of marque separated these authorized privateers from pirates whose acts would be illegal. The logic of these private wars is found in just war doctrine and the justifications given for Wars between sovereigns. Nevertheless, the separate institution of prize law developed in time of War meant that enemy

50. GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY 68–69 (Martine Julia van Ittersum ed., Gwladys Williams & Walter Zeydel trans., Liberty Fund 2005) (1603) (footnotes omitted; editor’s brackets in original).

51. STEPHEN NEFF, WAR AND THE LAW OF NATIONS 77 (2005).

52. *Id.* at 78.

53. HORNE *supra* note 40, at 2, where the footnote reads, “The term *marque* is derived from the antiquated word *marche*, denoting a boundary or limit.” See also NEFF, WAR AND THE LAW OF NATIONS, *supra* note 51, at 81 (“This expression apparently derives from the German word *Mark*, meaning frontier, referring to the right to take action beyond the frontier of the issuing state.”). See further, for other suggestions of the relevance of the term *marque*, based on the Latin *marchare*—to seize as a pledge—Grover Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 AMERICAN JOURNAL OF INTERNATIONAL LAW 694 (1933).

property and enemy vessels on the high seas could be captured and condemned through adjudication by a prize court. The captured property might also include enemy goods on neutral vessels, neutral goods on enemy vessels, contraband of war, or vessels caught breaching a Blockade.

The prize was claimed as a sovereign right of a belligerent State at War. By the beginning of the nineteenth century, some saw this as a universally accepted right that flowed from sovereignty and the need to acquire such property in time of war. The issue was no longer the recuperation of what had been wrongfully taken (reprisal) but a Belligerent Right based on ancient practice to take and keep all such foreign property captured on the high seas in time of War. Any connection to a just war cause was by this time severed. As Sir William Scott (later Lord Sewell), sitting as a judge in prize court, explained in an 1804 judgment: “The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown; and the disposal of these acquisitions may be of the utmost importance for the purposes of both war and peace.”⁵⁴

The value of the ship and the cargo taken in War was divided between the State (the Crown) and the crew and officers of the relevant authorized ships.⁵⁵ As with bounty (or prize bounty), there were complex rules that applied to the distribution of prize money with regard to the value of the captured ship. For the United States:

The net proceeds of all property condemned as prize, shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors, except that in case of privateers and letters of marque, the whole shall be decreed to

54. The *Elebe*, Dec. 19, 1804, *reprinted in* 1 REPORTS OF PRIZE CASES: 1745 TO 1859, at 447 (E. S. Roscoe ed., 1905); *see also* WILLIAM HAZLITT & HENRY ROCHE, A MANUAL OF THE LAW OF MARITIME WARFARE 374 (1854).

55. Articles of Agreement would set out the division of prize between the owner of the ship and the captain, officers, and crew. For example, for the *Mars* in New York (1762), the owner was to get half, the other half to be divided between the captain (6 shares), lieutenants and master (3 shares), captain’s clerk, mates, steward, prize-master, gunner, boatswain, carpenter and cooper (2 shares), their mates (1½ shares), doctor (3 shares) and the rest of the company deemed able seamen (1 share). JOHN JAMESON, PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD 581–82 (1923).

the captors, unless it shall be otherwise provided in the commissions issued to such vessels.⁵⁶

The British rules on distribution have been traced back to 1511, early in the reign of Henry VIII, when, for one expedition, prizes were divided between the King and the admiral. The rules reached a consolidated form under Queen Anne, in 1708, when prizes were transferred completely to the captors (with nothing left to the sovereign). Those rules can be summarized as providing for a captain “actually on board at the time of the prize” to be allowed three-eighths; lieutenants one-eighth; gunners, carpenters, surgeons and chaplains one-eighth; gunner’s mates, surgeon’s mates, etc., one-eighth; trumpeters, barbers, cooks, etc., two-eighths.⁵⁷

Today, prize in the United States, or in the United Kingdom, would belong exclusively to the State, but in the eighteenth and nineteenth centuries the sums that would accrue to the officers or crew could be enormous. The record sum probably goes to the 1762 capture of the Spanish frigate *Hermione*, loaded with treasure, which led to each seaman getting £485, a sum which would perhaps be worth close to £100,000 in 2021. The captains received around £65,000 each, a sum equivalent to around £13,000,000 today.⁵⁸ One can see why the State had an interest in ensuring that it got its fair share of the proceeds through careful application of the law in prize courts. The prize courts also operated as courts applying international law (the Law of Nations) and/or national law, to protect the rights of those who risked having their property seized and eventually condemned.⁵⁹

The rules relating to the character of the goods that could be captured were set out as far back as the thirteenth century in well-known books for traders, such as the *Consolat de Mar* (originally in Catalan), and in the following

56. See 54 Rev. Stat. § 4630 (1873). For an overview of the distribution in the British, Italian, Russian, and French systems, see ANDERSON, *supra* note 4, at 54–57.

57. For the Cruizers Act 1708 and the proclamation issued by the Queen following the statute, see ANDERSON, *supra* note 4, at 6–7.

58. For further details, see *Action of 31 May 1762*, WIKIPEDIA, https://en.wikipedia.org/wiki/Action_of_31_May_1762; and for the salaries at the time, see Naval Warfare Officer’s Association, *Pirates and the Way to Fame and Fortune*, ENGAGE! (Sept. 2013), <http://warfareofficers.org.au/members/engage/2013-September.pdf>.

59. For a full explanation, see JAN HENDRIK VERZIJL ET AL., INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART IX-C THE LAW OF MARITIME PRIZE (1992). For the controversy as to whether prize courts really apply only international law, or are in the end municipal courts that will apply national law when ordered to do so, see *id.* at 596–601.

centuries from the British Navy's perspective in the *Black Book of the Admiralty* (in ancient French). According to the *Consolat de Mar*, property belonging to enemies on neutral ships could be captured by a belligerent State in time of War, while it was prohibited to capture neutral property when capturing an enemy ship. Not all States respected this rule and various powers came to different arrangements for different Wars. In the run-up to the Crimean War, Sweden and Denmark declared their neutral status and sought exemption from capture of enemy goods on neutral vessels. In turn the British and French, who were joining the War against Russia on the side of Turkey, agreed to such a waiver of rights. In the words of the British Declaration of War on Russia, "Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to Her by the law of nations. . . . Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war."⁶⁰

Following the 1856 Congress of Paris, which brought the Crimean War to an end, the participants adopted the Declaration of Paris (as a legally binding treaty) and, in an early commitment to multilateralism, opened the treaty up to States that were not at the Congress. This treaty stated that it was prohibited to capture two categories of non-contraband goods: enemy goods on neutral ships; and neutral goods on enemy ships.⁶¹

But even after the 1856 Paris Declaration offered protection for neutral goods and ships, there was still unease with the idea that the fact of a War (in the technical legal sense) could allow a State (with the requisite naval capacity) to seize and capture enemy goods on enemy ships on the high seas. Not only were such goods seized along with the ships, but through the institution of prize courts, the seizing State could acquire property rights over such goods and a title to such goods valid against the whole world. While there might once have been some strategic rationale for cutting off trade from the enemy State, including food and other goods, over time, with the

60. *Declaration*, SUPPLEMENT TO THE LONDON GAZETTE, Mar. 28, 1854, at 1008.

61. Declaration of Paris, Apr. 16, 1856, 1 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 89–90 (1907). Article 2 states, "The neutral flag covers enemy's goods, with the exception of contraband of war"; Article 3: "Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag." See Hisakazu Fujita, *Commentary to the 1856 Paris Declaration*, in THE LAW OF NAVAL WARFARE 66–75 (Natelino Ronzitti ed., 1988); although some may not have considered that this sort of exception from capture should apply beyond the States parties (see FRANCIS PIGGOTT, THE DECLARATION OF PARIS (1919)), the Declaration is today widely seen as reflecting customary international law. See DOCUMENTS ON THE LAWS OF WAR 47 (Adam Roberts & Richard Guelff eds., 3d ed. 2001).

advent of new forms of transport (railways meant that many ports were no longer dependent on ships for supplies), such seizures started to look more like benefitting from the fortunes or spoils of war—in other words, another form of war booty (even if not falling into that technical category under most definitions).

A joint resolution of the U.S. Congress in 1904 stated:

it is desirable, in the interest of uniformity of action by the maritime states in 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.⁶²

This was not the first time the United States sought to swim against the tide of allowing rights of capture of private enemy property. Already in its 1785 treaty with Prussia, it protected private trading vessels from interference or capture on the high seas, but, as Jan Hendrik Verzijl's historical accounts show, subsequent attempts by the United States and others, such as France, Italy, Austria, Prussia, China, and the Institut de droit international, all failed to enshrine a lasting ban on capture of private property at sea.⁶³ In Paris, the United States proposed to abolish privateering in return for a new rule that the private property of the subjects of a belligerent power should not be seized by the other belligerent unless it be contraband.⁶⁴ The U.S. case was that "The prevalence of Christianity and the progress of civilization have greatly mitigated the severity of the ancient mode of prosecuting hostilities. War is now an affair of Governments." And so it was argued that there was a received rule,

at least as operations upon land are concerned, that the persons and effects of non-combatants are to be respected. The wanton pillage or uncompensated appropriation of individual property by an army, even in possession of an enemy's country, is against the usage of modern times. Such a mode

62. 33 Stat. 592 (1904).

63. VERZIJL ET AL., *supra* note 59, at 275–79. See also Verzijl's examination of the Institut's texts from the meetings in the Hague (1875), Zurich (1877), and Turin (1882), which were, as he explains, all "in favour of the abolition of the capture and confiscation of private enemy property in naval war." *Id.* at 278.

64. PIGGOTT, *supra* note 61, at 146 (the official proposal is reproduced at 398–404).

of proceeding at this day would be condemned by the enlightened judgment of the world, unless warranted by special circumstances. Every consideration which upholds this sentiment in regard to the conduct of a war on land favours the application of the same rule to the persons and property of citizens of the belligerents found upon the ocean.⁶⁵

This was not acceptable to the other States in Paris, or when proposed in a new treaty the following year. Rear Admiral Charles Stockton, writing in retirement, explains how the newly elected President Buchanan suspended negotiations on this issue for the entire period of his administration, leaving the issue for President Lincoln to find in this “unsettled state.”⁶⁶ Nevertheless, in the American Civil War, both the North and the South formally approved the rules prohibiting the seizing of enemy property on neutral ships and neutral property on enemy ships, in their relations with neutral shipping from France and Great Britain.⁶⁷

A subsequent American proposal to the 1907 Hague Peace Conference, which would have demanded respect for enemy property on the high seas, attracted twenty-one votes, with eleven votes against, eleven not responding, and one abstention. To pass the proposal would have required twenty-three votes among the forty-four participating States.⁶⁸ The United States unsuccessfully invoked the following ideas in favor of abolition of the right to

65. Note from William L. Marcy, U.S. Secretary of State, to Count Sartiges (July 28, 1856), in PIGGOTT, *supra* note 61, at 397.

66. Charles Stockton, *The Declaration of Paris*, 14 AMERICAN JOURNAL OF INTERNATIONAL LAW 356, 364 (1920).

67. *Id.* at 366–67; PIGGOTT, *supra* note 61, at 411–435. See the proposed Article I: “That privateering is, and shall remain, abolished, and the private property of subjects or citizens of a belligerent, on the high seas, shall be exempted from seizure by the public armed vessels of the other belligerent, except it be contraband.” Letter from G. M. Dallas to the Earl of Clarendon (Feb. 24, 1857), in PIGGOTT, *supra* note 61, at 407.

68. In favor, the United States, Germany (with reservations due to the uncertain nature of the law on contraband and blockade), the Austro-Hungarian Empire, Belgium, China, Cuba, Denmark, Ecuador, Greece, Haiti, Italy, Norway, the Netherlands, Persia, Romania, Siam, Sweden, Switzerland, Turkey; against, Colombia, Spain, France, Great Britain, Japan, Mexico, Montenegro, Panama, Portugal, Russia, Salvador; abstaining, Chile. MIN. DES AFFAIRES ÉTRANGÈRES, LA DEUXIÈME CONFÉRENCE INTERNATIONALE DE LA PAIX 1907 (1908) at 102.

capture enemy property on the high seas: there was minimal military advantage to be gained by capturing enemy goods; reasons of humanity; and the existing prohibition of pillage in land warfare.⁶⁹

The British delegation had instructions to support such an initiative, as the government appreciated that changing the rules to grant immunity to enemy merchant ships and property at sea would possibly benefit Great Britain, restrain acts of war, and diminish expenditure on arms. The government also considered that, logically, immunity for merchant ships would involve “the abolition of the right of commercial blockade.” Bearing in mind that the government considered at that time that “[t]he British navy is the only offensive weapon which Great Britain has against Continental Powers,” the government was clear that it did not authorize the delegation to “agree to any Resolution which would diminish the effective means which the navy has of bringing pressure to bear upon an enemy.”⁷⁰ Naval powers were, in the end, unwilling to abolish their acquired Belligerent Rights.

One has to ask whether such rights for States can continue to exist today. Mainstream opinion suggests that they can. Military manuals state that a belligerent State is entitled to capture and confiscate enemy goods on enemy ships along with the ships, as well as enemy aircraft with enemy goods.⁷¹ Title will pass following condemnation by a prize court after it is determined that the capture is “good prize.”⁷²

Rather than suggesting that such Belligerent Rights apply in all armed conflicts, we should accept that they can no longer be upheld in the face of States’ obligations under the UN Charter. A State should no longer be able

69. *Id.* at 101. The rhetorical point that capture of enemy property at sea is essentially piracy was similarly unpersuasive; the Colombian delegate, Triana, reportedly said that war was organized murder. JOHN WESTLAKE, INTERNATIONAL LAW: PART II WAR 311 n.1 (1907). The Belgian and Brazilian proposal that the conference should adopt a voeu (recommendation) that the property should be returned after the War was similarly unsuccessful. *Id.* at 314.

70. The full instructions are reproduced in ALEXANDER PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES 614–25 (1909) (the quotations are taken from paragraphs 18–20).

71. Capture must take place outside neutral waters or airspace. *See, e.g.*, UK MANUAL, *supra* note 13, ¶¶ 12.91–12.96, 13.99–13.104; SAN REMO MANUAL, *supra* note 9, ¶¶ 135–145.

72. The procedural rules for the standing of an enemy alien before a prize court vary from State to State, and justice would clearly demand that the prize court should be able to hear the point of view of the enemy whose property has been captured. C. JOHN COLOMBOS, A TREATISE ON THE LAW OF PRIZE 349–55 (3d ed. 1949).

to seize and confiscate a foreigner's private property, whether or not there is a Declaration of War, and whether or not it sets up a prize court.

Although the British and Germans resorted to capture and prize during both World Wars, the United States, despite passing a series of laws, has not used prize law since around 1903. Congress abolished bounty and prize money in 1899. The French law from 1939 regulating maritime prize was updated in 2014 and now excludes enemy warships seized during hostilities.⁷³ The remaining prize jurisdiction over other ships and their cargo would require a State of War (*état de guerre*).⁷⁴ Interestingly, merchant ships and their goods captured by the French maritime armed forces, if condemned in the Conseil des prises, would be divided among all the armed forces taking part (including the army and air force). One quarter would go to the captors or their heirs, and three-quarters to the treasury of the French State. The captors' share would in turn be divided among the officers and crew, one-quarter going to the officers and three-quarters to the crew, according to weighted percentages, with vice admirals getting twice as much as commanders, and first mates getting four times more than sailors. The relevant rank is the rank at the time of capture.⁷⁵

B. *Contraband of War as Prize*

A further aspect of prize law relates to the law on contraband of war. This meant that belligerent States considered they had Belligerent Rights to stop and search neutral ships for contraband (certain goods destined for use by the enemy). There were eventually attempts to distinguish between the Belligerent Rights applicable to absolute contraband (e.g., arms and ammunition) and conditional contraband (e.g., food and provisions destined for the

73. Décret-loi du 1er septembre 1939 relatif aux prises maritimes, as amended.

74. I am extremely grateful to Commissaire-Général Jean-Louis Fillon for guiding me through the French legislation. He concludes, "L'application de la législation des prises relève bien d'un cadre juridique différent, celui du temps de guerre qui dans notre droit constitutionnel reste formellement marqué par la déclaration de guerre." See Jean-Louis Fillon, *A propos du Conseil des prises et de la déclaration de la guerre: Etude sur l'obsolescence du droit de la guerre navale*, REVUE MARITIME 516, at 126, 133 (Mar. 2020). A key text is the Ministerial Instruction No. 2380/EMM/2 (Dec. 31, 1964), on the Application of International Law in the Event of War (*l'instruction sur l'application du droit international en cas de guerre*) (last amended in 1969).

75. Décret-loi du 1er septembre 1939 relatif aux prises maritimes (last amended 2014).

army).⁷⁶ The concept of “continuous voyage” meant that even goods to be unloaded in a neutral port could be condemned in prize if they were ultimately destined for the enemy.⁷⁷

Today, the law states that neutral ships carrying contraband can be captured outside neutral waters.⁷⁸ Contraband has been defined in the *San Remo Manual* (1994) as “goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict.”⁷⁹ And the Manual states that in order for there to be a right of capture for the contraband goods or neutral vessels, the belligerent must have published contraband lists.⁸⁰

76. The London Declaration, *supra* note 9, arts. 22–44. This distinction is no longer deemed particularly relevant, as today States would draw up specific lists of contraband; *see* SAN REMO MANUAL, *supra* note 9, ¶¶ 147–150.

77. *See* Christian Schaller, *Contraband*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW ¶ 14 (updated Sept. 2015), <https://opil.ouplaw.com/view/10.1093/epil/9780199231690/law-9780199231690-e276?rskey=nbtHLD&result=1&prd=MPIL>; The London Declaration, *supra* note 9, art. 30. For the legal effects on British subjects, *see* Proclamation of King George V (Aug. 5, 1914), *reprinted in* ARTHUR CLEMENTS & HENRY WATERSON, COMMERCIAL LAW IN WAR TIME: A BOOK FOR BUSINESS MEN 67 (1914). As explained in chapter 5 of ANDREW CLAPHAM, WAR (2021), the definition of “alien enemy” under English law is not solely related to a person’s nationality but rather connected to their “war domicile.” *See* ARTHUR PAGE, WAR AND ALIEN ENEMIES: THE LAW AFFECTING THEIR PERSONAL AND TRADING RIGHTS, AND HEREIN OF CONTRABAND OF WAR AND THE CAPTURE OF PRIZES AT SEA 4–7 (2d ed. 1915).

78. SAN REMO MANUAL, *supra* note 9, ¶ 146.

79. *Id.* ¶ 148.

80. *Id.* ¶ 149. The MANUAL seems to draw a distinction between capture and condemnation in this context. *See id.* at 213–14. Whether the goods or vessels can actually be condemned in this context by a prize court is not certain. *See* 2 OPPENHEIM’S INTERNATIONAL LAW: A TREATISE, *supra* note 27, ch. 5. Views differ on the relevance of the knowledge of the master or the owner of the character of the cargo as contraband and of the outbreak of war. This idea, which centers on the “state of mind of the neutral claimant,” can be traced back to the time when carrying contraband in breach of neutrality was a crime. *See* COLOMBOS, A TREATISE ON THE LAW OF PRIZE *supra* note 72, ch. 5. Today it is difficult to see why neutral vessels or the goods they are carrying should be condemned in a punitive way either for carrying contraband, or for unneutral service. *But see* HARVARD MANUAL ON AIR WARFARE, *supra* note 9, at 348–53, which assumes that neutral airplanes and their cargo can be condemned in prize courts.

C. *Attacks on Merchant Vessels*

Merchant ships flying the flag of the enemy and their enemy cargo have been captured, diverted, or, in exceptional circumstances, destroyed.⁸¹ The property passed to the capturing State following adjudication by a prize court of the capturing State (all efforts to have an international prize court have been stalled since the non-entry into force of the Hague Convention XII (1907)). Resisting visit, search, and capture meant a merchant ship could be attacked. Captured vessels could be destroyed in cases of military necessity. Even the civilian crew on board could be interned as prisoners of war, in part to forestall their future use as sailors in the navy.⁸² Some vessels, such as hospital ships and small fishing boats, are exempt from capture under certain conditions.⁸³

More generally in this context, the purpose of sea warfare became, in Oppenheim's words, "annihilation of the enemy merchant fleet."⁸⁴ It was the nature of the World Wars that explains the erosion, or absence, of rules that protected merchant shipping. This particularly applied to submarine warfare against merchant shipping. The war logic in part is that merchant ships, their civilian crews, and indeed all enemy vessels, including private yachts, etc., are presumed to be potentially part of the enemy's naval fleet.⁸⁵ The institution of War meant that captures could be made even after the end of hostilities, as long as there was a formal State of War.⁸⁶ Moreover, in the World Wars

81. SAN REMO MANUAL, *supra* note 9, ¶¶ 135–140. For an early work highlighting some of the practice and controversies, see FREDERICK SMITH, *THE DESTRUCTION OF MERCHANT SHIPS UNDER INTERNATIONAL LAW* (1917).

82. *See* Convention (III) Relative to the Treatment of Prisoners of War art. 4(A)(5), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, and, for the "more favourable treatment" referred to there, *see* Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War arts. 5, 6, Oct 18, 1907, 36 Stat. 2396, T.S. No. 544 [hereinafter Hague Convention XI] (Article 6: "The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war?").

83. SAN REMO MANUAL, *supra* note 9, ¶¶ 136, 137; *see also* Hague Convention XI, *supra* note 82.

84. 2 OPPENHEIM'S INTERNATIONAL LAW: A TREATISE, *supra* note 27, at 458.

85. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, *supra* note 14, at 551–52.

86. Wolff Heintschel von Heinegg makes the point that the confiscation of private property in War continues even after an armistice. Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law*, 30 CANADIAN YEARBOOK

the belligerent States assumed control over merchant vessels to the extent that they were seen as naval auxiliaries.⁸⁷

The two World Wars were total or “totalitarian” wars. They came to involve almost all the Powers and all, or almost all, of their populations and resources so that each of them strained every resource to ensure victory. As the contest increased in intensity, resort was made to additional and more ruthless means and methods of fighting as the conflict escalated. . . . For each side, the war was, in a very real sense, “to the death,” and because more and more of each nation’s resources were sucked into the fight, the escalation became a function of each side’s desperation.⁸⁸

Despite this history of unrestricted attacks on merchant shipping in situations of total war, as well as the more recent practice in the Iran–Iraq War, the fundamental rules that determine if and when a merchant ship has become a military objective remain in force. Today, such targeting rules must not depart from the established rule requiring that in order for objects to be attacked they must be military objectives, “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁸⁹ As we shall see, retaining the rules on search, capture, and blockade engenders further rules on resistance to capture and breach of blockade, which in turn lead to a claimed right to attack such merchant ships.⁹⁰

OF INTERNATIONAL LAW 283, 305 (1992); *see also* COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, *supra* note 14, at 548 (“The outbreak of war immediately confers on a belligerent the right to seize and confiscate enemy merchant vessels on all areas of the sea outside neutral territorial waters.”).

87. “In a general war, the true merchant vessel is rarely to be found because the belligerent states normally assume such a degree of control over their own vessels and neutral vessels engaged in trading with them as to convert them into de facto naval auxiliaries. As de facto naval auxiliaries, they should be subject to the same treatment as de jure naval auxiliaries, that is, they may be sunk on sight outside of neutral waters.” Fenrick, *supra* note 8, at 253.

88. Louis Goldie, *Targeting Enemy Merchant Shipping: An Overview of Law and Practice*, 65 INTERNATIONAL LAW STUDIES 1, 19 (1993).

89. SAN REMO MANUAL, *supra* note 9, ¶ 40.

90. *Id.* ¶¶ 98, 52, 67.

D. Modern Prize Court Legislation

In the interests of clarity, it is worth explaining at this point that a significant stream of the commentary in English has distinguished “capture” from “seizure.”⁹¹ Capture is used to denote that full legal ownership passes to the State taking control. This is said to be the case for enemy warships or other enemy ships employed in public service.⁹² Captured warships would more properly therefore be considered booty of war, and were included in prize court jurisdiction “for the purpose of prize money only [bounty], as property passes immediately on capture.”⁹³ Strictly speaking, then, these sorts of captures do not form part of contemporary prize law, as they are not adjudicated and condemned through prize courts.⁹⁴ “Seizure” refers to the situation where the act does not transfer legal ownership; this happens only after adjudication and condemnation by a prize court. The international usage today is, however, not consistent, so the terms in this article have had to be used somewhat interchangeably.

The “Law of Prize” (as already explained, from the French “prise” meaning “seize”), comprises rules that were central to the laws of war and were administered by national courts, under which vessels, aircraft, and goods were seized and then liable to be condemned by the national prize court of the captor State, with the result that the title to property would pass to the captor Belligerent State if the seizure was a good prize.⁹⁵ The most recent entry on the “Law of Prize” in *Halsbury’s Laws of England* seems to assume a State of War:

Capture is lawful from the outbreak of war, the exact moment of which is usually stated in the declaration of war by the belligerent power, until the

91. See SMITH, THE LAW AND CUSTOM OF THE SEA, *supra* note 11, at 93–94.

92. *Id.* at 94; compare the definitions of capture and seizure given in INSTITUTE OF INTERNATIONAL LAW, THE LAW OF NAVAL WARFARE GOVERNING THE RELATIONS BETWEEN BELLIGERENTS (1913) (OXFORD MANUAL OF NAVAL WARFARE), *reprinted in* THE LAWS OF ARMED CONFLICTS 1123 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

93. COLOMBOS, A TREATISE ON THE LAW OF PRIZE, *supra* note 72, at 51.

94. Capture with immediate transfer of ownership and without reference to prize court is said to apply to enemy and neutral merchant vessels and aircraft that have become military objectives. See SAN REMO MANUAL, *supra* note 9, at 187.

95. For a study on the law applied by a wide variety of States and the implications for international law, see LUIGI SICO, TOUTE PRISE DOIT ÊTRE JUGÉE: IL GUIDIZIO DELLE PREDE NEL DIRITTO INTERNAZIONALE (1971).

final termination of the war, which is not necessarily synonymous with the total cessation of hostilities unless accompanied by a declaration on the part of the victorious power that the war is ended.⁹⁶

Indeed, when writing about prize law commentators often reference wars and warfare, but some will imply that prize law can apply beyond declared War to international armed conflicts more generally (even though all commentators exclude its application to non-international armed conflicts).⁹⁷

India, however, in reaction to the establishment of prize courts by Pakistan in 1965, argued not only that prize courts could only be established in the context of a declared War,⁹⁸ but that as War was now banned under the UN Charter, so too must prize courts now be illegal:

[P]rize court action is contrary to the international law as at present established under the regime of the United Nations Charter. It is well known that the United Nations Charter has banned war and no country can, therefore, legally declare a war. Without such declaration of war, prize court

96. 85 Halsbury's Laws of England ¶ 609 (2012) (footnotes omitted).

97. See Kraska, *supra* note 49, ¶ 1 ("In modern usage the term 'prize' means a ship or property captured at sea under the laws of war. A prize is a legal capture at sea during wartime. The concept of prize law arose in customary international law in connection with the seizure at sea of enemy property in naval warfare, which may include ships and cargo at sea during times of international armed conflict."). See also HARVARD MANUAL ON AIR WARFARE, *supra* note 9, at 338 ("There is no concept of prize law in non-international armed conflict"). For the law of prize is said to be "applicable in international armed conflict only." Wolff Heintschel von Heinegg, *Blockades and Interdictions*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 925, 940 (Marc Weller ed., 2015). See also Hans-Georg Dederer, *Enemy Property*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW (updated Sept. 2015), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e294?rskey=2nmnuI&result=1&prd=MPIL>, who contemplates the use of prize law for enemy merchant ships and enemy property, but confines the term enemy to international armed conflict, while non-international armed conflicts involve adversaries rather than enemies.

98. Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part II, Developments since 1945*, 30 CANADIAN YEARBOOK OF INTERNATIONAL LAW 89, 96 (1992), explains that Pakistan exercised prize court jurisdiction over fifty ships and their cargoes (mostly consisting of tea belonging to Indian owners or British corporations). India protested the seizure of Indian cargo on neutral ships, "asserting that the laws of prize can be exercised in a formal state of war only."

action is illegal. If any country declares a war, it establishes its naked aggression. In the circumstances, contraband control and prize court action stand illegal.⁹⁹

The Indian Naval and Aircraft Prize Act, 1971, in an apparent change of approach, now specifies that India's prize court has "exclusive jurisdiction in respect of each prize and each proceeding for the condemnation of property as prize, whether such prize is taken before or after the commencement of this Act."¹⁰⁰ Jurisdiction also extends to all ships, aircraft, cargo, etc., "as may be captured or seized as prize during a war or as a measure of reprisal during an armed conflict or in the exercise of the right of self-defence."¹⁰¹ When asked in Parliament why India had not passed similar legislation in 1965, the minister responded that no goods had been captured on the high seas.¹⁰² The measure was welcomed by one member of parliament, "as we are certain that we are going to have a rich haul of enemy property."¹⁰³ In the brief debate on the legislation, members of parliament referred to "a state of belligerency at the outbreak of war," "powers with whom we are in a state of belligerency," "a state of belligerency and hostility," and of the need to check neutral ships when "we are at war with Pakistan."¹⁰⁴ One member of parliament urged the government that, "having been fortified with this law, they should at no cost return the enemy property captured by us during this war with Pakistan." He continued, "I have referred to this in particular because we cannot afford to commit the same mistake again."¹⁰⁵ The minister responded to a number of points, explaining that property belonging to the State of Pakistan would not be subjected to the prize courts but would be

99. Statement of March 26, 1966, quoted in ARNOLD MCNAIR & ARTHUR WATTS, *THE LEGAL EFFECTS OF WAR* 457 (4th ed. 1966). They state that "the Government of India announced that cargoes detained in India and belonging to third countries would be returned to them." *Id.* The Indian Ministry of Defence's official *HISTORY OF THE INDO-PAK WAR, 1965*, ch. 10, at 284 (1992) suggests that plans were made to seize Pakistani merchant ships but not to sink them.

100. Naval and Aircraft Prize Act, 1971, § 4(1), No. 59, Acts of Parliament, 1971 (India). The section goes on to outline the conditions for bringing the prize within the jurisdiction of the prize court.

101. *Id.* § 4(3).

102. Shri Vidya Charan Shukla, *Parliamentary Debates*, Dec. 15, 1971, Fifth Series, vol. XX, no. 24, col. 70.

103. Shri Somnath Chatterjee, *id.* at cols. 60–61.

104. *Parliamentary Debates*, *supra* note 102, at cols. 61, 62, 64, 66.

105. Shri JM Gowder, *id.* at col. 66.

simply captured as booty of war;¹⁰⁶ the legislation was said to be primarily aimed at contraband on neutral ships headed to Pakistan.

In the 1971 conflict with Pakistan (which is said to have been considered a War by the parties and the United States¹⁰⁷), India captured four Pakistani navy vessels (ships of war), a number of Pakistani merchant ships, declared a blockade of eastern Pakistan, published lists of contraband (as did Pakistan) and adjudicated contraband cargo unloaded from Danish ships.¹⁰⁸ It seems likely that Indian prize court jurisdiction would only cover declared War and international armed conflicts of a certain duration, and would apply the customary international rules on prize.¹⁰⁹

A more recent example of prize court legislation is that of Iran, which sought to condemn, through a prize court, property seized in its conflict with Iraq. Although this court never came into effect, it is interesting that Iran would have authorized acquisition of property from “States at war” with Iran under Article 3(a) of the 1987 Iranian law regarding “war prizes,” thus limiting enemy property taken as prize to property owned by States. Certain other property, including that owned by nationals of the enemy State, would be confiscated as war contraband involving, under Article 3(b), a contribution to the combat power of the enemy. This last category is said to be intended to go beyond the idea of absolute contraband and reflect the practice of Iran of seizing “any merchandize benefitting the war effort of the enemy, either directly or indirectly.”¹¹⁰ For the property of enemy States at War with Iran, and objects that Iran had forbidden to be transported to enemy territory, the confiscation could, according to this law, have taken place without the intervention of a judge.¹¹¹

The Iranian “Law Regarding the Settlement of Disputes over War Prizes,” ratified by the Constitutional Council on January 31, 1988, to apply as an experiment for five years, included the following provisions:

106. See Naval and Aircraft Prize Act, 1971, *supra* note 100, § 12 (“Prize proceedings not to apply to enemy warships and military aircraft.”).

107. See Wolff Heintschel von Heinegg, *Introductory Report I*, in VISIT, SEARCH, DIVERSION AND CAPTURE: THE EFFECT OF THE UNITED NATIONS CHARTER ON THE LAW OF NAVAL WARFARE 1, 56 (Wolf Heintschel von Heinegg ed., 1995).

108. *Id.*; Goel, *Comment No 4*, in *id.* at 103–06.

109. See Naval and Aircraft Prize Act, 1971, *supra* note 100, § 4(4).

110. See the explanation in Djamchid Momtaz, *Iran*, in THE IRAN–IRAQ WAR (1980–1988) AND THE LAW OF NAVAL WARFARE 19, 26 (Andrea de Guttry & Natalino Ronzitti eds., 1993).

111. *Id.* at 27.

Article 3: According to this law, the following goods, merchandise and means of transport shall be considered as war prizes:

- (a) All goods, merchandise, means of transport and equipment belonging to a State or to States at war with the Islamic Republic of Iran.
- (b) Merchandise and means of transport in paragraph (a) belonging to neutral States or their nationals, or to nationals of the belligerent State if they could effectively contribute to increasing the combat power of the enemy or their final destination, either directly or via intermediaries, is a State at war with the Islamic Republic of Iran.
- (c) Vessels flying the flag of a neutral country as well as vehicles belonging to a neutral State transporting the items set out in this article.
- (d) Merchandise, means of transport and equipment which the Islamic Republic of Iran forbids from being transported to enemy territory.

Article 4: All goods, merchandise and means of transport indicated in paragraph (a) of Article 3 will become the property of the Islamic Republic of Iran. All goods, merchandise and means of transport indicated in paragraphs (b) and (c) of Article 3 will be confiscated by the Government of the Islamic Republic of Iran. . . . The means of transport indicated in paragraph (d) of Article 3 will become the property of the Islamic Republic of Iran or be confiscated according to circumstances. Any person contesting this must appear before the Tribunal.¹¹²

This War Prizes Tribunal was premised, then, on the notion or fact of one or more States being in a State of War with Iran. The jurisdiction of the tribunal was dependent on the State of War.

As we saw above, the UK and U.S. prize courts, for example, have been institutionalized as part of the national legal orders and, as with other States, are no longer required to be commissioned through an express instrument.¹¹³ There have been no instances of American or British prize courts since the

112. *Id.* at 39–40.

113. See further COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, *supra* note 14, at 804, 812, for the United Kingdom and the United States. For brief references to France, Belgium, Italy, Germany, Japan, China, the USSR, Thailand, Austria, Turkey, Greece, Romania, the Netherlands, and Norway, see COLOMBOS, *A TREATISE ON THE LAW OF PRIZE* *supra* note 72, at 36–47. For further detail, see Steven Haines & Craig Martin, *Prize Courts: Their Continuing Relevance*, in *THE LAW OF NAVAL WARFARE* 267 (Dale Stephens & Matthew Stubbs eds., 2019). See also, for the prize court in the United Kingdom, 85 HALSBURY'S *LAW OF ENGLAND* ¶ 645 (2012).

Second World War, leaving the situation a little uncertain. Certainly the famous judgments of the highest courts in these two States have historically conceived of the international law applied by prize courts as related to “acts done by the sovereign power in right of war;”¹¹⁴ “the acts of a belligerent Power in right of war;”¹¹⁵ “capture at sea during war;”¹¹⁶ “prize of war;”¹¹⁷ and “the immunity of fishing boats in time of war.”¹¹⁸ So, while prize courts may now be established as temporarily dormant institutions, rather than created for each and every War, it remains unclear whether national prize courts would operate outside a situation of a formal State of War.

The practice in the United Kingdom has been for prize jurisdiction to be exercised following a special commission “upon the outbreak of every war.”¹¹⁹ The U.S. Code provides that the federal district courts have exclusive jurisdiction over prize,¹²⁰ and states that “This chapter applies to all captures of vessels as prize during war by authority of the United States or adopted and ratified by the President.”¹²¹

In the context of the discussion over the legal consequences of a blockade of Cuba by the United States in 1961, it seems to have been assumed by the assistant attorney-general that captured ships accused of attempting to breach such a blockade “could be treated as prizes and placed within the prize jurisdiction of the federal district courts, provided the captures could be deemed to have been made ‘during war.’”¹²²

The idea of prize court jurisdiction is to ensure that the draconian rights of the belligerent State are not applied against totally innocent parties. A hearing before a prize court is a chance for the parties affected to claim that

114. *The Zamora* [1916] 2 AC 77, 91 (PC).

115. *Id.* at 92.

116. *Id.* at 94.

117. *The Paquete Habana*, 175 U.S. 677, 678 (1900).

118. *Id.* at 702.

119. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, *supra* note 14, at 804.

120. 28 U.S.C. § 1333 (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: . . . Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.”).

121. 10 U.S.C. § 8851 (2018).

122. Robert Kramer, Assistant Attorney-General, Office of Legal Counsel, Authority of the President to Blockade Cuba: Memorandum Opinion for the Attorney General (Jan. 25, 1961), *in* 1 SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL 195, 200 (2013); *see also* Legal and Practical Consequence of a Blockade of Cuba: Memorandum (unsigned) (Oct. 19, 1962), *in* 1 SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL 486 (2013).

the Belligerent Rights related to capture have been abused, and that the property should not be condemned (and pass to the blockading State) but rather be restored to its owner. There may even be related issues concerning compensation to the shipowners for visit, search, and seizure where such action could not be based on a reasonable belief on the part of the belligerent State.¹²³ As we have seen, prize court jurisdiction has been asserted only very rarely since the Second World War, and some national legal orders probably require a Declaration of War before a prize court can sit. Wolff Heintschel von Heinegg is unequivocal that the law of prize is “applicable in international armed conflict only.”¹²⁴

In the twentieth century, prize courts were commissioned against a background of Belligerent Rights in a State of War.¹²⁵ Modern military and expert

123. For details of the different approaches of British and German prize courts with regard to the burden of proof on the award of damages where there was unfounded reasonable suspicion on the side of the captor, see PHILIPP WENDEL, *STATE RESPONSIBILITY FOR INTERFERENCES WITH THE FREEDOM OF NAVIGATION IN PUBLIC INTERNATIONAL LAW* 236 (2007); see also *The London Declaration*, *supra* note 9, art. 64; COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, *supra* note 14, at 775–825.

124. Heintschel Von Heinegg, *Blockades and Interdictions*, *supra* note 97, at 940.

125. The Security Council, with regard to Israel and Egypt in 1951, considered the Armistice Agreement to be of a “permanent character,” so that “neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search and seizure for any legitimate purpose of self-defence.” S.C. Res. 95 (Sept. 1, 1951). The most extensive debate on this topic took place in 1951 in the Security Council with regard to the claim of Egypt that it enjoyed Belligerent Rights under a state of War with Israel, notwithstanding the armistice. The Security Council found that neither Israel nor Egypt was an active belligerent, and that neither of them could reasonably assert that they were required “to exercise the right of visit, search and seizure for any legitimate purpose of self-defence.” *Id.* While several Council members emphasized the permanent nature of the armistice, Israel also argued that “the claim to belligerency cannot be sustained by the United Nations.” Ambassador Eban of Israel continued, “The Charter has created a new world of international relations within which the traditional ‘rights of war’ cannot be enthroned. It is no accident that belligerent rights have never been recognized or mentioned either by the Charter or by any organ of the United Nations. Members of the United Nations are pledged to refrain entirely in their international relations from the threat or use of force, except on behalf of the purposes of the United Nations. There can therefore be no room within the régime of the Charter for any generic doctrine of belligerency, since belligerency is nothing but a political and legal formula for regulating the threat or use of force.” U.N. SCOR, 549th mtg. ¶ 40, U.N. Doc. S/PV.549 (July 26, 1951). See also the rest of the debate in S/PV.550–553 and S/PV.555. Whether or not belligerent rights existed, several delegations would seem to limit them to rights that would be exercised in self-defense following an armed attack. Egyptian prize courts may have continued to operate on the assumption that there was a

manuals, however, assume that the armed forces can as a matter of extant international law capture and divert vessels for adjudication and condemnation in prize court, whether or not they are dealing with a recognized State of War between two States or simply an international armed conflict.¹²⁶ And yet the same manuals make no reference to the ways in which prize court jurisdiction is to be established, or the prospect that under national law today these may still be premised on a Declaration or State of War.

V. BLOCKADE

In order to avoid the legal consequences of a state of formal War, States in the nineteenth and twentieth centuries sought to portray their blockades of foreign ports as “pacific blockades.” Their argument was that the action (arguably in reprisal) was only being taken against ships from the blockaded

State of War. See *The Lea Lott*, United Arab Republic, Prize Court, Dec. 16, 1959, 28 INTERNATIONAL LAW REPORTS 652; *The Esperia*, United Arab Republic, Feb. 26, 1959, 28 INTERNATIONAL LAW REPORTS 656; *The Fjeld*, Egypt Prize Court of Alexandria, Nov. 4, 1950, 17 INTERNATIONAL LAW REPORTS 345; *The Flying Trader*, Egypt, Prize Court of Alexandria, Dec. 2, 1950, 17 INTERNATIONAL LAW REPORTS 440. However, one prize court later additionally referred to the fact that the measures were only taken in areas of sovereign territory rather than under the “rules of war on the high seas,” and that, in any event, the Constantinople Treaty of 1888 “gives Egypt the right to take all necessary measures for the maintenance of public order in time of peace and for her defence in time of war.” *The Inge Toft*, United Arab Republic, Prize Court, Sept. 10, 1960, 31 INTERNATIONAL LAW REPORTS 509, 518 (1966).

126. See, e.g., U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 5.2 (2017); U.S. LAW OF WAR MANUAL, *supra* note 29, ¶ 3.4.1.1; UK MANUAL, *supra* note 13, ¶ 12.78.1. Note that the 2007 amendments to the UK MANUAL delete the words “the United Kingdom has not used prize courts for many years and is unlikely to do so in the future.” See James Farrant, *Modern Maritime Neutrality Law*, 90 INTERNATIONAL LAW STUDIES 198, 305 (2014); Steven Haines, *The United Kingdom’s Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared*, 36 ISRAEL YEARBOOK OF HUMAN RIGHTS 89, 100–01 (2006). In the Netherlands, Article 14 of the Prize Regulations states that “The Right of Capture may be exercised during the period in which the Netherlands is in a state of war or armed conflict with another Power.” Zeeman, *The Netherlands, The Law of Neutrality, and Prize Law*, in INTERNATIONAL LAW IN THE NETHERLANDS 337, 361 (H.F. van Panhuys et al. eds., 1980). We will consider the recent use of prize court jurisdiction by Israel in Section IV(B), Contraband of War as Prize, below.

State, which could be “seized and sequestered but not condemned and confiscated.”¹²⁷ The ships of third States were free to pass through the blockade to the blockaded port.¹²⁸ Where action was desired against neutral shipping, a pacific blockade would have to be converted into a Blockade proper, with an accompanying State of War. An act of blockade,¹²⁹ whatever the intention, could become an act of War when either side considered the legal situation to be one of a State of War.¹³⁰

Generations of lawyers have studied the *Prize Cases* decided by the U.S. Supreme Court. This judgment concerned the Civil War between the Northern States loyal to the Union (the North) and the Confederate States (the South) that had broken away. In this situation, the U.S. Supreme Court considered that “The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case.”¹³¹ This was in a way a recognition of the Belligerency for the rebel forces of the Confederate States, creating an international armed conflict out

127. 2 OPPENHEIM’S INTERNATIONAL LAW: A TREATISE, *supra* note 27, at 148. For examples of pacific blockade and the reactions of third States, which drew a distinction between the rights of States in pacific blockade and Blockade in a State of War, see *id.* at 144–49.

128. Heidelberg Resolution of the Institut de droit international, Déclaration concernant le blocus en dehors de l’état de guerre ¶ 1 (1887).

129. A blockade has been explained as “a belligerent operation to prevent vessels and/or aircraft of all nations, enemy and neutral, from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation. The purpose of establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory.” Wolff Heintschel von Heinegg, *Blockade*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW ¶ 1 (updated Oct. 2015), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252?rskey=b6vYrm&result=1&prd=MPIL>. I am using a capital “B” for Blockades to signify that these Blockades were recognized as part of a State of War in the technical sense, giving rise to Belligerent Rights for States. The capital letters signify that the International Law of War, in the technical sense of a State of War, gave rights to Belligerents in International Law. These rights were assumed to flow from International Law as such (or the Law of Nations) and not from national law or any particular treaty.

130. See ARNOLD MCNAIR & ARTHUR WATTS, *THE LEGAL EFFECTS OF WAR* 20 (4th ed. 1966), suggesting that pacific blockade “does not ipso facto give rise to a state of war, although even if the blockading State is acting *sine animo beligerendi*, it will amount to an act of force which the blockaded State may elect to regard as creating a state of war.”

131. *The Prize Cases*, 67 U.S. 635, 670 (1863).

of a civil war, with the attendant rules that applied in time of War (for the belligerent parties and for States with neutral status).

Today a series of questions arise that are not easily answered. First, can one institute a blockade without also accepting that one has created a State of War? And, second, in the absence of a recognition of Belligerency, is the declaration or establishment of a blockade, with the traditional associated rights and obligations, applicable to a non-international armed conflict? If so, does such an application of the law of blockade still imply a recognition of Belligerency, as it did at the time of the American Civil War?

A. Is Blockade Limited to a State of War (in the Legal Sense)?

The idea that today, maritime warfare rules related to blockade require a State of War has been rejected in broad terms by Heintschel von Heinegg: “The existence of a state of war is not a precondition for the legality of certain methods and means of warfare anymore.”¹³² At one level this seems sensible. After all, it ought to be possible to judge the legality of a blockade by the modern humanitarian law standards that relate to its effect on the civilian population, and not simply according to whether there is a War on or not. One might be able to determine the limits of this method of warfare using the customary principles applicable to warfare more generally, the distinction between civilian objects and military objectives, the prohibition on disproportionate damage to the civilian population, and agree that there is a prohibition on blockades when their sole purpose is “starving the civilian population or denying it other objects essential for its survival.”¹³³ More generally there is a prohibition of starvation of civilians as a method of warfare.¹³⁴

But, seen from another perspective, Blockade is inextricably associated with the old institution of War, and beyond the legality of the means and methods of warfare, the institution of Blockade is said to bring with it certain traditional customary rights for the Blockading State that affect the economic rights of neutral and enemy nationals. These rights belonging to the

132. Wolff Heintschel von Heinegg, *Naval Blockade*, 75 INTERNATIONAL LAW STUDIES 203, 204 (2000). Similarly, see Heintschel von Heinegg, *Blockade*, *supra* note 129, ¶ 5; see also LESLIE GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 204–07 (3d ed. 2008); PHILIP DREW, THE LAW OF MARITIME BLOCKADE: PAST, PRESENT, AND FUTURE (2017).

133. SAN REMO MANUAL, *supra* note 9, ¶ 102.

134. See Wolff Heintschel von Heinegg, *The Law of Armed Conflict at Sea*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 463, 532–38 (3d ed. 2013) (especially at 535, where he states that “If a blockade has the effect of starving the civilian population it becomes illegal according to Article 49 para 3, and Article 54, para 1 AP I.”).

Blockading State are mostly unregulated by treaty and traditionally flow from being in a State of War. One has to ask, therefore, whether the rights of a Blockading State (as opposed to the obligations imposed by international humanitarian law) can continue with the withering away of the institution of War?

At the time of the Cuban missile crisis, legal advisors within the U.S. administration studied the implications of declaring a Blockade of Cuba. The U.S. *Law of War Manual* quotes part of one unsigned memorandum:

The declaration of a state of war was helpful in ascertaining the rights and obligations of neutrals in a given situation. Apart from this, however, it served little function. War itself, whatever its reason, was legal self-help, and so were lesser measures if such could be said to exist. Whether or not a nation declared a state of war it would be found by others to exist if that state were claiming rights, such as blockade, normally associated with war.¹³⁵

The memorandum goes on, however, to explain: “One could deduce a state of war from the existence of a blockade. And one could not conceptually claim rights of blockade without acknowledging its relationship to war.”¹³⁶ And then the unsigned memorandum states:

I would recommend, therefore, that if we declare a blockade, we simply claim all the rights a blockading nation would have if a state of war existed. This clarifies our position sufficiently for legal purposes. A number of states will say this amounts to a declaration of war against Cuba, but that could scarcely be avoided under any circumstances.¹³⁷

The summary conclusion that heads the memorandum reads “a blockade could be regarded by Cuba and other Soviet Bloc nations as an act of war.”¹³⁸

A similar legal opinion from 1961 explained that prize courts could operate to treat neutral ships breaching the blockade as prizes, “provided the

135. The U.S. LAW OF WAR MANUAL, *supra* note 29, ¶ 3.4.1.1 n.59, includes references to a legal opinion of October 19, 1962. This is an unsigned, unaddressed memorandum, titled “Legal and Practical Consequences of a Blockade of Cuba.” *See supra* note 122.

136. Legal and Practical Consequence of a Blockade of Cuba, *supra* note 122, at 489.

137. *Id.* at 489.

138. *Id.* at 486.

captures could be deemed to have been made ‘during war.’”¹³⁹ The opinion also stated, “In the absence of a state of war, it might also be possible for Cuban nationals to resort to our courts for the purpose of testing the legality of the blockade.”¹⁴⁰ The United States ultimately instituted a “quarantine,” which only focused on certain goods; precisely, it seems, to avoid the legal implications that flow from Blockades being bound up with a State of War.¹⁴¹

Traditionally, we find that the blockading State had, in the case of breach of Blockade, the right to seize vessels and goods from ships flying the flag of any State. The idea that neutral vessels can be seized in some circumstances, and that the property rights pass permanently to the seizing State (even an aggressor Blockading State), must lead us to question whether these days the formal institution of Blockade, with its attendant rights, can be established without the formal State of War from which those rights flow. And even if one imagines such a formal State of War today, how can Blockade at the same time not only be considered an act of aggression under the UN Charter,¹⁴² and a crime of aggression under the Statute of the International Criminal Court,¹⁴³ but also give rise to a UN Member State’s right to seize and permanently keep the property and vessels of neutrals? International law surely cannot outlaw such acts of war as aggression under the UN Charter, criminalize such acts of aggression for the leaders who ordered the blockade, and then reward the perpetrators by sanctioning that they may keep anything they seize while carrying out the international crime?

Remarkably, the military manuals and expert textbooks that I have been able to consult seem untroubled by this contradiction. I suppose that the authors of such military manuals always consider themselves to be imposing Blockade for justified reasons, and are concerned to maintain the legitimacy of this method or tactic of warfare. The most recent Manual, published by

139. Kramer, *supra* note 122, at 200.

140. *Id.* at 201.

141. See further THE COMMANDER’S HANDBOOK, *supra* note 126, ¶ 4.4.8 (Maritime Quarantine). For the international law on the quarantine, see Quincy Wright, *The Cuban Quarantine*, 57 AMERICAN JOURNAL OF INTERNATIONAL LAW 546–65 (1963); see also Lerman Wilson, *International Law and the United States Cuban Quarantine of 1962*, 7 JOURNAL OF INTER-AMERICAN STUDIES 485–92 (1965).

142. “The blockade of the ports or coasts of a State by the armed forces of another State” qualifies as an act of aggression. Definition of Aggression, G.A. Res. 3314, art. 3(c) (Dec. 14, 1974).

143. Rome Statute of the International Criminal Court art. 8bis (2)(c), July 17, 1998, 2187 U.N.T.S. 90.

New Zealand in 2019, comes closest perhaps to recognizing the modern tension. It states early on that “[a] blockade is an act of war”¹⁴⁴ and that New Zealand “is unlikely to be enforcing a blockade other than as part of a coalition operation.”¹⁴⁵ But it goes on nevertheless to outline the rules for capture of ships breaching blockade, and for attacking ships resisting visit, search, or capture, and for confiscation of neutral property in the context of breach or attempted breach. And yet the hesitation is clear when the Manual later addresses the idea of exercising prize jurisdiction in order permanently to confiscate ships or goods: “It is generally not now appropriate for a State to profit financially from the waging of armed conflict, although it will still wish to be compensated for its losses.”¹⁴⁶

There has also been some hesitation among other States over the idea that Blockade can simply be decoupled from the institution of War. This could be for either of two reasons. First, a non-belligerent State today may wish to avoid Belligerent Rights being exercised by the Blockading State over their ships and cargoes. Speaking about the UK government’s approach to the conflict between Iran and Iraq in the 1980s, Christopher Greenwood explained as follows:

[T]he Foreign Office and Ministry of Defence recently have avoided any references to a war in the Gulf. Although originally British spokesmen talked about the United Kingdom being “neutral” in the “war” between Iraq and Iran, since 1986 the tone of statements has changed. Reference is made instead to an “armed conflict” in which Britain is “impartial.” This is more than just the British love of understatement. It represents, in part, an attempt to ensure that the law of blockade will not be applied to the detriment of British shipping.¹⁴⁷

Second, it may be that States contemplating establishing a Blockade still see Blockade as associated with formal War and aggression. For them this

144. NEW ZEALAND DEFENCE FORCE, MANUAL OF ARMED FORCES LAW, *supra* note 29, ¶ 10.5.1.

145. *Id.* ¶ 10.5.2.

146. *Id.* ¶ 10.6.16 n.126.

147. He continued, “Whether it is right to assume that the law of blockade would be applicable in a state of war, and would not be applicable if the conflict was not recognized as war, remains a much more complicated question.” Christopher Greenwood, *Remarks*, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 158, 158–59 (1988).

means Blockade has to be justified under the UN Charter.¹⁴⁸ Steven Haines, who was involved in the British Ministry of Defence discussions over the appropriateness of a Blockade of the Montenegrin port of Bar during the NATO armed conflict over Kosovo in 1999, recounts that there “was a marked reluctance on the part of many within NATO, first to admit that the Alliance was actually in a state of war with Serbia and second, that belligerent blockade was an acceptable way of controlling access to Bar.”¹⁴⁹ Ian Speller, similarly, suggests that “In 1999 NATO was unwilling to declare a blockade of the port of Bar in Montenegro (during the Kosovo conflict), because it was not formally at war with Yugoslavia.”¹⁵⁰ Ronzitti puts it slightly differently, explaining, “During the NATO intervention against the Federal Republic of Yugoslavia in 1999, the United States proposed the blockade of the port of Bar, but the proposal was not endorsed by France and Italy as they deemed it required authorization by the UN Security Council.”¹⁵¹

The issue is that blockade is not just a method or tactic of warfare; blockade in itself has to be justified as compatible not only with humanitarian rules for the protection of the civilian population, but also with the UN Charter. So Greenwood, even though he considered the NATO aerial attacks legal and justified as a humanitarian intervention, considered that any naval blockade would still have to be judged against the claimed justification for what would otherwise be a breach of the rule in the UN Charter prohibiting the use of force.¹⁵² He is making an important point for the purposes of our present inquiry. He is saying that a State establishing a blockade only has rights over neutral shipping to the extent that these are necessary for its legitimate purpose in resorting to force in the first place.

148. There were apparently internal British Government discussions on the decision not to declare War or impose a blockade (as it seemed to them that blockade could not be undertaken without War) in the context of the conflict with Argentina over the Falklands/Malvinas; see TANISHA FAZAL, *WARS OF LAW: UNINTENDED CONSEQUENCES IN THE REGULATION OF ARMED CONFLICT* 103–07 (2018).

149. Steven Haines, *The United Kingdom’s Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared*, 36 ISRAEL YEARBOOK OF HUMAN RIGHTS 89, 108 (2006).

150. IAN SPELLER, *UNDERSTANDING NAVAL WARFARE* 138–39 (2d ed. 2019).

151. Natalino Ronzitti, *Naval Warfare*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW ¶ 17 (updated June 2009), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-c342?rskey=iOzqBj&result=1&prd=MPIL>.

152. Christopher Greenwood, *The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign*, 78 INTERNATIONAL LAW STUDIES 35, 56–57 (2002).

B. *Do the Belligerent Rights in Blockade Apply Beyond Inter-State Armed Conflicts?*

Let us turn to the other question posed above: does the institution of Blockade apply where one or more of the parties is a non-state actor? Heintschel von Heinegg is again emphatic: “It is to be emphasized that blockade is a method of warfare recognized to apply in international armed conflicts only.”¹⁵³ The U.S. *Law of War Manual* contains sections on the right to blockade, but defines blockade as applying only where one State blockades the port, coast, etc., of another State.¹⁵⁴ The commentary to the *Harvard Manual on Air Warfare* is clear: “Aerial blockade is a method of warfare exclusively applicable in international armed conflicts.”¹⁵⁵

While some might consider that the international law on blockade imposed by Israel should give Israel Belligerent Rights in the context of Gaza, even if this were to be considered a non-international armed conflict,¹⁵⁶ others are just as adamant that no Belligerent Rights flow from such a blockade in a non-international armed conflict.¹⁵⁷

153. Heintschel von Heinegg, *Blockade*, *supra* note 129, ¶ 25; *see also* Magne Frostad, *Naval Blockade*, 9 ARCTIC REVIEW ON LAW AND POLITICS 195, 200 (2018).

154. U.S. LAW OF WAR MANUAL, *supra* note 29, ¶ 13.10 (“A blockade is an operation by a belligerent State to prevent vessels and/or aircraft of all States, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy belligerent State.”).

155. HARVARD MANUAL ON AIR WARFARE, *supra* note 9, at 358.

156. *See* 1 JACOB TURKEL ET AL., THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, at 45–49 (2011), https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf (“the Commission would have considered applying the rules governing the imposition and enforcement of a naval blockade even if the conflict between Israel and the Gaza Strip had been classified as a non-international armed conflict”). *Id.* at 49. *See also* James Farrant, *The Gaza Flotilla Incident and the Modern Law of Blockade*, 66 NAVAL WAR COLLEGE REVIEW 81, 94 (2013); Eran Shamir-Borer, *The Revival of Prize Law—An Introduction to the Summary of Recent Cases of the Prize Court in Israel*, 50 ISRAEL YEARBOOK ON HUMAN RIGHTS 349, 362–66 (2020); Jeff Lahav, *Summary of Recent Cases of the Prize Court in Israel*, 50 ISRAEL YEARBOOK ON HUMAN RIGHTS 373, 418–41 (2020) (summarizing the Haifa maritime court case of *The State of Israel v. The Ship Marianne*).

157. *See* TURKISH NATIONAL COMMISSION OF INQUIRY, REPORT ON THE ISRAELI ATTACK ON THE HUMANITARIAN AID CONVOY TO GAZA ON 31 MAY 2010, at 61–63 (2011), <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf>; Russell Buchan, *The Palmer Report and the Legality of Israel’s Naval Blockade of Gaza*, 61 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 264, 268 (2012).

No State is likely to accept that a non-State actor involved in blocking access to its own ports can assert legal rights over any shipping, whether flagged by that blockaded State or by neutral States.¹⁵⁸ The Tallinn expert manual on cyber operations is clear: “Non-state actors are not entitled to establish and enforce a naval, aerial, or a fortiori, cyber blockade.”¹⁵⁹ On reflection, therefore, there seems little room for extending the Belligerent Rights associated with Blockade to non-international armed conflicts.¹⁶⁰ This conclusion is further supported by the absence of any State seeking to apply the law of Blockade to the control measures taken off the coast of Yemen, notwithstanding that the action is popularly referred to as the blockade of Yemen.¹⁶¹

It is true that the international community of States came to accept that the traditional Belligerent Rights associated with naval Blockade in a formal War between States meant there would be interference with neutral shipping and their right to trade. But there is no evidence that States have accepted that neutral shipping can be interfered with, or that global trade (unrelated to supplies directly related to the conflict) can be blocked as a result of a

158. HARVARD MANUAL ON AIR WARFARE, *supra* note 9, at 358; Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflict at Sea and the Need for Revision*, *supra* note 7, at 12–13.

159. *See also* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 507 (Michael N. Schmitt gen. ed., 2017).

160. It is sometimes suggested that the San Remo Manual left open the possibility of applying the rules on blockade in non-international armed conflict. *See, e.g.*, NEW ZEALAND DEFENCE FORCE, MANUAL OF ARMED FORCES LAW, *supra* note 29, ¶10.5.1; Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident app. I, ¶¶ 23–24 (Sept. 2011), https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2235.pdf (which represents an account by the chair and vice-chair of the principles of public international law but not the opinion of the other two members). The bulk of opinion since the publication of the San Remo Manual would nevertheless suggest that the international law on blockade does not apply to non-international armed conflicts. This does not mean, however, that the humanitarian law that protects civilian populations from the effects of a naval or aerial action designed to cut off trade from the port or coast is not relevant, as we shall see below. Whether or not the action qualifies as a blockade under international law should not affect the question whether the effects of the action can be judged for compliance with humanitarian law rules concerning starvation and disproportionate damage for the civilian population.

161. For the conclusion that there can be no legal application of the Belligerent Rights of States related to Blockade in this non-international armed conflict, see Martin Fink, *Naval Blockade and the Humanitarian Crisis in Yemen*, 64 NETHERLANDS INTERNATIONAL LAW REVIEW 291, 296–97 (2017).

State's declaring a blockade in its non-international armed conflict with a non-state actor.¹⁶² Of course a State is entitled to restrict access to its own territory at any time, including during a non-international armed conflict, and a State may have claims related to self-defense against foreign shipping under the UN Charter, but these rights do not flow from the legal institution of Blockade.¹⁶³

C. *The Impact of Blockade*

It is often suggested that blockade (even if it is not a proper Blockade in legal terms) has become to be seen as “a blunt instrument,” which “can have an impact on the innocent as much (often rather more) than enemy belligerents.”¹⁶⁴ It was estimated that around 763,000 wartime deaths could be attributed to the “five-year economic strangulation” of Germany during the First World War.¹⁶⁵ Philip Drew points out that the “Hunger Blockade” of Germany “was responsible for the deaths of more German civilians than was the Allied strategic bombing campaign of World War II.”¹⁶⁶

Blockade is often presented as just another method of warfare. But, like siege on land, it has often been aimed at deliberately creating suffering.¹⁶⁷ As Yoram Dinstein explained:

162. Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, 81 BRITISH YEARBOOK OF INTERNATIONAL LAW 171, 191–194 (2011). But see his tentative suggestion: “On the basis of relevant state practice one can at most hazard a suggestion that irrespective of the precise classification of a conflict, states are likely to tolerate the assertion of a blockade only in cases of higher-intensity conflicts on a par with the traditional understanding of war.” *Id.* at 194.

163. Heintschel von Heinegg, *Blockades and Interdictions*, *supra* note 97, at 931–32, 939–41.

164. SPELLER, *supra* note 150, at 139.

165. Philip Drew, *Can We Starve the Civilians? Exploring the Dichotomy between the Traditional Law of Maritime Blockade and Humanitarian Initiatives*, 95 INTERNATIONAL LAW STUDIES 302, 309 n.34 (2019).

166. *Id.*

167. One legitimate aim of a siege is said to be to limit supplies reaching enemy forces in order to force the enemy to surrender. See Emanuela-Chiara Gillard, *Sieges, the Law and Protecting Civilians*, CHATHAM HOUSE BRIEFING (June 27, 2019), <https://www.chatham-house.org/2019/06/sieges-law-and-protecting-civilians>. International humanitarian law would prohibit a deliberate attempt to starve the civilian population or the starvation of civilians as a method of warfare, as well as, as we saw above, disproportionate incidental effects on the civilian population. See also U.N. Office of the High Commissioner for Human Rights, *International Humanitarian Law and Human Rights Law Relevant to Siege Warfare*

A blockade applies even to cargoes destined for the civilian population, and should this population be dependent on the importation of foodstuffs for its survival, the blockade may utilize the populace's suffering as a lever to pressure the enemy into surrender.¹⁶⁸

Recent practice, with regard to the conflict in Yemen, has resulted in the conclusion by the UN Group of Eminent Experts that the proportionality rule, usually associated with attacks, can apply to the effects of a blockade, or a similar action, whether it can be called a Blockade under international law or not. They “find persuasive the argument for a broader interpretation of ‘attacks,’ where the requisite violence for an attack can be found in the consequences of an operation.”¹⁶⁹ They went on to find that the effects of the embargo/blockade could not be justified:

No possible military advantage could justify such sustained and extreme suffering by millions of people. When the coalition was able to assess that the naval restrictions were causing harm to the civilian population that was

(Jan. 2017), https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/sieges_legal_note_-_final_-_en_1.pdf.

168. Yoram Dinstein, *Sea Warfare*, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 201, 204 (Rudolf Bernhardt ed., 1982).

169. Report of the U.N. High Commissioner for Human Rights on the Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014, U.N. Doc. A/HRC/39/43, at 29 (Aug. 17, 2018); *see also* DREW, *supra* note 132, ch. 7. The German Navy Handbook states: “A blockade must never be devoted to the sole objective of starving the civilian population or depriving it of vital items (prohibition of the so-called hunger blockade). A blockade is also inadmissible, if it is certain or to be anticipated that the negative effect on the civilian population is out of all proportion to the concrete and direct military advantage anticipated.” GERMAN NAVY, SM 3, COMMANDER'S HANDBOOK: LEGAL BASES FOR THE OPERATIONS OF NAVAL FORCES ¶ 298 (2002). In an extensive article Tom Dannenbaum takes a look at blockade against the modern law of armed conflict and concludes at one point: “It is difficult to imagine a blockade that would fail the sole purpose test.” Tom Dannenbaum, *Encirclement, Deprivation, and Humanity: Revising the San Remo Manual Provisions on Blockade*, 97 INTERNATIONAL LAW STUDIES 307, 335 (2021). He also states “Blockades are clearly a method of warfare. They are also, however, almost inevitably indiscriminate.” *Id.* at 339 n.154. He also makes the important point that “the extraordinary scale of both the civilian loss expected in a blockade (including, potentially, mass starvation) and the military advantage anticipated from it (including, potentially, total victory in the war) would bear no relation to the scale of those factors in ordinary targeting operations, where iterated practice has arguably established some rough sense of how to appraise these values in relation to one another.” *Id.* at 340.

excessive in relation to the anticipated concrete and direct military advantage of those restrictions, the coalition was required by law to cancel or suspend those restrictions. It has failed to do so.¹⁷⁰

D. *The Israeli Prize Court Adjudication over the Protest Ships attempting to Reach Gaza*

In the twenty-first century, Israel has exercised prize court jurisdiction and condemned two ships captured while they were engaged in protesting the blockade of Gaza.¹⁷¹ The court ordered that the proceeds of the sale of the ships (one under Swedish flag and the other flagged in the Netherlands) be transferred to the State of Israel.¹⁷² An earlier case concerned the *Estelle*, a Swedish-owned, Finnish-flagged ship, which had sailed from Finland and was said to have been attempting to breach the naval blockade of Gaza. The Haifa Maritime Court and the Israeli Supreme Court found that the State of Israel had initiated prize proceedings ten months after seizure, that this delay exceeded the accepted international norms in this area, and that the State had not contacted the owners or responded to their inquiries, and thus the State of Israel had, through these failures, deprived the owners of their right to submit their claims. The Supreme Court therefore ordered the release of the *Estelle* and for Israel to pay the ship's costs.¹⁷³

170. Report of the U.N. High Commissioner for Human Rights, *supra* note 169, at 32. If a State were to impose a blockade in an international armed conflict without Security Council authorization, the effect of the blockade would also have to comply with the necessity and proportionality requirements of self-defense under the U.N. Charter. See Greenwood, *The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign*, *supra* note 152, at 55–57; Heintschel von Heinegg, *Blockades and Interdictions*, *supra* note 97, at 931.

171. According to a newspaper report, the Swedish Ministry of Foreign Affairs protested its view of the incident to Israel. The report states that only the flag State can interfere with a ship in international waters. *Ship to Gaza: Sex släppta*, ÖSTERBOTTENS TIDNING (June 30, 2015).

172. Lahav, *supra* note 156, at 418–41 (especially at 441, summarizing the Haifa maritime court case of *The State of Israel v. The Ship Marianne*, Case No. 7961-07-05), 441–47 (especially at 447, summarizing *The State of Israel v. The Ship Zaytouna-Oliva*, Case No. 19424-10-16).

173. *State of Israel v. the Ship Estelle*, Original Petition, Claim in Rem 26861-08-13, Israel Haifa District Court, (Aug. 31, 2014), *reprinted in* 2014 INTERNATIONAL LAW IN DOMESTIC COURTS 2299 (2014). For commentary in English, see Ruth Levush, *Israel: Supreme Court Orders Release of Ship Captured Attempting to Break Gaza Blockade*, LIBRARY OF CONGRESS

The two Israeli judgments in the case of the *Estelle* were the first to grapple with the question of whether such a prize jurisdiction actually existed as a matter of Israeli law. It was argued that the prize jurisdiction for Israel applied due to the extension of the UK Naval Prize Act 1864 to Palestine through the UK Prize Act 1939, with the associated Supreme Court of Palestine (Prize) Order in Council of 1939 (which vested prize court authority in the High Commissioner)¹⁷⁴ and the UK's Order in Council of 1939 Declaring War that we looked at above. Such a prize jurisdiction was originally dependent on a Declaration of War (in this case the United Kingdom's 1939 Declaration of War on Germany). The district court heard from Israel that it now had an independent power to continue this prize jurisdiction and that the blockade of Gaza should allow not only for seizure, but also for confiscation. According to the 2014 judgment in the Haifa District Court:

The State did not present a proclamation about the outbreak of war as it ostensibly was required for the establishment of the authority according to the King's Order of 1939, but argues that there is no need for such a proclamation. The state believes that the King's Order does not depend on the authority of a future publication of a proclamation, but rather on the declaration of war, which, as we know, broke out shortly before the publication of the King's Order (the outbreak of World War II on 9/1939). The State also contends that with the establishment of the State and the publication of the Order of Government and Law Ordinance, 5748-1948, there is no longer a need to obtain the approval or authorization of the Secretary of the British King and that all the powers have been transferred to the State of Israel. Lastly, it was claimed, that there is no need to proclaim a war for the purpose of starting the procedure of confiscating a ship, it is enough that an armed conflict exist, and the existence of such a conflict is not disputed.¹⁷⁵

(Aug. 10, 2016), <https://www.loc.gov/law/foreign-news/article/israel-supreme-court-orders-release-of-ship-captured-attempting-to-break-gaza-blockade/>. For a detailed comment by the lawyers for the ship, see John Harris & Yoav Harris, *The "Awakening" of the English Naval Prize Act 1864—By the Haifa Maritime Court*, <https://shiparrested.com/wp-content/uploads/2015/11/The-Awakening-of-the-Prize-Court.pdf> [last visited Sept. 3, 2021].

174. See also Supreme Court of Palestine (Prize) Order 1939, No. 1137, Sept. 2, 1939, 2 Statutory Rules and Orders 2906-07 (1939); UK Prize Act 1939, 2 & 3 Geo. 6 c. 65, § 2(1) (1939).

175. State of Israel v. the Ship *Estelle*, ¶ 31, reprinted in 2014 INTERNATIONAL LAW IN DOMESTIC COURTS 2299 (English translation with the assistance of Dr. Sharon Weill).

In the Supreme Court we find a similar statement that “[t]he existence of a state of war or at least an armed conflict between Israel and the residents of the Gaza Strip is not controversial.”¹⁷⁶ The Maritime Court and the Supreme Court on appeal nevertheless ordered the release of the *Estelle* due to the delay of ten months in initiating the prize proceeding.

The Israeli judges determined that no link to the 1939 Declaration of War was necessary. This was because they found the authority of the prize court established by the British King at the outbreak of the Second World War had been bestowed on the State of Israel. The lower court found it had jurisdiction to operate as a prize court and authority to interpret the Naval Prize Act of 1864 and the 1939 Regulations;¹⁷⁷ and, as we saw, it referenced the existence of a state of war, or at least an armed conflict, between Israel and the residents of Gaza. In a concurring opinion in the Supreme Court, Justice Meltzer stated that the Minister of Defence’s declaration of the Gaza blockade “renewed the continuum (even if severed) and is sufficient for our needs.”¹⁷⁸

Although the Haifa court determined that it could operate as a prize court under Israeli law, for all three ships it stressed the need for legislation, stating that “leaving such an important chapter as far as maritime laws and prize laws practically hidden from the public’s view is contrary to the principle of legality.”¹⁷⁹ The judges were also aware that it is not clear how a contemporary application of prize law could be squared with expectations of protection of individual and property rights as well as freedom of navigation.¹⁸⁰ In the subsequent rulings the court applied a series of considerations that were not derived from the ancient law of Blockade. The court stated

176. *See id.* (where the Supreme Court refers to its holdings in HC 769/02, Public Committee Against Torture in Israel v. Government of Israel [6] (2003) and HCJ 201/09 Physicians for Human Rights v. Prime Minister [1] (2009)).

177. Lahav, *supra* note 156, at 396.

178. *Id.* at 416.

179. *Id.* at 397.

180. State of Israel v. the Ship *Estelle*, Original Petition, ¶ 46, reprinted in 2014 INTERNATIONAL LAW IN DOMESTIC COURTS 2299 (citing Eliav Lieblich, *Yet Another Front in Israel/Palestine Lawfare—International Prize Law*, OPINIOJURIS (Jan. 13, 2014), <http://opiniojuris.org/2014/01/13/lieblich-guest-post-yet-another-front-israelipalestinian-lawfare-international-prize-law/>), and Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part II, Developments since 1945*, *supra* note 98); *see also* Lahav, *supra* note 156, at 385, 391.

that it would examine, inter alia, “whether the ship itself or its cargo is intended to be used or can be used as part of the enemy combat equipment” and “whether there is an affinity between the shipowner and the activity intended to violate the blockade and consider whether this affiliation is sufficient to justify the expropriation of property.”¹⁸¹

In the two later cases of the protest ships in the maritime court, such considerations did not, however, prove an obstacle to condemnation. The court also considered its condemnation as justified when weighed against the right to protest. According to the summary of the judgment in *State of Israel v. The Marianne*:

The flotilla organizers, including the shipowners and the STG [Ship to Gaza] organization, which includes the current flotilla organizers, have a right to protest and protest Israeli operations in the Gaza Strip, anywhere and in any other legal way. However, the attempt to violate the naval blockade as a means of protest violates the public interest and harms the purpose of imposing the blockade and, in particular, the purpose of weakening Hamas in the Gaza Strip. The entrance of ships for the purpose of protest will encourage the population, strengthen the power of Hamas and damage the blockade objectives.

In these circumstances, where the purpose of the ship’s journey is merely a protest, and when it is proven that the ship was on its way to violate the blockade, the State of Israel was entitled to seize it and there is cause to order the condemnation of the ship.¹⁸²

E. *Final Thoughts on Blockade*

In concluding this section on blockade, we can welcome the important restrictions highlighted by the UN Group of Eminent Experts concerning the blockade of Yemen. But the existence of such protection does not resolve the tension that we find with the rights of neutral shipping, encountered in the most recent cases concerning Gaza. Under the traditional idea of Blockade, ships of all States (including neutral States) can be blocked from approaching or leaving the enemy coast or a part of it; and merchant vessels believed to be breaching a blockade can be seized along with their cargo. We have questioned whether this can still be correct. The *San Remo Manual* reit-

181. Lahav, *supra* note 156, at 438, 445–47.

182. *Id.* at 440 (*State of Israel v. The Marianne*).

erates the traditional Belligerent Right: “Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.”¹⁸³ Accordingly, on this reading of the law, any ship in the world that is reasonably believed to be breaching the blockade can be captured and condemned in prize court, with the property title passing to the capturing blockading State. It is this last draconian set of Belligerent Rights relating to attack and confiscation that I would call into question.¹⁸⁴

With regard to seizure for breaching Blockade, the leading scholar in the field, Heintschel von Heinegg, has even raised doubts whether the old rule remains valid:

Under the traditional law (Art 21 London Declaration of 1909) a vessel found guilty of breach of blockade may be condemned, ie, subject to the decision of a prize court, and property of the vessel or aircraft may be transferred to the capturing State. It is doubtful whether that rule continues to be valid today. In any event, the capturing State is entitled to repress the aircraft or vessel for the duration of the international armed conflict.¹⁸⁵

Other scholars have, at least since 1862, voiced doubts over whether a commercial blockade should take priority over the rights of neutral States and their nationals.¹⁸⁶ We have to conclude that there is real uncertainty over

183. SAN REMO MANUAL, *supra* note 9, ¶ 98. See also paragraph 67: “Merchant vessels flying the flag of neutral States may not be attacked unless they: (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture.”

184. The experts assembled in San Remo were apparently divided on the continuing existence of the international law related to blockade: “Although a minority believed that the traditional rules for formal blockade were in complete desuetude, a majority believed the occurrence of a number of incidents subsequent to the Second World War, in which States engaged in actions adopting some or all of the traditional rules of blockade, indicated that the doctrine still had utility as a coercive instrument.” SAN REMO MANUAL, *supra* note 9, at 176.

185. Heintschel von Heinegg, *Blockade*, *supra* note 129, ¶ 41. In France, as we shall see below, it is uncertain how capture in blockade could be legalized in the absence of prize jurisdiction, which in turn requires a Declaration of War. See Jean-Louis Fillon, *A propos du Conseil des prises et de la déclaration de la guerre: Etude sur l’obsolescence du droit de la guerre navale*, REVUE MARITIME (Mar. 2020).

186. See, e.g., JOHN MACQUEEN, CHIEF POINTS IN THE LAWS OF WAR AND NEUTRALITY, SEARCH AND BLOCKADE 30–31 (1862) (“It may be said that to abolish blockades would

whether a State could, today, rely on traditional so-called “Belligerent Rights,” which belonged to a State at War, to seize and permanently confiscate neutral vessels in the context of breach of blockade.¹⁸⁷

VI. SOME SUGGESTIONS FOR REFORM

We should now draw a few conclusions with regard to the viability of this kind of economic warfare in the contemporary world.

I have come to conclude that there is indeed, as Elihu Lauterpacht put it, “a genuine measure of absurdity in suggesting that a legal system which has excluded the right to have recourse to force should nonetheless permit the wrongdoer to assert belligerent rights arising out of his own wrongdoing.”¹⁸⁸ I think it would be better to deny States (whether engaged in an act of aggression or acting in self-defense) the traditional Belligerent Rights to acquire property rights against the civilian owners of ships, vessels, and aircraft. In other words, we need to reconsider the traditional rule that is said to allow for any State at war with another State to capture and (following condemnation in the captor State’s own prize court) acquire title over privately-owned enemy merchant ships, enemy aircraft, and enemy goods on board either ships or planes.¹⁸⁹ The rule seems even more ripe for review

be a hardship upon belligerents. But may it not be answered, that to continue blockades would be a greater hardship upon neutrals? Who are the most entitled to favour—the bulk of mankind, who are at peace, or the small, ill-conditioned portion who fight for an idea? Even supposing war to be a necessary evil, the struggle should be to make its mischiefs as small as possible to those not engaged in it.”). *See also* John Westlake, *Note on Belligerent Rights at Sea*, in ALMÁ LATIFI, *EFFECTS OF WAR ON PROPERTY* 152 (1909); WESTLAKE, *INTERNATIONAL LAW: PART II WAR*, *supra* note 69, at 164-69; but see Westlake’s second edition (1913) at 263 and chapter IX, and the discussion in 2 OPPENHEIM’S *INTERNATIONAL LAW: A TREATISE*, *supra* note 27, at 770-75.

187. *See* Andrea Gioia & Natalino Ronzitti, *The Law of Neutrality: Third States’ Commercial Rights and Duties*, in *THE GULF WAR OF 1980–1988*, at 221, 232–33 (Ige Dekker & Harry Post eds., 1992). Heintschel von Heinegg, while considering that a formal State of War is relevant neither for blockade nor for prize law, seems to accept that prize measures may not create permanently valid titles where the seizing State is acting beyond what is permitted by the necessities of self-defense. *See* Wolff Heintschel von Heinegg, *The Current State of International Prize Law*, in *INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT* 5, 34 n.163 (Harry Post ed., 1994).

188. Elihu Lauterpacht, *The Legal Irrelevance of the “State of War,”* 62 *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 58, 63 (1968).

189. *See, e.g.*, *OXFORD MANUAL OF NAVAL WAR*, *supra* note 92, art. 33; *SAN REMO MANUAL*, *supra* note 9, ¶ 135; *HARVARD MANUAL ON AIR WARFARE*, *supra* note 9, r. 134.

when one remembers that the same manuals insist that such civilian ships and aircraft can be destroyed, having secured the safety of the passengers and crew, where “military circumstances preclude taking the aircraft [vessel] for prize adjudication.”¹⁹⁰ How feasible will it be today for naval powers during a war to bring a prize into their own ports for condemnation in prize court? Destruction will remain a very real option.

Even if these traditional rules applied to both World Wars, and even if States might come to agree that the rules are different in a total war, today the idea that an aggressor State, in any international armed conflict, can seize and keep such property seems to contradict the modern law that prohibits recourse to war to settle disputes. The idea of a State’s claiming Belligerent Rights simply because it is at war seems completely at odds with the UN Charter and the prohibition of aggression.

Any attempt, however, to reserve the right to seize private ships and aircraft only to the State said to be acting in self-defense is doomed to failure. First, all States will claim they are acting in self-defense. Second, there is no overarching international umpire to determine which side started it. Prize courts may be applying some sort of international law, but they traditionally will not enter into who was the aggressor and who was the innocent party. In any event, as national courts they could not credibly make such a determination.

Several authors have pointedly burst the fictitious bubble that suggests that prize courts simply apply the law of nations. Not only will a prize court ultimately have to follow rules or legislation laid down by its own government, but where there are differences between different States on the substantive rules, one has to expect that prize court judges will be more likely to follow the local interpretation, especially where they are bound to do so by national precedent or legislation.¹⁹¹ The British concern over Russian prize

See also YORAM DINSTEIN & ARNE W. DAHL, OSLO MANUAL ON SELECT TOPICS OF THE LAW OF ARMED CONFLICT 14 (2020) (Rule 17), for the suggestion from a group of experts that “enemy outer space systems and assets” could be subject to capture as prize “in theory.”

190. HARVARD MANUAL ON AIR WARFARE, *supra* note 9, r. 135; SAN REMO MANUAL, *supra* note 9, ¶¶ 139, 140.

191. *See* JAMES BRIERLY, THE LAW OF NATIONS 89–90 (5th ed. 1955). “But when we remember that the question upon which Lord Stowell was deciding concerned the resistance to visit and search by a British warship on the part of a Swedish ship sailing under convoy, and that the right of convoy was one on which the British and Swedish views were at that time diametrically opposed, it is hard to believe that Lord Stowell really thought that a Swedish judge, sitting in Stockholm, would have been likely to decide the case in the way in

courts led to the proposal for an International Prize Court and the eventual adoption of Hague Convention XII (1907).¹⁹² But the failure to ratify the 1909 London Declaration Concerning the Laws of Naval War (1909), which would have determined rules that such an international prize court would apply, meant that the court was never established.

Given these problems, an alternative could be to say that because the defending State needs these Belligerent Rights, we have to be pragmatic and allow such rights to both sides. But even the defending State is limited as to how it can interfere with the rights of other States, bound as it is by the UN Charter's limitations of proportionality and necessity. It is hard to see how those limits can be read as authorizing the permanent confiscation of foreigners' property, in effect punishing individuals for the actions of their State.¹⁹³

We are left not only with considerable uncertainty concerning the applicable treaty law on prize (all relevant treaties are strictly speaking dependent on a State of War, and mostly only applicable where all parties to the War are parties to the treaties),¹⁹⁴ but also with no specialized international judicial or arbitral body to ensure the impartial application of this law beyond what is decided by national jurisdictions. It is suggested that rather than continuing to quest for an international jurisdiction to ensure an impartial application of

which he proposed to decide it himself." *Id.* at 89. See also VERZIJE ET AL., *supra* note 59, at 596–601; Note, *The Case of the Zamora*, 30 HARVARD LAW REVIEW 66 (1916); *The Zamora* [1916] 2 AC 77; David Foxton, *International Law in Domestic Courts: Some Lessons from the Prize Court in the Great War*, 73 BRITISH YEAR BOOK OF INTERNATIONAL LAW 261 (2002).

192. Frits Kalshoven, *Commentary to the 1909 Declaration*, in THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 257, 257 (Natalino Ronzitti ed., 1988).

193. I am grateful to Sandesh Sivakumaran for these points.

194. See, e.g., Declaration Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1, 15 Martens Nouveau Recueil (ser. 1) 791, *reprinted in* 1 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 89 (1907); Convention No. VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907, 205 Consol. T.S. 305; Convention No. VII Relating to the Conversion of Merchant Ships into War-ships, Oct 18, 1907, 205 Consol. T.S. 319; Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct 18, 1907, 36 Stat. 2396, T.S. No. 544; Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545; Convention on Maritime Neutrality, Feb. 20, 1928, 135 L.N.T.S. 187; Procès-Verbal: Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930, Nov. 6, 1936, 173 L.N.T.S. 353, 3 Bevens 298, *reprinted in* 31 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 137 (1939).

the rules, the uncertain nature of the rules themselves needs to be revisited to see if such rules should be upheld at all. The time has come to overhaul the presumptions that suggest a belligerent State can acquire through the law of prize (applied by its own courts) title to private enemy or neutral property.

As a matter of treaty law, then, there seems to be no treaty authorization for the seizure of private enemy property, whether as a ship, an aircraft, or as enemy goods on board. The authority comes from the general assumption (including among most scholars) that these rules continue as a matter of customary international law. The rules are detailed in expert manuals, alongside military manuals from powerful States, and they are usually stated to be a reflection of customary international law. Commentators such as Marco Sassòli come close to questioning the continuing validity of such rules by referring, in this context, to law from before the First World War that “allegedly still applies.”¹⁹⁵ He also describes the rules as “outdated” due to the changes outlined above regarding the way goods are now shipped around the world, but also to “changes in moral perception.”¹⁹⁶

He is right. The rules (at least those relating to seizure, condemnation, and exceptional destruction of private enemy ships, planes, and goods¹⁹⁷) must now be seen as not only outdated and unworkable, but also immoral, and moreover a sure way to undermine the distinction between military objectives and civilian objects.

But denying these so-called “Belligerent Rights” to keep other people’s property need not leave States unable to defend themselves. Rather than seeing interception, search, and seizure as an economic warfare right undertaken to weaken the war-making capacity of the enemy, one can simply see them as related to the right to self-defense under the UN Charter.¹⁹⁸ Seizing guns destined for the enemy could be excused as a proportionate and necessary measure of self-defense. But confiscating tea exports, or any ships seeking

195. MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW ¶ 8.434 (2019).

196. *Id.* ¶ 8.440.

197. The rules relating to seizure and condemnation of enemy merchant ships and neutral ships, etc., accused of carrying contraband to an enemy State, or breaching blockade or engaging in unnatural service, may also need revisiting and are discussed below.

198. See Article 21 of the International Law Commission’s Articles on State Responsibility and the explanation in the Commentary that the justification or excuse of self-defense applies where non-performance of the obligation is related to a breach of Article 2(4) of the UN Charter. UN Int’l Law Comm’n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, pt. 2, art. 21. It foresees that action in self-defense may have effects vis-à-vis third States. *Id.* art. 21, cmt. 5.

to trade by breaching blockade, widens the concept of war-like activity for both sides. This legitimization of economic warfare certainly risks blurring the distinction between civilian objects and military objectives, leading to a wider range of objects being considered to be engaged in war-sustaining activity and perhaps turning them into apparent military objectives.

Stripping away a customary international law right to confiscate on the high seas all enemy property and certain neutral property need not interfere with the right of a State to defend itself. The British chief naval judge advocate, while not purporting to reflect the views of the Ministry of Defence, made a similar point when evaluating the state of the law in 1997:

It is entirely possible that under the modern conditions of economic warfare at sea, depriving the enemy of the necessary arms and war materials is sufficient belligerent action, and the capture and condemnation, and thus benefit to the capturing belligerent, of the ship and/or cargo, is unnecessary in furthering that belligerent's war aims. It would also obviate, it would seem, the necessity for establishing a Prize Court in accordance with the traditional law, and thus it may well be, if the law develops in this direction, that Prize Courts and Prize Law become obsolete.¹⁹⁹

This may seem radical, but in fact these belligerent rights have not been the subject of a prize court condemnation since the India–Pakistan conflicts in 1965 and 1971. Specific national legislation was last adopted in the 1980s for the Iran–Iraq conflict, and even then the jurisdiction of the proposed “War Prizes Tribunal” was never actually established by Iran.

Today we also have to counter the impracticality of applying many of these rules in the context of modern maritime commerce. Haines explains:

Searching a container ship would be impossible. The characteristics of the majority of merchant ships today make it extremely difficult to divert them to convenient ports because few ports will be able to take them. This is especially the case with container vessels, which require specialist container terminals. It would also be difficult to put together a prize crew capable of operating a modern merchant vessel. It also seems most unlikely that the lawful destruction of very large container vessels on the high seas would

199. David Humphrey, *Belligerent Interdiction of Neutral Shipping in International Armed Conflict*, 2 JOURNAL OF CONFLICT AND SECURITY LAW 23, 39–40 (1997).

be regarded as appropriate, either politically, or economically or environmentally.²⁰⁰

Let me now separate out suggestions for reform into questions of (a) seizure for breach of blockade; (b) visit, search, and seizure of neutral ships and goods in connection with breach of rules on contraband; and (c) the seizure of enemy merchant ships and enemy property at sea.

A. Seizure for Breach of Blockade

The modern expert manuals on conflict at sea and air warfare still reiterate that neutral merchant ships and aircraft are subject to seizure if caught breaching blockade.²⁰¹ The ships and aircraft are then to be adjudicated in prize court and condemned—property titles passing to the captor State. For some time, leading experts have been tentatively expressing doubts as to the continuing validity or feasibility of maintaining the existence of such a right for States. In the words of Heintschel von Heinegg, “It is doubtful whether that rule continues to be valid today. In any event, the capturing State is entitled to repress the aircraft or vessel for the duration of the international armed conflict.”²⁰²

200. STUART CASEY-MASLEN & STEVEN HAINES, HAGUE LAW INTERPRETED: THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT 306 (2018). The impracticality of searching for and distinguishing contraband from free goods was highlighted by Charles Stockton already in 1920: “This difficulty [of searching merchant vessels on the open seas] is plain, not only arising from stormy weather and high seas in the examination of small vessels with simple cargoes, but presents in the case of large vessels with their great and complex cargoes almost insurmountable difficulties, added to by the existence or growth of the parcel posts of mail vessels, when we consider what may arise from the exposure to both aerial and submarine warfare, the former of which is sure to develop in the future, and the continued existence of the latter in future warfare always a possibility until the arrival of the much-to-be-desired millennium when human passions and practices will pass away for the good of mankind.” Stockton, *The Declaration of Paris*, *supra* note 66, at 363. More recently, Christopher McMahon (a Rear Admiral in the U.S. Maritime Service) has canvassed not only the potential importance of maritime trade warfare in the future, but also the arguments against the likelihood of such warfare in the future. Christopher McMahon, *Maritime Trade Warfare: A Strategy for the Twenty-First Century?*, NAVAL WAR COLLEGE REVIEW, Summer 2017, at 15, 25–39.

201. SAN REMO MANUAL, *supra* note 9, ¶¶ 98, 146(f), 153(f); HARVARD MANUAL ON AIR WARFARE, *supra* note 9, r. 140(f).

202. Heintschel von Heinegg, *Blockade*, *supra* note 129, ¶ 41.

I think it is indeed important to state clearly that this rule allowing for capture for breach of blockade should no longer apply.²⁰³ Obviously the execution of such claimed Belligerent Rights can lead to international friction with States that are not parties to the conflict. More fundamentally, it is difficult to understand why the property rights of individuals and companies should be overridden because a State has decided to enforce a Blockade outside its territory. But beyond these traditional objections, I should like to highlight a few further reasons why the institution of Blockade should no longer give rise to a Belligerent Right to seize merchant ships or aircraft.

The manuals (and here I am referring to the expert manuals on conflict at sea and air warfare, as well as the various military manuals published by States that address this issue) are explicit that a merchant vessel or aircraft (for aerial blockade) may be attacked if, after warning, it clearly resists capture or an order to land.²⁰⁴ Some States (such as Canada) may consider that breach of blockade is in itself a ground to attack such a vessel.²⁰⁵ Others (such as the United Kingdom and Germany) may consider that breach of blockade converts the merchant vessel into a military objective.²⁰⁶ Whichever way this is reasoned, the resulting deaths of civilians seem hard to justify as a general matter of morality, and attacks such as these would certainly undermine the general idea that civilians are immune from attack.

203. The regulation of Blockades in 1856 was to prevent long-distance or paper blockades by demanding that a Blockade be effective. Paragraph 4 of the Paris Declaration of 1856 provided that “Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.” See also SAN REMO MANUAL, *supra* note 9, ¶¶ 93–104. For the earlier history and the Declaration of 1780 by Catherine II of Russia, see ARMED NEUTRALITIES OF 1780 AND 1800: A COLLECTION OF OFFICIAL DOCUMENTS PRECEDED BY THE VIEWS OF REPRESENTATIVE PUBLICISTS 273–77 (James Brown Scott ed., 1918). See also JOHN BASSET MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS 40, 48 (1924), for whom, once it was clear that Blockade had to be effective, the “conflict between belligerent right and neutral right” moved to the domain of contraband. In turn, once the list of contraband was made long enough, in his words, “the rule becomes a farce.” *Id.* at 50. Moore appends various treaties with lists of contraband from 1659 through the U.S. proposition for a definition of contraband in 1907.

204. SAN REMO MANUAL, *supra* note 9, ¶¶ 67(a), 98.

205. CHIEF OF THE GENERAL STAFF (CANADA), B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS ¶ 719(3)(a) (2001).

206. UK MANUAL, *supra* note 13, ¶ 13.47(a); GERMAN MANUAL, *supra* note 25, ¶ 1017 (“Blockades are not a prize measure. Vessels breaching a blockade may, however, be confiscated in accordance with prize measures. Vessels which, after prior warning, clearly resist capture become a military objective.”).

The right to capture a neutral vessel for breach of blockade is, then, inextricably bound up with a right to attack for resisting capture. It is also directly linked to the exceptional right to destroy such a captured ship “when military circumstances preclude taking or sending such a vessel for adjudication as an enemy prize.”²⁰⁷ So resisting capture can end in attack, and in some exceptional circumstances, even compliance with capture can result in destruction. Such destruction is supposed to take place only once the “safety of passengers and crew is provided for.”²⁰⁸

When this rule on the permissible attacks on neutral vessels was being codified at the expert level in San Remo in 1994, there were some doubts as to why a neutral vessel could be attacked at all, considering that the Charter only allowed the use of force in self-defense,²⁰⁹ and the majority view was that “the definition of military objectives did not apply to the relationship between belligerents and neutrals.”²¹⁰ Nevertheless, a group of participants felt that “States could not be expected to accept rules that would force them to lose the war.”²¹¹ So, in the end, the participants seemed to have relied on the idea that capture for breach of blockade was foreseen in the London Declaration of 1909, and the practice of attacking neutral shipping in both World Wars led to the formulation of a rule that neutral ships can be attacked for breach of blockade.²¹²

It seems the idea remains that if you want to strangle another State’s economy and deprive its people of imports and exports, attacking neutral ships under such circumstances is fair and just because States still have some sort of “right to win a war.” This to me makes no sense in a world where war has been outlawed.

The reader may feel that this complex rulebook seems of little relevance today, with blockade a relative rarity and economic warfare at sea looking increasingly unlikely. Wars look more and more like counter-terrorism operations rather than the naval strategies of yesteryear. But the destruction of merchant shipping in the relatively recent “tanker war” between Iran and Iraq in the 1980s was considerable—by one estimate with over two hundred

207. SAN REMO MANUAL, *supra* note 9, ¶¶ 151, 152.

208. *Id.* ¶ 151; see also the discussion of submarine warfare and the difficulty of securing passengers’ safety in this context in CLAPHAM, WAR ch. 7.4.1 (2021).

209. SAN REMO MANUAL, *supra* note 9, ¶ 67.3.

210. *Id.* ¶ 67.7.

211. *Id.* ¶ 67.8.

212. *Id.* ¶ 67.19.

mariners killed in attacks on over four hundred ships, thirty-one merchant ships sunk, with another fifty or so damaged as to be declared total losses.²¹³ This destruction and killing was not confined to rules concerning blockade, but related more generally to a disregard for the rules on distinction and a conflation of all the rules relating to economic warfare and merchant shipping.

In the end, the continuing idea that international law authorizes blockade with associated rights for States to engage in visitation, search, and seizure, as well as attacks for resistance, and, exceptionally, destruction, can only lead to confusion and the erosion of the rules designed to minimize the suffering and destruction in war. The apparent rules that allow for capture (and associated attack and destruction) for breach of Blockade should be revisited to see if they can really still be applicable in the contemporary world. These rules are not contained in treaties but are derived from practices that have nothing to do with the humanitarian dimension that ought now to drive the development of the laws of war.²¹⁴ Rather than allowing them to gradually slip away,²¹⁵ a more concerted effort should be made to state clearly that international law no longer confers such Belligerent Rights on warring States. But of course, as stated in the introduction, this would mean a few powerful States having to accept that they may be giving away some rights that they might want to rely on later.

B. *Interference with Neutral Shipping and Seizure of Contraband Goods and Neutral Ships*

The point of a Belligerent Right to search neutral ships is to ascertain if there is contraband aboard. The idea of contraband was, however, expanded through extensive lists of items constituting contraband. Neff recounts how

213. George Walker, *Guerre de Course in the Charter Era: the Tanker War, 1980–1988*, in *COMMERCE RAIDING: HISTORICAL CASE STUDIES, 1755–2009*, at 239, 249 (Bruce Elleman & Sarah Paine eds., 2013).

214. For a forensic analysis of how law-making in the nineteenth century was focused more on preserving the interests of powerful States than on anything that we might call humanitarian concerns, see Eyal Benvenisti & Doreen Lustig, *Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874*, 31 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 127 (2020).

215. I am grateful to Steven Haines for this turn of phrase to describe the changing nature of some of these naval warfare rights. E-mail from Steven Haines to author (2020) (on file with author).

France declared that rice destined for China would be considered contraband as it was so important for the Chinese in 1885, as otherwise France said they “would run ‘the risk of depriving themselves of one of the most powerful means of coercion.’”²¹⁶ Contraband was also expanded, as we saw, through the use of the notion of “continuous voyage” and, lastly, through the idea of contraband infecting other goods on board so that the whole cargo and ship could be captured and condemned as prize.²¹⁷ Even today, the *San Remo Manual* foresees destruction in certain circumstances where the contraband is reckoned to form more than half the cargo.²¹⁸

The United Kingdom, in particular, has come in the last decades to focus on the rights of neutrals and no longer asserts Belligerent Rights against neutrals as it did in the past. In 1986, in the context of the Iran–Iraq war, the United Kingdom asserted that any Iranian right to stop and search was bounded by the right to self-defense.²¹⁹ The idea that the international law relating to the use of force adds cumulative restrictions on top of those obligations found in the traditional law of naval warfare is now replicated in the *UK Manual*.²²⁰ A detailed study in 2010 suggested that when States came to

216. Neff, *The Prerogatives of Violence*, *supra* note 18, at 51.

217. SAN REMO MANUAL, *supra* note 9, ¶¶ 146(a), 153(a) (neutral vessels and aircraft are subject to capture for carrying contraband); *see also* HARVARD MANUAL ON AIR WARFARE, *supra* note 9, r. 140(a).

218. Destruction is foreseen for captured neutral merchant vessels. The captured vessel may “as an exceptional measure, be destroyed when military circumstances preclude taking or sending such a vessel for adjudication as an enemy prize,” the conditions to be met beforehand include that “(a) the safety of passengers and crew is provided for.” For vessels carrying contraband, “[a] vessel may not be destroyed under this paragraph for carrying contraband unless the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo.” SAN REMO MANUAL, *supra* note 9, ¶ 151. This provision did not garner full support from the experts involved in adopting the Manual. *See id.* at 218–19. *See also* Article 40 of The London Declaration, *supra* note 9 (“A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.”).

219. Statement by the Minister of State to the House of Commons, in 57 BRITISH YEAR BOOK OF INTERNATIONAL LAW 583 (1986).

220. *See* UK MANUAL, *supra* note 13, ¶ 13.3; Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 273, 283–88 (Yoram Dinstein & Mala Tabory eds., 1989); *contra* Wolff Heintschel von Heinegg, “Benevolent” Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 543, 561–65 (Michael Schmitt & Jelena Pejic eds., 2007). For an expansive view of belligerent rights, see generally Wolff Heintschel

exercise rights of search of merchant shipping, they prioritized the international law of self-defense as the justification rather than the traditional law of maritime warfare.²²¹ Ronzitti now concludes that the practice is orientated towards reducing belligerents' rights so that they conform to rights exercised in self-defense, and that only action compatible with the law on self-defense would be within the law.²²²

At the opening of the 1907 Hague Peace Conference, the United Kingdom sought a new treaty that would abolish the principle of contraband, declaring:

In order to diminish the difficulties encountered by neutral commerce in time of war, the government of HBM [His Britannic Majesty] is prepared to abandon the principle of contraband in case of war between powers which may sign a convention to that effect. The right of visit would be exercised, only in order to ascertain the neutral character of the merchantmen.²²³

When this initiative failed to garner a consensus and attracted negative votes from France, Germany, Russia, the United States, and Montenegro, the British delegation sought to take the initiative outside the Hague Conference (which was supposed to operate at something approaching unanimity).

The support for the British initiative then fell away as it was seen as inappropriate to agree to a Convention at the Conference but outside the rules for the Conference. The proposed text would have stated "Goods belonging to a subject of a neutral contracting power on board neutral or enemy ships cannot be condemned as being contraband."²²⁴ The proposal was dropped due to the opposition concerned with the venue. John Westlake hoped that the Convention could nevertheless be adopted at "an early date" through the "ordinary methods of diplomacy."²²⁵ This did not happen.

von Heinegg, *International Economic Relations and Armed Conflict*, in *THE 1998–2000 WAR BETWEEN ERITREA AND ETHIOPIA* 371 (Andrea de Guttery et al. eds., 2009).

221. JAMES UPCHER, *NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW* 167 (2020).

222. "La prassi sembra, infatti, decisamente orientata a far discendere i diritti di belligeranza compatibili con l'esercizio di questo diritto sono ritenuti legittimi." NATALINO RONZITTI, *DIRITTO INTERNAZIONALE DEI CONFLITTI ARMATI* 149 (6th ed. 2017).

223. WESTLAKE, *INTERNATIONAL LAW: PART II WAR*, *supra* note 69, at 298.

224. *Id.* at 299.

225. *Id.* at 300.

Half a century later, in the wake of the Second World War and the prohibition on resorting to any use of force by UN Member States against any other state, Lauterpacht ended his edited volume of *Oppenheim's International Law* with the words:

To the existing ingredients of prize law recent developments in International Law have added one consideration of vital significance, namely, that as a rule the war will be waged on one side in violation of a legal obligation of a fundamental nature. In such a contingency the guilty belligerent will not be able to claim the benefit of the doubt in a branch of law in which so much is controversial and unsettled.²²⁶

Forty years later, Heintschel von Heinegg suggested that “With regard to measures directed against neutral vessels (aircraft), the law may be in a state of change.”²²⁷ But he offered only the following guide to the future:

It is suggested, then, that the general status of neutral merchant shipping in an armed conflict *de lege ferenda* is as follows. At the outset, there is a rebuttable presumption for their general exemption from capture. The reasons justifying capture (and probably diversion) will depend on the policy of the flag state. If its policy is not to support any of the belligerents with war material, strong reasons will be needed to justify capture. Minor standards will apply if the flag state's policy is otherwise. Where the flag state is neither able nor willing to exercise the necessary control, belligerents will be entitled to exercise all those rights conferred upon them by the traditional law.²²⁸

Again, as with capture for breach of blockade, the time has come to relate the draconian nature of these rules not just to the UN Charter, but to our desire to separate out the use of force that is necessary in self-defense from what States would like to do to win a war. Once we accept the right of capture and condemnation in prize for contraband violations, we end up accepting, it seems, the contingent rights to attack neutral vessels where they

226. 2 OPPENHEIM'S INTERNATIONAL LAW: A TREATISE, *supra* note 27, at 878.

227. Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare*, *supra* note 98, at 135.

228. *Id.* at 128–29.

are believed to be carrying contraband and, “after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture.”²²⁹ Civil aircraft can be attacked where they

are believed on reasonable grounds to be carrying contraband, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.²³⁰

As we saw above, the wide nature of the contemporary understanding of contraband includes goods destined for the enemy, “which may be susceptible for use in armed conflict.” The uses and customs on contraband of war, according to H. Reason Pyke, “have been created by the action of belligerent rather than neutral states, and with a view to extending and not restricting the advantages that accrue to a belligerent from the possession of a predominant command of the sea.”²³¹ For him, writing in 1915, it was impossible for “nations at war to exercise the power and force required for the purpose of overthrowing each other without inflicting injury and loss upon the trade of other nations.”²³² Today, we no longer believe that nations have any business overthrowing each other, and so States should not be accorded the necessary rights against neutrals to do this. And yet the old rules apparently endure, with nefarious consequences. I would suggest that a belligerent State should no longer be able to claim that international law authorizes it to capture and permanently confiscate through a prize court the neutral ships and aircraft found to have been carrying contraband or engaging in unneutral service.²³³

This is not only a question of respecting the rights of individuals and the rights of non-participating (neutral) States. As already stated, the rights to search and capture quickly turn into a right to target under certain conditions.

229. SAN REMO MANUAL, *supra* note 9, ¶ 67(a), but note that paragraphs 68 and 40 require that the target fulfil the requirements of being a military objective.

230. *Id.* ¶ 70(a). *See also* ¶¶ 40, 71.

231. H. REASON PYKE, THE LAW OF CONTRABAND OF WAR vi (1915).

232. *Id.* at 1.

233. For the different types of unneutral service leading to capture as prize, “transport of troops or military men,” and “carriage of dispatches,” see VERZIJL ET AL., *supra* note 59, at 456–70; COLOMBOS, A TREATISE ON THE LAW OF PRIZE, *supra* note 72, ch. 6.

For example, a neutral civilian aircraft apparently becomes “a military objective” because it is suspected of carrying contraband and refusing to divert from its destination.²³⁴ I am not convinced by the orthodox argument that by behaving in this way, the ship or an aircraft has become a military objective and the crew are no longer protected civilians because they are directly participating in hostilities.

The old Belligerent Rights need to be revised so that searching for contraband comes closer to law enforcement. Allowing the current regime to remain in place can only reinforce the mistaken idea that merchant shipping and civil aircraft might be fair game when it comes to capture, targeting, and destruction.

C. *Seizure of Enemy Merchant Ships, Aircraft, and Cargo*

Turning away from neutral property (or property belonging to individuals from non-participating States) and looking to private property belonging to enemy nationals, we might recall that there is no right for a belligerent to capture on land private property belonging to enemy nationals. The time has come to reject the idea that enemy commercial maritime traffic is so essential to winning the war that it should be not only seized, but also condemned and permanently acquired by the seizing State.²³⁵ As mentioned above, at one point the British government would have considered joining in the American idea of abolishing this Belligerent Right of capture at sea. The instructions to the British delegation in 1907 started by stating:

Anything which restrains acts of war is in itself a step towards the abolition of all war, and by diminishing the apprehensions of the evils which war would cause, removes one incentive to expenditure upon armaments. It is also possible to imagine cases in which the interests of Great Britain might benefit by the adoption of this principle of immunity from capture.²³⁶

But as explained previously, the utility of Blockade was considered too strategically important: “The British navy is the only offensive weapon which

234. See HARVARD MANUAL ON AIR WARFARE, *supra* note 9, r. 174(a); UK MANUAL, *supra* note 13, ¶ 12.43.1(a).

235. The law may be based on long-established custom, but there are no relevant treaties that authorize such seizures, only attempts to prevent some merchant ships being seized or requisitioned at the outbreak of hostilities.

236. PEARCE HIGGINS, *supra* note 70, ¶ 19.

Great Britain has against Continental Powers. The latter have a double means of offence: they have their navies and they have their powerful armies.”²³⁷

In the end, the eventual Hague Convention VI on Enemy Merchant Ships at the Outbreak of Hostilities (1907) only states that “it is desirable” that a merchant ship of a belligerent State be allowed to depart an enemy port after a period of grace, and it provides that certain merchant ships that were unable to leave, or ignorant of the outbreak of hostilities at the time of encounter with the enemy navy on the high seas, may not be confiscated but only detained and restored after the war without compensation, or alternatively requisitioned or destroyed with compensation.

The United States refused to join the treaty on the grounds that customary international law was already more protective of merchant shipping than the proposed treaty. James Brown Scott made the point that “it rarely happens that a vessel is provided on the outbound voyage with sufficient coal for the return.”²³⁸ This means that on the outbreak of War, whether it continues on to the belligerent port or attempts to return home, the enemy merchant ship risks being captured. Moreover, he added even if it is indeed ignorant of the outbreak of hostilities at the time of being seized,

it may be detained subject to restoration at the end of the war without compensation. The value of the vessel may be seriously depreciated in case of a long war. If requisitioned, it is unlikely that the transaction will be profitable to the original owner, and if destroyed it is improbable that the compensation will at all be adequate. The article in question, therefore, can not be considered an advance; it is a distinct limitation of customary rights.²³⁹

On the other hand, the treaty was seen as too protective of merchant shipping by Russia and Germany. Both States formulated reservations as they felt disadvantaged; not having “naval stations in different parts of the world” that could receive the seized vessels, they would “find themselves

237. *Id.* ¶ 20.

238. James B. Scott, *Status of Enemy Merchant Ships*, 2 AMERICAN JOURNAL OF INTERNATIONAL LAW 259, 269 (1908).

239. *Id.*

compelled to destroy them.” Japan became a party, while the United Kingdom and France eventually renounced the treaty, in 1925 and 1939, respectively.

In 2020 there were only thirty-one States parties to this treaty. At the time of its drafting commentators simply stated “[i]t is a well recognized rule of international law that private property belonging to the enemy on the sea is liable to capture.”²⁴⁰ The treaty merely regulates the exceptions, in order to “ensure the security of international commerce against the surprises of war.” One such exception is that there can be no capture where the enemy merchant ship is met at sea and is ignorant of the outbreak of hostilities. Neither this treaty, nor any other multilateral treaty in force,²⁴¹ would seem to grant the Belligerent Right to capture enemy merchant ships.

The Hague Convention VI (1907) details which merchant ships cannot be captured. I do not see how such a treaty (which most experts consider is no longer in force), or the Hague Convention XI (1907) that, *inter alia*, exempts coastal fishing vessels from capture (and has only 32 States parties), could justify a continuing universal right of any State to capture all other enemy merchant ships and aircraft.²⁴²

240. PEARCE HIGGINS, *supra* note 70, at 300; Scott, *supra* note 238, at 259 (“private property of the enemy upon the high seas is subject to capture”).

241. The London Declaration, *supra* note 9, of course covered enemy property in Articles 57–60, but this treaty never entered into force. The Declaration of Paris 1856, *supra* note 61, starts, “That maritime law, in time of war, has long been the subject of deplorable disputes; That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts”; it then limits what goods cannot be captured on the high seas, *i.e.*, “The neutral flag covers enemy’s goods, with the exception of contraband of war,” and “Neutral goods, with the exception of contraband of war, are not liable to capture under enemy’s flag.” It seems a convoluted legal logic to suggest that such a prohibition from over 160 years ago could generate a universal permission in international law today. For the conclusion that the “mere existence of regulations” under international humanitarian law “should not be understood as creating strong permissions,” see ANNE QUINTIN, *THE NATURE OF INTERNATIONAL HUMANITARIAN LAW: A PERMISSIVE OR RESTRICTIVE REGIME?* 10 (2020). One might question whether such a treaty is really just a negotiated bargain between belligerents and neutral States, rather than part of the corpus of humanitarian law, but there are passages addressed to the safety of persons on board merchant ships. These restrictions on capture and condemnation from 1907 should not be read as today providing evidence that the right to capture enemy ships and goods remains unaffected by the outlawing of war and the ban on the use of force.

242. It has been suggested that Hague VI (1907) has fallen into desuetude and is therefore of no legal effect for the States that remain parties. CASEY-MASLEN & HAINES, *supra*

I suppose some will argue for a continuing general customary right for States to capture enemy merchant ships (notwithstanding the limited significance of these treaties). They will claim it is for those who no longer believe in the right of capture to show that it has fallen into disuse, or been overtaken by the laws that outlaw war and prohibit the use of force. When we recall the longstanding nature of this right to capture rule, we might remember that enemy goods in the past included slaves, being transported on enemy ships or belonging to the enemy. In fact, in the eighteenth century, members of the crew on any captured ship that were Black or mixed race would be presumed to be slaves, even where they might have evidence they were free. Captured and sold as prize, such crew members proved useful to captains either as income or as additions to the crew. Prize law has an inglorious past. Charles Foy concludes his study:

For Obadiah Gale and the hundreds of other black mariners sold into slavery during the American Revolution, the newly established American prize

note 200, at 285 n.36; *see also* DOCUMENTS ON THE LAWS OF WAR, *supra* note 61, at 95, where editors Adam Roberts and Richard Guelff point to the failure of States to follow the Convention in the Second World War and the facility with which merchant ships can be converted into warships or used as auxiliary vessels to service warships. The use by the United Kingdom of cruise liners to transport troops in the Falklands/Mavinas conflict is a reminder of how useful merchant ships could be to a belligerent. Andrea de Guttry considers that the treaty can, however, still prohibit confiscation for certain ships and their cargo, even if in general States are no longer enthusiastic about protecting enemy merchant ships due to the decisive contribution merchant shipping can make to a belligerent's economy and the "war effort." Andrea de Guttry, *Commentary to the 1907 Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities*, in *THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES* 102, 109 (Natalino Ronzitti ed., 1988). To the extent that the Convention's preamble refers to ensuring "the security of international commerce against the surprises of war," one could assume that this treaty would only apply in a formal State of War, even if certain provisions reference the commencement of hostilities. De Guttry certainly makes reference to the significance of a captain's "ignorance of a state of war" (*id.* at 104) and to the status of enemy ships in "time of war" (*id.* at 106). Because the treaty covers obligations related to the outbreak of hostilities, it seems sensible not to limit the treaty to the period when a Declaration of War takes effect but to address the "surprises of war." Nevertheless, because the treaty adjusts vulnerability to confiscation of enemy ships, it should be seen as applying in the context of a formal State of War (if indeed it continues to apply at all). The experts in San Remo considered it had fallen into desuetude, and therefore did not include vessels in port and mail ships as exempt from capture in their Manual. *SAN REMO MANUAL*, *supra* note 9, at 207.

system was little different from its British colonial predecessor. Both systems presumed that blackness equaled enslavement. . . . With both systems predicated upon a desire to develop maritime forces through awarding prize monies, little priority was given to black mariners' individual liberty. As a result, British and American prize systems ensured that going to sea involved anxiety for black seamen and their loved ones.²⁴³

Returning to the present day, modern academic commentary on the capture of enemy property at sea is sparse, but again, Heintschel von Heinegg admits that the rule concerning capture and confiscation of enemy merchant ships and cargo may need to be reinterpreted or restricted in the light of the UN Charter's restriction on the resort to force:

In this context, one may consider exempting from capture passenger vessels that are transporting civilians and no contraband articles, because capture always implies certain hazards for the ship concerned. If a belligerent wishes to make use of such a vessel, it can be requisitioned. Enemy merchant vessels in enemy port at the outbreak of hostilities, however, are not, and never have been protected by any binding rule. Today, because it is possible to integrate almost any merchant vessel into naval forces without major technical difficulties, states will be even less willing to agree to such a rule than they were in 1907. Nevertheless, if the direct influence of the United Nations Charter on the law of economic warfare at sea is accepted, the legality of condemning enemy property will probably have to be reconsidered. If all measures have to meet the principles of necessity and proportionality set out in the Charter, it is doubtful whether the acquisition of all enemy property at sea is legally justified.²⁴⁴

The most recent military manual of New Zealand (2019) makes it clear that such a use of prize law is no longer considered normal in the contemporary context:

243. Charles Foy, *Eighteenth Century "Prize Negroes": From Britain to America*, 31 *SLAVERY AND ABOLITION* 379, 388–89 (2010). Even where States were legislating against the importation of slaves, prize law was used to get around such restrictions, with slaves being sold after condemnation as good prize captured in war. See J.P. van Niekerk, *Judge John Holland and the Vice-Admiralty Court of the Cape of Good Hope, 1797–1803: Some Introductory and Biographical Notes (Part 1)*, 23 *FUNDAMINA* 176, 186–95 (2017). I am grateful to Alessandro Marinaro for raising this issue and leading me to inquire further.

244. Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part II, Developments since 1945*, *supra* note 98, at 134.

Due to the nature of modern armed conflict, in particular the need to limit conflict as much as possible and return to peaceful conditions quickly, the exercise of prize jurisdiction for the purposes of permanently acquiring the ships and property of another State is almost unknown. It is generally not now appropriate for a State to profit financially from the waging of armed conflict. New Zealand warships may seize enemy merchant vessels and submit them for prize arbitration only with the express authority of CDF [Chief of Defence Force]. If practicable, the advice of an NZDF LEGAD [New Zealand Defence Force Legal Adviser] is to be obtained before a vessel is seized as a prize. A ship that is captured may, however, be held until the end of hostilities, which may require that it is tied up in a foreign port.²⁴⁵

This captures perfectly the point with which I should like to conclude. If we have outlawed War as an institution at the disposal of States then we have to abolish the Belligerent Rights of States to benefit from War, or indeed any sort of armed conflict. It makes no sense to say that you cannot resort to armed conflict against another State and yet, if you do, you can keep the old Belligerent Rights that belonged to those that went to War. We do not outlaw burglary but then tell the law-breaker and home owner that they can keep what they find in the other's house.

245. NEW ZEALAND DEFENCE FORCE, MANUAL OF ARMED FORCES LAW, *supra* note 29, §10.6.15 (footnote omitted).