PRIZE COURTS: THEIR CONTINUING RELEVANCE

Steven Haines and Craig John Martin

Submitted and accepted for publication 3 June 2019, in:

D Stephens and M Stubbs (Eds), *The Law of Naval Warfare* (Sydney, Australia: Lexis/Nexis, 2019), In Press, publication date Oct/Nov 2019

PRIZE COURTS: THEIR CONTINUING RELEVANCE

Steven Haines and Craig John Martin

INTRODUCTION

It is commonly asserted that war has been subject to some form of normative influence since classical times.[1] Such claims have an air of wishful thinking about them when they are judged against the history of warfare. Clausewitz famously stated in *On War*; that 'Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it'.[2] His thinking was, of course, a product of his times and heavily influenced by his personal experience of wars fought on land by France under Napoleon. He should not go unchallenged, however, especially in relation to war at sea. The Emperor has never been noted for consulting legal advisers before resorting to war. Nevertheless, he was certainly aware of the Law of Nations, often referring to it in justifying his strategic decisions. One element of it with which he appears to have been very familiar was that relating to war at sea.

In exile on the island of St Helena he wrote a good deal about war, including about 'the law of nations governing maritime war', of which he was especially critical. Unsurprisingly, he was not favourably disposed towards Britain's use of naval power, claiming that the Royal Navy's actions demonstrated that the law 'remained in a state of utter barbarism'. He had three relevant criticisms of it. First, he objected to the confiscation of private property during action against enemy commerce. Second, he deplored the vulnerability of civilian crews of merchant ships to capture and incarceration. Finally, he disliked neutral vessels being subject to interdiction, seizure or destruction if carrying contraband.[3] His observations were directly related to both the strategic purpose and the operational/tactical conduct of economic warfare at sea, that function of navies subject to the regulatory influence of Prize Law.

Prize was a feature of war at sea during all of the major maritime conflicts fought during the era of maritime imperial rivalry, from the Anglo-Dutch Wars of the 17th century to the two World Wars of the 20th. That era is now at an end. The maritime empires have passed into history, as have the general and prolonged naval wars in which they frequently engaged. Given the current rise in Chinese naval power and a resurgence in that of Russia, however, there is arguably an increasing possibility of major naval confrontation, which might lead to war at sea. If it did, a return to economic warfare at sea is at least possible.

---

1 See the essays by J Ober ('Classical Greek Times), R Stacey ('The Age of Chivalry') and G Parker ('Early Modern Europe') in M Howard, G Andreopoulos and M Shulman, *The Laws of War: Constraints on Warfare in the Western World* (Newhaven: Yale University Press, 1994).

2 C von Clausewitz, *On War* (edited and translated by M Howard and P Paret) (Princeton: Princeton University Press, 1984), p.75

3 B Colson, *Napoleon On War* (Oxford: Oxford University Press, 2015), pp.35-39.

It is appropriate, therefore, to assess the future relevance of Prize Law and the Prize Courts whose function has been to administer it.

This demands an examination of State practice and legal thinking in the relatively recent past. Nevertheless, some understanding of the historical development of Prize Law serves to reveal its purpose, as well as fluctuations in its application and interpretation. We start, therefore, with comment about the development of Prize Law since the 17th century, before going on to examine its application since the end of the Second World War. We will then draw some conclusions.

COMMENTS ON THE HISTORY OF PRIZE LAW

Despite its apparent medieval origins, Prize Law is largely a product of the Grotian Era in ocean affairs, which encapsulates the intense period of maritime imperial rivalry from the 17th to the 20th centuries.[4] Throughout that era the seas were regarded as 'free' for all to use for legitimate purpose, including for the waging of naval war, which was regarded as a sovereign right. Maritime imperial wars resulted in navies routinely interfering with their opponents' maritime trade. The strategic aim was to apply sufficient economic pressure that the enemy was persuaded to capitulate. The interference with, and protection of, commerce were critically important naval objectives between the 17th and 20th centuries. Belligerent trade was frequently carried in neutral shipping and belligerents had the right to challenge and visit ships sailing under neutral flag, with neutral States under an obligation to permit belligerent visit and search of their vessels - the price they paid for the exercise of their neutral right to continue trading activities. A balance evolved between neutral rights and obligations, on the one hand, and belligerent obligations and rights, on the other.

The legitimate interdiction of trade was achieved in two ways. First, enemy trade could be intercepted anywhere on the high seas in what came to be termed *guerre de course*. There was no geographic limit; ships (both belligerent and neutral) could be intercepted on any of the world's oceans, at great distance from the confrontations on land. A naval war between Britain and France, for example, could result in the naval vessels of each side intercepting shipping as far away from European confrontations as the Pacific and Indian oceans. The second method of preventing enemy trading activity was by blockade operations, in which all shipping – belligerent and neutral - was prevented from accessing an enemy's ports. This was required to be non-discriminatory, with no vessels permitted access, regardless of flag and the nature of their cargoes.

An important consideration for all belligerents was the risk of provoking neutrals into belligerency through interference with their commerce. Prize Law evolved between the early-17th and mid-19th centuries to regulate the seizure of cargo embarked in both belligerent and neutral shipping. Enemy goods were frequently transported under neutral flag and neutral goods were to be found in belligerent vessels. In relation to *guerre de course*, the character of goods being carried was important. A distinction was

[4] The earliest mention in English documents dates from the 14th century; see R Marsden (Ed), *Documents Relating to the Law and Custom of the Sea,* Two Volumes (Navy Records Society, 1915) at pp.19, 44, 75, 102 and 106.. Even earlier (in the 11th century), the *Consolato del Mare* was a body of law promulgated in the Mediterranean; see R Hill, *The Prizes of War: The Naval Prize System in the Napoleonic Wars 1793-1815* (Stroud: Sutton Publishing, 1998), p.5.

made between contraband on the one hand, and private and free goods on the other, the former being goods likely to benefit the war-fighting ability of belligerents.

Despite Clausewitz's dismissal of law as lacking influence, naval war came to be significantly influenced by Prize Law. The complexity of the rules relating to the seizure of ships and cargoes demanded judicial review of any seizure, hence the establishment of Prize Courts.[5] Those courts examined the seizure of vessels and cargoes by their own State's naval vessels and by privateers operating under letters of marque issued by their governments.[6] The legality of seizure was determined in the courts of the State whose naval forces were responsible for it. The cynical may assume that a court in a belligerent State would reach judgment favouring its own State's actions. This was not invariably the case, however. Prize Courts judge the legitimacy of naval actions by reference to international law and not by the influence of State policy. The British judicial approach, in particular, was generally regarded as independent of State influence.

One issue that created some controversy was what constituted 'international law'. Internationally agreed conventional law was in its infancy; there was none dealing with the conduct of economic warfare until 1856.[7] Until then, the courts had to rely on customary law. This would itself be influenced by how the State interpreted the law. While the courts might be independent of the State, judgments might well be influenced indirectly by what the State believed international law to be. One issue of note was how different States defined contraband. They each had the right to promulgate what they regarded as the distinction between contraband and free goods. There was no clear international agreement on what constituted contraband, with national Prize Courts applying their own State's definition of it.

Napoleon's criticism of the law was a consequence of differences of opinion between Britain and the continental powers on the legitimacy of the seizure of private goods and on the extent to which neutral shipping was subject to *guerre de course*. That difference persisted until Britain and France reached agreement on combined naval operations against Russia in support of Turkey in the Crimean War. Following that war, in the Paris Declaration of 1856,[8] the neutral flag was declared as covering enemy goods, which were exempt capture unless contraband, and neutral goods (again, excepting contraband) were exempt seizure when carried in belligerent vessels. Even after 1856, controversy continued, especially in Britain where naval interests came into domestic political conflict with commercial interests keen to retain free movement of trade on the high seas during war. Those commercial interests developed during the 19th century as a consequence of a shift in attitudes to do with imperial trade.

From the 17th until the 19th century, the maritime powers with overseas empires tended to enforce mercantilist economic strategies which placed severe restrictions on access to colonies by vessels of rival powers. Prize Law was shaped by mercantilist economic imperatives during that time. As the 19th century progressed and mercantilism gave way

---

5 On the history of Prize and related subjects, an unequalled account is provided in C Colombos, *The International Law of the Sea* 6th Edition (London: Longmans, 1967)

6 On Letters of Marque and Privateers, see R Hill, *The Prizes of War: The Naval Prize System in the Napoleonic Wars 1793-1815* (Stroud: Sutton, 1958), pp.6-8. Also S.B. Kaye and L.B. Bautista *The Naval Protection of Shipping in the 21st Century: An Australian Perspective* (December 15, 2011) Papers in Australian Maritime Affairs No. 34 p.57.

7 In 1856 Paris Declaration Respecting Maritime Law, in A Roberts and R Guelff, *Documents on the Law of War* 3rd Edition (Oxford: Oxford University Press, 2000), pp.47-52 (see below).

8 See Note 7.

to free trade, however, commercial interests freed from the restraints of imperial economic constraints began to apply pressure on governments to restrict economic warfare at sea. The emergence of economic *laissez-faire* coincided with the ending of the age of sail. Neither was conditional on the other but their combined effects challenged the precepts of traditional Prize Law.

That controversy continued to the First World War. It affected British policy towards 1907 Hague Convention XII,[9] an attempt to establish an International Prize Court. The quest for clarity on Prize Law led to the London Conference of 1909, but the agreement reached never entered into force. A further attempt was made to codify the law in the Oxford Manual on the Law of Naval Warfare published in 1913[10] but, while a notable document, it is clearly not a formal international agreement. When viewed through the methodological prism of international law, the lack of any post-1856 expanded conventional law and the measure of international disagreement, meant that there was no fully accepted 'international Prize Law'.

The controversy was unresolved when war broke out in 1914. Although economic warfare was emphatically a major feature of war at sea between 1914-18, the principal means of conducting it shifted significantly due to the influence of submarines. From warships interdicting merchant ships on the high seas and seizing them as prize, to warships attacking merchant ships without warning, either because they were steaming in protected convoys (which rendered them vulnerable to attack) or because merchant ships were armed, leading to campaigns of unrestricted attacks on trade. The bulk of the merchant shipping targeted during the war at sea was sunk and never subjected to Prize Court process. Submarines were the major culprit.

In the 1930s, an attempt was made to constrain submarine operations within the same rules applied to surface warships. Agreement was reached in 1930 and further progressed in 1936. By the outbreak of war in 1939 almost fifty States had formally agreed, including all the major belligerents.[11] Unfortunately, this did not result in the effective re-establishment of legitimate *guerre de course* during the Second World War. The German pocket-battleship *Graf Spee* may have conducted traditional interdiction operations in the South Atlantic and southern Indian Ocean in the period from September to December 1939 but, as the war proceeded, shipping sunk without warning far exceeded the amount seized as Prize. Prize Law certainly did function during the two World Wars, but its overall influence was significantly less than in the age of sail.

THE CURRENT BODY OF PRIZE LAW

Prize Law today reflects experience since the middle of the 19th century and during the World Wars, with Colombos's third edition of his *Treatise on the Law of Prize* appearing

---

9 *1907 Hague Convention XII Relative to the Creation of an International Prize Court,* available at https://ihl-databases.icrc.org/ihl/INTRO/235?OpenDocument

10 1913 *Oxford Manual of Naval War* reproduced in N Ronzitti (Ed), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* and P Verri 'Commentary' (Dordrecht, Boston, London: Martinus Nijhoff, 1988), at pp.277-342.

11 By the *1936 London Protocol Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April* 1930 (see Roberts and Guelff, *Documents,* as Note 7, pp.170-173). See also Chapter XX in this volume.

in 1949.[12] It remains the most recent comprehensive manual on the subject. Since then, there has been little change in the law governing the conduct of economic warfare at sea; there has been no treaty law and no general and sustained naval war to generate practice sufficiently significant to influence custom.

The most obvious reference to consult today is not Colombos, however, but the *San Remo Manual* (SRM),[13] published half a century after the Second World War as an attempt to update the Law of Naval Warfare.[14] A series of workshops involving an impressive number of naval officers (both operators and lawyers) and prominent academic lawyers from around the world were conducted to consider post-War developments. A particular focus was on the Law of the Sea, including enhancements and extensions of coastal state jurisdiction affecting areas within which naval operation can be conducted. It includes over forty rules dealing with economic warfare at sea.

The SRM is not a source of law itself but reflects both conventional law and custom, as well as extensive expert opinion. It has been used as a reference in all the main official State manuals dealing with the subject.[15] Those manuals provide some measure of verbal practice, as well as an indication of what States believe constitutes *opinio juris*. The SRM is the closest we have to a comprehensive Prize Manual today and includes an additional commentary in the commercially published edition.[16] Very useful additional guides to Prize Law are Kraska's contribution to the *Max Planck Encyclopedia* and Heintschel von Heinegg's to *The Handbook of International Humanitarian Law* edited by Fleck.[17] Farrant's recent work on neutrality is also of good value.[18] In what follows, however, we rely exclusively on the SRM rules.

Belligerent warships can exercise the right of visit and search in relation to any merchant vessels (enemy or neutral) if there are reasonable grounds for suspecting they will be subject to capture (SRM 118) - capture defined as 'taking such a vessel as prize for adjudication' (SRM 138). Although belligerents have this right in relation to enemy merchant vessels, there is no requirement for it to be exercised prior to capture (SRM 135). While both enemy and neutral merchant ships may be captured, in relation to the former there are exceptions leading to exemptions (SRM 136) and, in relation to the latter there are conditions that need to be met if capture is to be legitimate. A vessel flying an enemy flag is assumed to be of enemy character (SRM 112), but this is also determined by registration, ownership, charter or other criteria (SRM 117). A neutral flag on a vessel

---

[12] C Colombos, *A Treatise on the Law of Prize* 3ed Edition (London: Longmans Green, 1949).

[13] L Doswald-Beck (Ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995). See also the Chapter by Heintschel von Heinegg in this volume

[14] See Heintschel von Heinegg chapter in this volume

[15] The UK's official manual (Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004)) is a good example. The first draft of its chapter on 'Maritime Warfare' consisted of the SRM, with subsequent drafts modified to reflect UK practice and opinion on the customary law of naval operations. Eventual differences between it and the SRM are described in S Haines, 'The United Kingdom's Manual on the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared', in *Israel Yearbook on Human Rights*, Vol.36 (Leiden/Boston: Martinus Nijhoff. 2006), pp.89-118.

[16] SRM as Note 13.

[17] J Kraska, 'Prize Law' in *Max Planck Encyclopedia of Public International Law*, available online at SSRN: https://ssrn.com/abstract=1876724 ; and W Heintschel von Heinegg, 'The Law of Armed Conflict at Sea', in D Fleck (Ed), *The Handbook of International Humanitarian Law* 3rd Edition (Oxford: Oxford University Press, 2015), pp.1001-1064.

[18] J Farrant, 'Modern Maritime Neutrality Law' in *International Law Studies*, (Newport, RI: US Naval War College, 2014), Vol.90, pp.200-307

is merely *prima facie* evidence of neutrality (SRM 113) and, if it is suspected of having enemy character, it can be visited and searched and, if necessary, diverted to enable an effective search to be conducted (SRM 114). If it is then revealed as having enemy character, it may be captured as prize subject to adjudication (SRM 116).

Enemy Vessels

Certain enemy vessels are exempt from capture if engaged in non-trading activities (including hospital ships, rescue craft and medical transports; the full list is in SRM 136), conditional on them being innocently employed in their normal role, not committing acts harmful to the enemy, submitting immediately to inspection when required, and not intentionally hampering the movement of combatants, and obeying orders to stop or move out of the way when required (SRM 137).

If an enemy merchant vessel subject to capture cannot be taken as prize at sea, it may be diverted to another area or to a port to complete capture, or it may be diverted away from its declared destination (SRM 138). Alternatively, a captured enemy merchant vessel, as an exceptional measure, may be destroyed, subject to criteria relating to the safety of crew and passengers and their personal effects, and the safeguarding of documents and papers relating to prize (SRM 139). The destruction of passenger vessels carrying only civilian passengers is prohibited, however; such vessels shall be diverted to an appropriate area or port in order to complete capture (SRM 140).

Neutral Vessels

Neutral merchant vessels are subject to capture if involved in activities rendering them liable to attack (SRM 67) or if it is established, following visit and search, that they are (SRM 146):

- Carrying contraband, defined as goods ultimately destined for the territory under enemy control and which may be susceptible for use in armed conflict (SRM 148). Such goods must appear on a published contraband list produced by the belligerent (SRM 149). Only contraband goods are subject to capture (SRM 147); other goods are designated as 'free goods' (SRM 150)
- On a voyage especially undertaken to transport passengers embodied in the armed forces of the enemy
- Operating directly under enemy control, orders, charter, employment, or direction;
- Present irregular or fraudulent documents, lack necessary documents or destroy, deface, or conceal documents
- Violating regulations established by a belligerent within the immediate area of naval operations; or
- Breaching or attempting to breach a blockade.

If a neutral merchant vessel subject to capture cannot be taken as prize at sea it may be destroyed, although every effort must be made to avoid doing so. It should not be destroyed without there being entire satisfaction that it can neither be sent into a belligerent port, nor diverted, nor properly released. Destruction can only be ordered if the safety of passengers and crew is assured, if documents relating to the captured vessel are safeguarded, and, if feasible, the personal effects of the passengers and crew are saved. It should not be destroyed simply for carrying contraband unless, by value, weight, volume or freight, the contraband forms more than half its cargo. Destruction will be subject to subsequent adjudication (SRM 151). It is prohibited to order the destruction of neutral passenger vessels carrying civilian passengers at sea (SRM 152).

Blockade

Twelve SRM rules govern blockade, the aim of which is to prevent supplies reaching the enemy by sea.[19] In the age of sail, weather permitting, blockading warships sailed close to the enemy's coast and the entrances to ports. As sail gave way to steam and as weapons technology increased the distances over which warships could threaten each other, the geographical extent of blockade areas increased. There emerged a debate over the relative value and legality of close and distant blockades.

The legality of a blockade today is determined by effectiveness (SRM 95), with the force conducting it to be positioned at a distance which poses a reasonable risk that access to the blockaded coast and ports will be effectively prevented. A force positioned too close to the coast may be at risk from shore-based armaments but if too distant will be unable effectively to prevent vessels accessing blockaded ports. Positioning of blockading forces will be determined by military requirements against prevailing circumstances; there is no precise definition of the sea area directly affected by blockade from which vessels should be excluded (SRM 96). A blockade should be declared to all belligerent and neutral states (SRM 93) and the notification should specify the extent of the blockade, the time it commences, its duration, and location. That declaration should stipulate the period following its commencement during which neutral vessels will be allowed to leave the blockaded coastline (SRM 94).

A blockade does not need to be mounted by surface warships alone. Other warships can be employed, as can a variety of legitimate weapon systems. It cannot, however, be enforced by the use of weapons alone, which means that the laying of a minefield purely for that purpose would be unlawful (SRM 97).[20] Merchant vessels believed to be breaching a blockade may be captured and, failing to heed warnings and attempting to resist capture, they may be attacked. Ordinarily the blockade must apply impartially to the vessels of all States (SRM 100), although the blockading power is obliged to allow entry and egress in certain circumstances, including for vessels in distress and those delivering food and essential supplies to the blockaded State's civilian population (SRM 103). A blockade should certainly not have as its objective the starving of the civilian population or damage to it in excess of the concrete and direct military advantage anticipated from it (SRM 102). Passage of medical supplies for both the civilian population and for the wounded and sick members of the armed forces should also be allowed, subject only to regulation and search as necessary (SRM 104).

Convoying

Convoys for defensive economic warfare can be used by both belligerents and neutrals, for the latter as a measure of security for their own and other neutral states' merchant vessels. Convoys of merchant vessels protected by belligerent warships are subject to attack without warning, regardless of the flag of the vessels in company. To quote the SRM commentary, 'Travelling under enemy convoy is held to be sufficient evidence of forcible resistance to the right of visit, search and capture which renders the vessel subject to attack without warning'.[21]

---

[19] See the work by P Drew, *The Law of Maritime Blockade: Past, Present and Future* (Oxford: Oxford University Press, 2017) and also Drew's chapter in this volume.

[20] See also the Commentary section of the SRM, p. 178. The restriction on the use of mines for this purpose derives from Article 2 of 1907 Hague Convention VIII.

[21] The SRM relies on Art.63 of the 1909 London Declaration as indicative of custom; see SRM, p.198.

Neutral merchant vessels accompanied by neutral warships benefit from exemption from the belligerent right of visit and search: if they are bound for a neutral port; if they are accompanied by neutral warships of either their own of other neutral states by way of agreement; if their flag state is able to warrant that they are not carrying contraband or otherwise acting contrary to their neutral status; and if the commanders of neutral escorting warships can provide all necessary information to belligerent warships that would otherwise be obtained via visit and search (SRM 120).

Colombos and the SRM: A Comparison

It is worth reflecting briefly on the extent to which the SRM is consistent with the rules in Colombos's 1949 Prize Manual. Several issues are worth highlighting, although space only allows for brief details.

Character of Vessels: The SRM focuses on the flag of the vessel (SRM 112 and 113), reflecting Colombos.[22] Reasonable suspicion of a vessel's character can be investigated by visit and search. Enemy character can be determined by several factors, with the most common (SRM 117) being registration, ownership or charter.[23] Other criteria include the residence of the vessel's owner in enemy controlled territory or ownership by a corporation substantially controlled by enemy interests. Colombos supports many of these criteria, including registration, and points out that the British Prize Court asserted a right to investigate beyond the flag where justified.[24] It has also placed great value on domicile, determined primarily by time spent within a place - although establishing it can be problematic in the absence of any clear rule. Commercial domicile was determined by a person's residence in a place for the purposes of trade and carrying on of a business.[25] According to Colombos, continental European states, as well as Japan, looked to the nationality of the individual, rather than residence or domicile, as well as the flag of the vessel.[26] German practice supported the British commercial domicile theory in the First World War, but this was not continued in the Second World War.[27] French doctrine considered where a corporation was founded, with French corporations, like American , considered national and left undisturbed except where violating national laws, such as trading with the enemy.[28] SRM 117 Commentary considers regular domicile law a matter for individual states, which can utilise residence, nationality, or otherwise, as indicative. The international law in this area is clearly unsettled. However, the SRM supports the control test for corporations, arguing that broad acceptance as state practice has made it international law.[29] It also suggests adherence to Article 51(3) of the 1913 Oxford Manual, indicating that States declare their intentions to adhere to either residence or nationality before the outbreak of hostilities.[30]

Character of Cargo: The SRM does not codify the law relating to the character of cargo to any significant degree, instead accepting the traditional rules that the character of goods on enemy vessels is determined by the ownership of the goods, with those unsupported by proof of ownership presumed to be enemy (SRM 117 Commentary). This is consistent

[22] *San Remo* (112, 113); Colombos 79
[23] *San Remo* (117);
[24] Colombos 80
[25] Colombos 70, *The Jonge Klassina* (1804) 5 C. Rob. 297, 303.
[26] Colombos 85-91
[27] Colombos 89
[28] Colombos 86
[29] *San Remo* Explanation (117.1) 193.
[30] *San Remo* Explanation (117.1) 193

with Colombos,[31] who deals with issues not discussed in the SRM, particularly concerning transactions of property. That transacted by enemies, even to neutrals, can be captured as prize subject to adjudication[32] unless the transfer is total, representing actual delivery to the neutral with no reservation by the seller.[33]

Restrictions on Capture of Enemy Property: Both Colombos and SRM restrict the capture of vessels in neutral waters, and allow immunity from capture, usually with the caveat that the ship must be adhering solely to its stated mission, and not be aiding the enemy. SRM 137 provides rules which exempt ships only if they 'are innocently employed in their normal role; do not commit acts harmful to the enemy; immediately submit to identification and inspection when required; and do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required'.[34] Neither work considers postal service vessels as an immune category, despite 1907 Hague Convention XI containing such.[35] This provision was ignored and overturned by practice. Colombos discusses the concept of 'days of grace' for enemy vessels that had, without hostile intent, docked in port before the outbreak of war. Internationally, practice was by no means general during the Second World War, and not uniformly enforced. France granted seven days grace to German ships in 1941. Italy had a declared policy of doing the same but then failed to apply it, immediately seizing ships when war broke out. The US seized foreign vessels, including those flagged in occupied states.[36] The SRM is silent on the matter.

Contraband of War: Colombos defines two elements to contraband: that the goods are destined for enemy territory or control; and that the goods are capable of warlike use.[37] SRM 148 defines contraband thus: 'goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict'. The definitions are broadly similar, although there are some differences in the details, including aspects to do with the eventual destination of goods bound initially for neutral ports but for likely onward transportation to enemy territory.[38] Whether goods were capable of warlike use is partially dependent upon destination as well, but it also led to an earlier distinction between absolute and conditional contraband. During the Second World War this distinction was discarded in favour of a straightforward ban on enemy trade. This was prompted by a recognition of the totality of war between 1939-45.[39] This change has endured, with the only distinction now recognised being that between contraband and free goods (SRM 150).

Navicerts: Colombos considered them 'the most promising method' of avoiding 'unnecessary friction' between neutrals and belligerents, although noting they were used primarily by the UK and France but otherwise not accepted.[40] Such certification is now

---

[31] Colombos 81
[32] Colombos 100, [1916] 5 LI. P.C. 230, 246.
[33] *The Kronprinsessan Margareta* [1921] 1 A.C. 486, 499; *The Vesta* [1921] 1 A.C. 77, 784.
[34] *San Remo* (137)
[35] *1907 Hague Convention XI Relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War*. The Hague, 18 October 1907, Chapter 1, Art. 1-2, which proposes that captured postal correspondence of neutrals and belligerents is inviolable and must be sent on without delay.
[36] Colombos 139-141
[37] Colombos 186-187
[38] San Remo Commentary (148) pages 215-216
[39] Colombos 214
[40] Colombos 216-217

referred to in SRM 122, suggesting Navicerts are now more widely recognised than Colombos had noted.

Unneutral Service: Neutral merchant vessels engaged in 'unneutral service' are liable to attack. Such activities listed by Colombos include carriage of enemy military persons (including conscripts),[41] except where travelling in a wholly private capacity;[42] being controlled by the enemy; receiving assistance from or being convoyed by the enemy;[43] and carriage of enemy dispatches, including the reporting of enemy movements.[44] Compulsion removes neutral authority over the vessel, and so the ship would not be subject to punishment.[45] The underlying principle is that any service given by a neutral ship may aid the enemy in its war. SRM 67 reflects Colombos, but the commentary to it provides a list of particular circumstances in which neutral vessels would be subject to attack.

STATE PRACTICE IN RELATION TO PRIZE SINCE 1945

Any developments in Prize Law would need to be based on customary law or the jurisprudence of any Prize Courts convened since 1945. As there has been no general conflict at sea involving major maritime powers since 1945, there has been no economic warfare of the purpose and scale that led to the development of Prize Law. There have been naval wars, some including the use of blockade and more general interdiction of shipping. Most, however, did not feature economic warfare, not even that between Britain and Argentina over the Falklands/Malvinas Islands. A significant reason has been the short duration of most naval wars; economic warfare is most appropriate in wars of long duration.

We review below those naval wars in which economic warfare methods have been employed. Before we do, it is important to distinguish between naval operations in war and others conducted in situations short of war but which do involve the interdiction of shipping. One set of circumstances, in particular, can lead to confusion. This is when the backdrop is undoubtedly an armed conflict but when maritime interdiction operations are not conducted under the law governing naval war. When the UN Security Council determines there to be a threat to the peace, a breach of the peace, or an act of aggression,[47] it may impose sanctions: diplomatic; economic; or military. Economic sanctions may be enforced by the mounting of a naval embargo operation. Despite these having the appearance of a blockade authorised under Article 42 of the Charter, they are in fact a constabulary means of enforcing economic sanctions under Article 41. For example, while there were armed conflicts in the Former Yugoslavia during the 1990s, related maritime economic embargo operations in the Adriatic and Mediterranean were constabulary operations. Additionally, operations conducted against pirate groups or for other law enforcement purposes on the high seas, are not *guerre de course* but also of a constabulary nature.

---

[41] Colombos 236, *The Asama Maru*
[42] Colombos 235, *The Svithiod* [1920] A.C. 718
[43] Colombos 241
[44] Colombos 232, *The Edna* [1921] 1 A.C. 735, 745.
[45] Colombos 245
[47] *Charter of the United Nations* art 39.

There have been around a dozen significant naval conflicts since 1945, although the number of naval incidents, in which the Law of Armed Conflict (LOAC) may have applied, exceeds that number (LOAC applies as soon as the naval forces of one State engage with those of another, but minor incidents do not invariably escalate into naval war).[48] Very few of the naval conflicts that have occurred have relevance to this discussion; they are:

- **India/Pakistan Conflicts of 1965 and 1971**: Despite both of these conflicts being relatively short, Prize Law was applied by both sides.[49] In 1965, both Pakistan and India issued contraband lists and the High Court of Pakistan condemned approximately fifty vessels as prize.[50] In 1971, both States again issued contraband lists and India conducted visit and search of approximately 100 vessels.[51]
- **Iran/Iraq War 1980-88:** Principally a land war, it did have a significant maritime dimension that considerably disrupted shipping in the Gulf. During the so-called 'Tanker War', Iran attempted to destroy Iraq's ability to export oil. Iran declared all goods going to or from Iraq carried in Iraqi flagged shipping as 'contraband'.[52] Iran may have wished to effect a blockade of Iraq, but it fell short of this because the restrictions on neutral shipping were less constraining. Even if they had been equally constrained, it would not have qualified as blockade because it would not have been effective given the considerable neutral naval presence deployed to the region to ensure the protection of shipping.[53] Iran's operations, clearly an attempt at economic warfare, were not conducted strictly in accordance with Prize Law.
- **Gulf Wars 1990-2003:** During the 1990-91 War, coalition naval forces (over 150 warships from 19 nations) boarded almost a thousand vessels carrying over one million tons of cargo contrary to UN economic sanctions.[54] Notwithstanding the points made above about the constabulary nature of maritime embargo operations, action taken against Iraq following its invasion of Kuwait could be interpreted as use of blockade under Article 42 of the UN Charter rather than the enforcement of economic sanctions under Article 41; it certainly had that effect. Coalition operations continued until the subsequent invasion of Iraq in 2003.
- **Arab/Israeli Conflicts:** Egypt issued a contraband list against Israel in 1950 (modified in 1953) and convened a Prize Court using precedent from Second World War cases. It only operated within its own waters and ports, although it continued to do so until 1979.[55] Syria diverted a Greek registered vessel during

---

[48] See W Heintschel von Heinegg, 'The Difficulties of Conflict Classification: Distinguishing Incidents at Sea from Hostilities, *International Review of the Red Cross,* Vol.98, no.902 (Aug 2017). P.449.

[49] P. Norton 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' in *Harvard International Law Journal* Vol. 17.2 (1976) p. 262.

[50] W. Heintschel von Heinegg 'Visit, Search, Diversion, and Capture in Naval Warfare: Part II, Developments since 1945' (30 Can. Y.B. Int'l L) Volume 89 (1992) p. 96; Norton p. 262

[51] Heintschel von Heinegg, p. 99.

[52] A. De Guttry and N. Ronzitti, *The Iran-Iraq War (1980-1988) and the Law of Naval warfare*, edited by A De Guttry and N Ronzitti, (Grotius Cambridge, 1993) p.24; Heintschel von Heinegg, p. 102.

[53] De Guttry and Ronzitti, p. 24; L. E. Fielding *Maritime Interception and UN Sanctions: Resolving issues in the Persian Gulf War, the conflict in the former Yugoslavia, and the Haiti Crisis* (Austin & Winfield, San Francisco, 1993)

[54] Commander J. Astley III USCG and M. N. Schmitt, USAF. 'The Law of the Sea and Naval Operations' in *Air Force Law Review* Volume 42 (1997) p. 27.

[55] Norton p. 258; Heintschel von Heinegg, pp. 92-93; D.P. O'Connell *International Law and Contemporary Naval Operations* (Australian Government Publishing Service, 1960) p.27

the Yom Kippur War in 1973.[56] The most recent Prize Court activity in the region known to us, however, arose from the Israeli blockade of Gaza. As far as we know, this resulted in the first Prize Court ever convened by Israel.[57] Significantly, the court found against the Israeli Government and made comments about the contemporary relevance of Prize Law. The case followed the 2012 seizure by Israel of the Finnish registered *Estelle*, attempting to breach the Israeli imposed blockade. The Government of Israel sought condemnation of the vessel in the District Court of Haifa, sitting as the Admiralty Court of Israel. The application was based on British legislation, with jurisdiction granted historically to courts in the former Palestine mandate through the British Naval Prize Act 1864 and the Prize Act 1939.[58] In its August 2014 decision[59] it rejected the State's application because the case had been brought before the Court after a delay of ten months and this it deemed excessive under customary international law. The SRM was used as a reference in the case. In one important sense, this case confirms the need for Prize jurisdiction in that it allowed for the State's seizure of the vessel to be declared unlawful. The Court also questioned the continuing relevance of Prize Law; we shall return to this below.

This brief account of relevant naval wars demonstrates the paucity of actual practice. In preparing this chapter, however, we also investigated the verbal practice of seven key States to establish whether they had legislation on Prize and official manuals providing guidance on the content of Prize Law. They all do. Those chosen were Australia, Canada, Germany, India, Russia, the UK and the US.[60]

In Australia, the relevant legislation for the convening of a Prize Court was for many years the *Naval Prize Act 1864* and the *Colonial Courts of Admiralty Act 1890*, both enacted by the Westminster Parliament.[61] Jurisdiction under the latter act was revoked in respect of federal courts by the *Admiralty Act 1988* (Cth) s 44, although the Supreme Courts of the States and self-governing Territories continue to enjoy that jurisdiction.[62] This did not repeal the application of the substantive prize law in the *Naval Prize Act 1864* and subsequent legislation in Australia, but it did remove the relevant jurisdiction of

---

[56] Heintschel von Heinegg p.93

[57] See report by Ruth Levush at http://www.loc.gov/law/foreign-news/article/israel-supreme-court-orders-release-of-ship-captured-attempting-to-break-gaza-blockade/.

[58] See report by Ruth Levush at http://www.loc.gov/law/foreign-news/article/israel-supreme-court-orders-release-of-ship-captured-attempting-to-break-gaza-blockade/.

[59] See http://opiniojuris.org/2014/09/14/guest-post-update-israelpalestine-revival-international-prize-law/

[60] Given the recent rise of China as a major naval power, we would have liked to have included its practice but we had been unable to identify any by the time of writing.

[61] The application of the *Colonial Courts of Admiralty Act 1890* to the High Court of Australia, and by inference to the Supreme Courts of the States, was confirmed in *John Sharp and Sons Ltd v The* Katherine Mackall (1924) 34 CLR 420.

[62] See, eg, *Australian Capital Territory (Self Government) Act 1988* (Cth), Sch 5, pt 3 'Imperial Acts in Force in the Territory' which provides that the following Imperial Acts relevant to prize remain in force in the ACT: *Naval Prize Act 1864* (27&28 Vic, c 25), *Naval Prize (Procedure) Act 1916* (6&7 Geo V, c 2), *Prize Act 1939* (2&3 Geo VI, c 65), *Prize Courts Act 1894* (57&58 Vic, c 39), *Prize Courts Act 1915* (5&6 Geo V, c 57) and *Prize Courts (Procedure) Act 1914* (4&5 Geo V, c 13). On the situation of prize law in Australia, see: Australian Law Reform Commission, *Report No 48 Criminal Admiralty Jurisdiction and Prize* (1990) 117-159; Michael White, *Australian Maritime Law* (Federation Press, Sydney, 2000) 340-51.

Australian federal courts. Prize Law is described in the official publication *ADDP 06.4: The Law of Armed Conflict*.[63]

The Canada Prize Act 1970 grants jurisdiction to the Canadian Federal Court, while Canada's position on Prize Law is contained in the Canadian *Law of Armed Conflict Manual*.[64]

Germany relies on Prize regulation dating back to the Second World War, with current interpretation of Prize Law being contained in the *Joint Service Law of Armed Conflict Manual.* [65]

India relies on *The Naval and Aircraft Prize Act 1971*, with instructions for naval forces contained in *Indian Maritime Doctrine*.[66]

Russia retains Prize jurisdiction before its courts, with internally published Guidance on IHL for the Armed Forces of the Russian Federation.[67]

In the UK, The *Supreme Court Act 1981* provides for the High Court to sit as a Prize Court and to exercise jurisdiction in relation to acts dating from 1864 to 1944. The UK's *Manual of the Law of Armed Conflict* details Prize Law but adds a note to the effect that it is regarded as unlikely that the UK will again need to convene a Prize Court[68]– a controversial statement, although not strictly incorrect as though unlikely it remains possible.

In the US, there is a Code on Admiralty and Prize Cases, and it established two Prize Courts, in New York and California, during Operation Desert Storm. The Department of Defence *Law of War Manual* covers Prize Law,[69] as does the US Navy's *Commander's Handbook*.[70]

PRIZE LAW IN THE CONTEMPORARY CONTEXT

Despite the paucity of naval wars involving economic warfare at sea, significant naval powers retain the belief that they may occur in future and that some measure of preparedness is necessary, especially in the light of current naval tensions. The extant law catered for general naval war in a different age. Would it be adequate and appropriate for an economic warfare campaign conducted today? What would a power resorting to economic warfare need to be prepared for? Here we need to consider the nature of international shipping in the 21st century.

---

[63] Australian Defence Force Warfare Centre 2006, *Law of Armed Conflict*, 1st ed, Defence Publishing Service, Canberra, ACT.

[64] *Canada Prize Act* R.S.C. 1970, c. P-24; *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 31 August 2001.

[65] *Law of Armed Conflict Manual: Joint Service Regulation (ZDv) 15/2,* Bundesministerium der Verteidigung, May 2013.

[66] *The Naval and Aircraft Prize Act* (India) 1971; *Indian Maritime Doctrine 2009*, Indian Navy, Naval Strategic Publication 1.1.

[67] Guidance on International Humanitarian Law for the armed forces of the Russian Federation (2001)

[68] *Senior Courts Act* 1981 (UK) (s 27); *Manual of the Law of Armed Conflict* (JSP 383), Ministry of Defence, August 2013, especially 12.78.1 regarding future Prize Courts.

[69] Department of Defence Law of War Manual, Office of General Counsel Department of Defence, June 2015 (updated December 2016).

[70] NWP 1-14M The Commander's Handbook on the Law of Naval Operations (Edition August 2017).

There have been profound changes to it in the past seventy years. Over 90% of global trade is transported by sea.[71] It has increased massively in volume since the Second World War. In 1950, around half a billion tons of cargo was carried by sea; today, the figure is around 8 billion tons.[72] The successful liner and tramp system that had dominated maritime shipping from the 19th century to the middle of the 20th simply and suddenly disappeared. The reason was to do with high and increasing labour costs, coupled with new alternative mechanized means of handling cargos.[73] Of particular significance was the introduction of the container, a simple and flexible means of transporting general cargo by sea, road and rail. The containerisation of cargo first occurred in the mid-1950s but expanded significantly in the late-1960s and the 1970s. Today, container vessels, the largest with the capacity to transport over 20,000 containers, are a striking feature of a sophisticated global supply system consisting of major shipping companies operating between substantial container handling ports, each linked to vital road and rail networks.[74] The ports are automated facilities with computerised systems for loading and unloading containers, all of which have unique numbers for global tracking. The container has become a fundamentally important factor in globalisation. Shipping costs have plummeted, and this has rendered cheap manufacturing costs (again labour driven) in regions like South and East Asia attractive draws for corporate interests. The unit cost of transporting goods by sea has dropped dramatically.[75]

It is not just container ships that have grown in size; so too have those transporting bulk and liquid cargoes. Globalisation as we know it today would have been impossible without the transformation in shipping ushered in by these developments.

In a parallel attempt to reduce labour costs even further, there has been a post-Second World War trend towards the registration of ships to 'open registries'. Prior to the middle of the 20th century, merchant ships were mostly registered in the ports of the major maritime powers. In recent years, however, those powers have improved domestic conditions of employment and applied stricter employment regulations; their labour costs have risen as a result. Globalisation has not merely expanded trade but rendered it more competitive, with higher labour costs a bar to commercial viability. Shipping companies in major maritime powers found it convenient to re-register vessels in States where labour was cheaper. The previously symbiotic relationship between merchant fleets and naval forces is no more a feature.[76] The ten largest flags today are: Panama; Liberia; the Marshall Islands; Hong Kong; Singapore; Malta; Bahamas; Greece; China; and Cyprus.[77] Only China has a navy of potentially oceanic significance. The quest for ever

---

71 According to the UN International Maritime Organization; see https://business.un.org/en/entities/13

72 See statistics in www.ics-shipping.org/shipping-facts/shipping-and-world-trade/world-seaborne-trade; and www.clarksonsresearch.wordpress.com/tag/global-seaborne-trade/ .

73 M Stopford, *Maritime Economics* (3rd Edition) (London and New York: Routledge, 2009), pp.35-44.

74 See 'Maersk Container Ship Sets New Load Record: 19,038 TEU' in *The Maritime Executive* (posted on 22 August 2018) at www.maritime.executive.com .

75 See M Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger* (Princeton and Oxford: Princeton University Press, 2006).

76 See www.mondaq.co.uk/x/461234/Marine+Shipping/Flag+State+2015+Top+10+Ship+Registers for data on Flag States

77 UNCTAD, *Review of Maritime Transport* (Geneva: United Nations, 2015), Table 2.3, p.36, available at http://unctad.org/en/PublicationsLibrary/rmt2015_en.pdf.

lower shipping costs is also about to enter another phase, prompted by the prospect of unmanned autonomous shipping.[78]

This evidence makes it difficult to imagine an economic warfare campaign being conducted using the existing body of Prize Law. The bulk of maritime trade is carried by flags that are most likely to be neutral in any future naval conflict. While Prize Law would arguably remain relevant, the process of establishing the presence of contraband in a typical neutral merchant ship at sea would demand something very different from the traditional visit and search routine. Even if some effective system of checking cargoes on neutrally flagged large container ships was established (perhaps through a sophisticated, internationally run, computer-based successor to the Navicert system), the taking of that ship as prize or its diversion to a 'convenient port' would be problematic. For a properly regulated economic warfare campaign to be possible today, Prize Law would need to be re-developed to cope with the contemporary and rapidly evolving shipping industry.

Finally, it is interesting to reflect on what the Israeli Prize Court said in the case of *Estelle*. It contrasted the strong protection of private property in land warfare, with the lack of such protection in naval war. It went on to consider the possibility that aspects of Prize Law seemed to be incompatible with developing Human Rights Law.[79] It dealt with the importance of 'armed conflict' and the shift away from the traditional legal framework in 'war'. It also commented on the possibility that Prize Law had fallen into desuetude. While the owners of the vessel argued that it had, the Court disagreed, saying that it remained a feature of Customary Law, quoting the relatively recently published SRM.[80]

CONCLUSIONS: ARE PRIZE COURTS STILL RELEVANT?

There may be very understandable concerns about the content of Prize Law today, but this does not lead us inexorably to the conclusion that Prize Courts are no longer relevant. Indeed, arguably they have an important role to play in response to inadequate or inappropriate law; it is a judicial function to interpret the law to take account of changing circumstances. It is compelling that a set of contemporary circumstances led to the convening of a Prize Court in Israel.

There is little doubt for us that Prize Law needs to be substantially reviewed in the light of existing circumstances, however. As this chapter was being prepared, a project is getting underway to review the SRM. This will involve representatives from a large number of states globally. They will include some of the world's leading specialists on the Laws of Armed Conflict Applicable at Sea who will be well aware of the contemporary environment within which economic warfare methods would be applied. The relevant rules in the SRM will certainly be on the project agenda. It is considered most unlikely,

---

[78] Rolls Royce Marine, *Autonomous Ships: The Next Step*, www.rolls-royce.com/~/media/Files/R/Rolls-Royce/documents/customers/marine/ship-intel/rr-ship-intel-aawa-8pg.pdf

[79] International Human Rights Law did not exist before the Second World War and Prize Law took no account of it; indeed, it only became a significant influence internationally in recent decades. See S Moyn, *The Last Utopia: Human Rights in History* (Cambridge Massachusetts: Belknap Press, 2012).

[80] See http://opiniojuris.org/2014/09/14/guest-post-update-israelpalestine-revival-international-prize-law/

however, that those conducting the review will dismiss entirely the role of Prize Courts. The law needs to change but the courts, whose role is to interpret that law as it evolves, will most certainly retain relevance.