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World War Prize Law Applied in a Limited War Situation: Egyptian Restrictions on Neutral Shipping With Israel†

Establishment of an economic or military blockade raises the currently interesting problem of determining what cargoes, if any, should be allowed to reach the enemy. During the two World Wars, using nineteenth century limited war doctrines, Allied prize courts created a body of globally-oriented international prize law. After tracing this development, the author examines its applicability to a modern limited war situation in the context of the Egyptian-Israeli conflict. He concludes with an analytical discussion of standards to be used in carrying over nineteenth century and World War prize doctrines to a present day limited war.

Thomas D. Brown, Jr.*

INTRODUCTION

Although the exercise by Egypt of belligerent rights to interfere with neutral shipping to Israel is most often discussed in terms of Egypt's duties under the Constantinople Convention and obligations imposed through United Nations membership, the purpose of this article is to examine the scope of her belligerent rights and duties with respect to neutrals under general doctrines of international law. The central doctrine Egypt has applied has been the right of contraband control. In applying it, Egypt has relied upon the scope of that right as defined by the Allied belligerents of the past two World Wars. The Allies, involved in global wars, expanded the scope of belligerent rights over neutral rights at sea far beyond what had been done during the limited wars of the nineteenth century.

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The problem is to discover the extent to which Egypt has been successful in applying these global war precedents and to discuss the possibility of finding new standards for their application in a limited war situation. Such a discussion must consider the extent to which neutrals have effectively sought to impose legal restrictions on the limited war belligerents more confining than those imposed on the global war belligerents, for only through a proper interaction between neutral and belligerent can limited war standards of contraband law be achieved.

I. THE PRECEDENT OF THE GLOBAL WARS

A. THE NEW DEFINITION OF CONTRABAND

In the century preceding World War I, Great Britain¹ did not engage in a single war involving major naval operations.² Thus, in 1914 the law of prize³ "stood . . . virtually where it was left by Lord Stowell at the end of the Napoleonic Wars."⁴ The unratified Declaration of London of 1909⁵ divided neutral cargo into the three standard categories: conditional contraband, unconditional or absolute contraband, and "free" goods. The signatories agreed that the declaration contained "the generally recognised [*sic*] principles of international law"⁶ pertaining to neutral and belligerent rights at sea. Susceptibility to use in war was needed if goods were to be considered war contraband.⁷ Conditional contraband included those items susceptible either to peaceful or belligerent use. Under the customary law, they could be seized only if destined for the enemy government or its armed forces. Absolute contraband, or specialized war goods, could be seized if found merely to be bound for territory controlled by the enemy. "Free" goods, or noncontraband, could not be seized.

1. Egyptian prize law has modeled itself primarily on British practice. See *The Hoegh De Vries*, [1950] Int'l L. Rep. 447 (No. 150), 6 *REVUE EGYPTIENNE DE DROIT INTERNATIONAL* [hereinafter cited R.E.D.I.] 225 (1950) where the court states: "The Egyptian Prize Courts have, in general, adopted the British rules in Prize matters . . ."

2. Fitzmaurice, *Some Aspects of Modern Contraband Control and The Law of Prize*, 22 *BRIT. YB. INT'L L.* 73, 74 (1945).

3. Prize law is that system of laws and rules applicable to the capture of prize at sea; its condemnation, right of captors, and distribution of proceeds. *BLACK, LAW DICTIONARY* 1363 (4th ed. 1951).

4. Fitzmaurice, *supra* note 2, at 74.

5. Reprinted in SMITH, *THE LAW AND CUSTOM OF THE SEA* 185-212 (2d ed. 1950).

6. *Id.* at 185.

7. See TUCKER, *WAR AND NEUTRALITY AT SEA* 263 (U.S. Naval War College, International Law Studies, 1955).

Shortly after the outbreak of World War I, the belligerents moved most items on the "free" list to the conditional list and most of those on the conditional list to the absolute list.⁸ In World War II, Britain and most of the belligerents abandoned the technique of specific listings used in the Declaration of London in favor of broad inclusive categories.⁹ Although the distinction between absolute and conditional contraband was formally retained, this distinction was rendered meaningless in actual practice.

This blurring of the distinction between absolute and conditional contraband was due in part to the expanded definition of "warlike use" which had evolved in World War I.¹⁰ The expansion was justified on the grounds that modern technology had rendered practically every import susceptible to military use.¹¹ In addition, this concept was expanded to include goods which sustained the *civilian* sphere of the economy, thereby "affording any help . . . to the enemy in his prosecution of the war."¹² Consequently, the national economic base sustaining the war effort was now conceived of as a vital and appropriate target of contraband control.¹³ A particular item could now be confiscated as absolute contraband either when there was a probability that it would be used in the war effort,¹⁴ or that it would indirectly sustain the waging of war.¹⁵

The scope of the contraband control power was also expanded on the theory that mere territorial destination was sufficient to condemn conditional contraband¹⁶ because total state control in a dictatorship was such that all goods bound for the country could be considered as bound for the state.

8. See SMITH, *op. cit. supra* note 5, at 266.

9. See copy of contraband list proclaimed by Great Britain in 1939 and subsequently adopted by New Zealand, Canada, Australia, and France. U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS 91-92 (1944-45); TUCKER, *op. cit. supra* note 7, at 267 n.7.

10. TUCKER, *op. cit. supra* note 7, at 266.

11. *Ibid.*

12. COLOMBOS, PRIZE 187 (3d ed. 1949).

13. See generally I MEDLICOTT, THE ECONOMIC BLOCKADE I (1952), quoting the official definition of the "Economic Warfare" which was to be waged by the British Ministry of Economic Warfare.

14. See STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 481 (2d impression rev. 1959); TUCKER, *op. cit. supra* note 7, at 266 n.6.

15. See The Hakan, [1916] P. 266, 272; COLOMBOS, *op. cit. supra* note 12, at 197.

16. COLOMBOS, *op. cit. supra* note 12, at 195-98; STONE, *op. cit. supra* note 14, at 484; TUCKER, *op. cit. supra* note 7, at 268-69 n.10.

In *The Alwaki and Other Vessels*¹⁷ the British Prize Court condemned foodstuffs bound for Germany on the ground that "there is the clearest possible evidence of German decrees which . . . impose Government control on all these articles and prescribe that they are automatically seized at the moment of crossing the frontier . . ." In *The Monte Contes*¹⁸ the court held that it was a matter of common notoriety that Italy, "as ruler of a totalitarian State," requisitioned and disposed of goods in the manner that would best promote the war effort.

These and other prize cases may appear to have stated the problem of conditional contraband as one of proof, the notion being that the line between combatant and noncombatant could no longer be drawn with clarity. In fact the courts were saying that the distinction was no longer relevant. The premises underlying global war, with the enemy's economic base a key objective of belligerent operations, are totally inconsistent with any combatant, noncombatant distinction. This attitude is most clearly indicated in *The Hakan*¹⁹ where the court found the distinction irrelevant on the ground that an increase in the civilian food supply would release an equal quantity of other goods to the military. Although the court was dealing with cargoes bound for totalitarian states, this was not a factor necessary to support the decision.

B. CONTINUOUS VOYAGE UPDATED: THE PROBLEM OF ULTIMATE DESTINATION

In both World Wars, direct overseas trade between neutrals and the Axis powers was almost totally cut off by Allied "war zones"²⁰ and long-distance blockades,²¹ both instituted as reprisals for allegedly illegal acts of the enemy against neutral shipping. In both wars, therefore, prize law developed primarily in the context of trade between overseas or "adjacent" neutrals and the enemy.²² Since hostile destination is required for contraband con-

17. [1938-40] Ann. Dig. 585, 586 (No. 223).

18. [1943-45] Ann. Dig. 544, 548 (No. 196).

19. [1918] A.C. 148, 151; see COLOMBOS, *op. cit. supra* note 12, at 196.

20. See SMITH, *op. cit. supra* note 5, at 97-99; TUCKER, *op. cit. supra* note 7, at 296-305.

21. See COLOMBOS, *op. cit. supra* note 12, at 266-83; STONE, *op. cit. supra* note 14, at 500-22; TUCKER, *op. cit. supra* note 7, at 305-15.

22. These terms were used by the British Ministry of Economic Warfare to distinguish, for purposes of economic blockade policy, between neutrals adjacent to the enemy and those overseas from him. 1 MEDLICOTT, *op. cit. supra* note 13, at 19-21.

demnation, an extensive application of the doctrine of continuous voyage or ultimate destination was central to the development of global war contraband law. The basic principle of this doctrine²³ was that the neutral could not do indirectly what he was barred from doing directly; it could not protect cargoes from seizure by claiming an ostensibly neutral destination when, in fact, the cargo was ultimately bound for the enemy. Furthermore, doctrine had to be updated to meet the more difficult problems of proof caused by the ease with which transshipments from neutral to enemy destination could be made and the ease with which such transactions could be legally camouflaged to avoid belligerent detection.

In order to aid themselves in establishing a reasonable suspicion of hostile destination, a series of presumptions were evolved by the Prize Court and by Orders-in-Council which furnished the court with *prima facie* grounds for condemnation. The British Order-in-Council of July 7, 1916 declared that enemy destination was presumed to exist:

until the contrary is shown, if the goods are consigned . . . to or for a person who, during the present hostilities, has forwarded contraband goods to an enemy authority, or an agent of the enemy state, or to or for a person in territory belonging to or occupied by the enemy, or if the goods are consigned "to order", or if the ship's papers do not show who is the real consignee of the goods.²⁴

There was also a presumption of enemy destination if the claimants attempted to withhold material documents in their possession or produced false papers, if the consignor or consignee was on the blacklist, or if either the shipper or consignee was closely associated through trade operations with the enemy.²⁵ In addition, the absence of a "navicert"²⁶ was considered a "suspicion" of enemy destination.²⁷

23. The doctrine is formally called the doctrine of "ultimate enemy destination." COLOMBOS, *op. cit. supra* note 12, at 187-92; TUCKER, *op. cit. supra* note 7, at 270.

24. U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS 49 (1944-45).

25. See COLOMBOS, *op. cit. supra* note 12, at 206-09.

26. Navicerts were "certificates issued by the diplomatic or consular representative of the belligerent in a neutral country testifying that the cargo on a vessel proceeding to a neutral port was not such as to be liable to seizure." 2 OPPENHEIM, INTERNATIONAL LAW § 421b, at 855 (7th ed. Lauterpacht 1952). For a comprehensive discussion of the navicert system during World War I see RITCHIE, THE "NAVICERT" SYSTEM DURING THE WORLD WAR (1938).

27. See COLOMBOS, *op. cit. supra* note 12, at 217.

Under the doctrine of "rationing,"²⁸ if an "adjacent" neutral imported goods in excess of its normal peacetime requirements as determined by the British Ministry of Economic Warfare, the ultimate destination of the excess was presumed to be the enemy.²⁹ Thus, unlike the other assumptions which attempted to establish some factual connections between the particular goods in question and the probability of hostile destination, the doctrine of "rationing" provided grounds for seizure and condemnation based on statistical probabilities in no way related to the particular facts surrounding the shipment in question. This has been described as "the most striking, and certainly the most controverted, development in the expansion of belligerent claims to control neutral trade in contraband."³⁰

Although traditional law had limited belligerents to the exercising of their rights of visit and search while at sea, effective application of the continuous voyage principle under modern conditions required British naval patrols to divert neutral shipping to Contraband Control Bases in Great Britain while information was gathered as to the cargo in question.³¹ If the captor established a prima facie case of ultimate enemy destination, the claimant then had the burden of rebutting the inference.³² Since the control of neutral shipping by the discretionary grant of navicerts removed the effective administration of the doctrine of ultimate destination from the jurisdictional control of the prize court, it would appear that the global war implementation of the doctrine involved more

28. See 1 MEDLICOTT, *op. cit. supra* note 13, at 124-33, 422-24, 432, for consideration of the practical planning problems. Medicott reveals that compulsory rationing served such ends as "preventing the accumulation of large stocks of dangerous commodities in adjacent neutral territory" so as not to tempt enemy conquest of that neutral. *Id.* at 424. It appears that there was a diversity of political and military considerations which determined what would be an adequate quantity of imports for domestic consumption. See TUCKER, *op. cit. supra* note 7, at 274-75; Fitzmaurice, *supra* note 2, at 89-95.

29. See TUCKER, *op. cit. supra* note 7, at 274-75.

30. *Ibid.*

31. See *id.* at 272. For a factual description of the diversion and contraband control base process, see 1 MEDLICOTT, *op. cit. supra* note 13, at 70-85.

32. This was initially decided in *The Louisiana and Other Ships*, [1918] 5 Lloyd's Prize Cases 230, 252. During World War II the Judicial Committee of the Privy Council reaffirmed the principle in the following terms:

The captor has to maintain his seizure by showing the case of reasonable suspicion in order to justify what he did. The claimant has to establish by evidence of fact his affirmative case, which he can do in a case like this by showing the precise character of the adventure and showing that the ostensible destination is the real destination.

The Monte Contes, [1943-45] Ann. Dig. 544, 545 (No. 196).

than a mere adaptation of substantive prize case law to fit new circumstances.³³

C. THE REPRISAL CONTEXT OF GLOBAL WAR CONTRABAND LAW

In the global war setting, prize court condemnation became a less important means of contraband control than other techniques³⁴ which were justified on the basis of reprisal for alleged breaches of international law committed by the Axis powers.

The reprisal Order-in-Council of July 31, 1940,³⁵ came in response to the expansion of Axis power on the continent during the preceding months. The traditional scheme of interception and diversion through patrolling principal trade routes to key ports of adjacent neutrals became unworkable because of the size of the coastline which had to be patrolled. Controlling neutral shipping at the source became essential.³⁶ The reprisal instituted a three-fold system of controls consisting of "compulsory" navicerting, forced rationing of neutrals and ship warrants.³⁷ Although most of the controls found precedent in the prior war, Medlicott concludes that "the comprehensiveness of the scheme represented a substantial innovation . . ."³⁸

The new Order-in-Council made mere absence of a navicert grounds for seizure of ship and cargo.³⁹ The British also extended the use of Ship's War Trade Lists which blacklisted "vessels with whose records the British authorities were dissatisfied."⁴⁰ No navicert would be issued to ships "on the Statutory List, Ships' Black List or the Ships' Discrimination List."⁴¹ The ship warrant system also supplemented the navicert scheme. These were issued to each ship whose owner had promised to comply with the Brit-

33. As defined by Lauterpacht:

[R]eprisals in time of war occur when one belligerent retaliates upon another, by means of otherwise illegitimate acts of warfare, in order to compel him and his subjects and members of his forces to abandon illegitimate acts of warfare and to comply in future with the rules of legitimate warfare.

2 OPPENHEIM, *op. cit. supra* note 26, § 247 at 561.

34. See generally Fitzmaurice, *supra* note 2, at 74.

35. See TUCKER, *op. cit. supra* note 7, at 313. For the full text of this document see [1940] 1 Stat. Rules & Orders 1129 (No. 1436).

36. 1 MEDLICOTT, *op. cit. supra* note 13, at 413-17.

37. TUCKER, *op. cit. supra* note 7, at 314 n.76.

38. 1 MEDLICOTT, *op. cit. supra* note 13, at 422.

39. TUCKER, *op. cit. supra* note 7, at 314.

40. 1 MEDLICOTT, *op. cit. supra* note 13, at 447.

41. *Id.* at 438.

ish regulation of neutral shipping.⁴² The British would deny the various world-wide shipping facilities under their control to any of the company's ships not having the warrant.⁴³

This network of "source" controls on neutral shipping imposed, in effect, a long-distance⁴⁴ blockade of all goods indirectly bound for the enemy or originating with the enemy—a blockade preceded by prohibition of all direct trade between neutrals and the enemy belligerent. By submitting to such a system of controls, the neutral shipper might be considered by enemy belligerents to have engaged in an act of nonneutral service.⁴⁵ Thus, in the future the neutral might be forced to comply with a system of belligerent control which in turn creates nonneutral service grounds for seizure by the other belligerent.⁴⁶

II. EGYPTIAN MEASURES OF CONTRABAND CONTROL

A. INITIAL MEASURES

The present "war"⁴⁷ between Egypt and Israel began on May

42. *Id.* at 422.

43. *Ibid.* For a comprehensive discussion of "Sovereign Right" measures taken by the Allies in World War I, consult 3 TURLINGTON, *NEUTRALITY, ITS HISTORY, ECONOMICS AND LAW: THE WORLD WAR PERIOD 67-99* (1936).

44. See TUCKER, *op. cit. supra* note 7, at 305-06, where he states that the British long-distance blockade policy rested largely on two orders in council—those of March 11, 1915 and of February 16, 1917.

45. Lauterpacht explains that the state of neutrality involves both rights and duties, including the duty of "abstaining from assisting either belligerent whether actively or passively . . ." 2 OPPENHEIM, *op. cit. supra* note 26, § 297, at 659. Thus, "according to customary rules of International Law, adopted also in the Declaration of London, a neutral vessel may be captured if visit or search establishes the fact, or arouses grave suspicion, that she is rendering unneutral service to the enemy." *Id.* at 841. See also the statement that: "It seems reasonably well-established that a neutral merchant vessel in accepting a safe-conduct pass from a belligerent subjects himself to the control of the latter and performs an act of unneutral service." TUCKER, *op. cit. supra* note 7, at 322.

46. *Ibid.* See 7 HACKWORTH, *INTERNATIONAL LAW* 107 (1943).

47. For purposes of this discussion it is assumed Egypt's contention that a state of war continues to exist between it and Israel is valid, and that it is justified in exercising rights of belligerency despite the General Armistice Agreement between Israel and Egypt, signed at Rhodes, February 24, 1949, 42 U.N.T.S. 251. For the Egyptian arguments to this effect, see *Conclusions du Gouvernement Egyptien au sujet des plaintes des Gouvernements etrangers quant a la visite des navires neutres et la saisie des objets de contrebande dans les ports egyptiens*, [hereinafter referred to as *Conclusions du Gouvernement Egyptien*] 7 R.E.D.I. 235, 238 (1951); Ghobashy, *Egypt's Attitude*

15, 1948, when the state of Israel was created and armed hostilities commenced between the two states. On that date the Egyptian Government established an inspection service for all ships entering its harbors.⁴⁸ Subsequent military proclamations in May⁴⁹ and June⁵⁰ provided for the seizure of all goods and munitions on ships destined directly or indirectly for Israel. Such capture was to be exercised "in accordance with the rules established by public international law."⁵¹ In addition, port authorities were authorized to refuse to provision vessels suspected of aiding the Israelis.⁵²

The validity of a seizure made under these preceding authorizations was to be decided by a "*Conseil de Prises*" or Prize Court established by Proclamation No. 38 on July 8, 1948.⁵³ Article 3 of the proclamation provided that contraband would include all items sent directly or indirectly to Israel which might be of such a nature as to intensify the Israeli war effort.⁵⁴ Furthermore, article 3 stipulated that the court was to apply the rules of public international law.⁵⁵

In view of the relative freedom of the belligerent in defining contraband during the two global wars, the President of the Egyptian Prize Court concluded in 1949 that "lists of contraband have lost their importance."⁵⁶ Instead, they were said to have

Towards International Law as Expressed in the United Nations—The Egyptian Israeli Dispute on the Freedom of Navigation in the Suez Canal, 11 R.E.D.I. 121 (1955). For a summation of the argument in rebuttal see Gross, *Passage Through the Suez Canal of Israel-Bound Cargo and Israel Ships*, 51 AM. J. INT'L L. 530, 543-49 (1957). See Resolution of the Security Council of the United Nations, U.N. Doc. No. S/2298/Rev. 1 (1951), for the official view of the United Nations.

48. JOURNAL OFFICIEL DU GOUVERNEMENT EGYPTIEN [hereinafter cited as J.O.] No. 51 (May 15, 1948). For a listing of subsequent proclamations and decrees through June 1949, see Brinton, *Palestine Conflict—Summary of Principal War Measures Including Proclamations, Decrees, Arretes, Notices and Memoranda*, 5 R.E.D.I. 73 (1949).

49. J.O. No. 55 (May 19, 1948).

50. J.O. No. 89 (June 28, 1948).

51. J.O. No. 55 (May 19, 1948).

52. *Ibid.*

53. J.O. No. 93 (July 8, 1948), subsequently codified as *Loi n. 32 du 12 Avril 1950 relative au Conseil des Prises*, J.O. No. 64 (June 26, 1950); see Brinton, *supra* note 45, at 76, for later proclamations relating to the Prize Court. The procedural aspects of the Prize Court are discussed in Ahmed Safwat Bey, *The Egyptian Prize Court: Organization and Procedure*, 5 R.E.D.I. 28 (1949).

54. J.O. No. 93 (July 8, 1948).

55. *Ibid.*

56. See Ahmed Safwat Bey, *supra* note 53, at 30.

been "replaced by the generally accepted idea of considering as contraband all goods that help to strengthen the war effort."⁵⁷ Subsequently, however, Egypt did produce several successive contraband lists modeled substantially on the expansive global war definitions of contraband.⁵⁸ Egypt has maintained that subsequent to the initial control measures it has constantly sought instructions to ease tensions whenever possible through its Prize Court.⁵⁹ However, it does not appear that the decree of February 6, 1950,⁶⁰ as modified in 1953 — the official contraband list — has involved any less stringent a standard than was laid down in 1949. In 1957, citing the amended decree, the Prize Court in *The Fedala*,⁶¹ held "goods which strengthened the war effort" contraband.

The 1950 Royal Decree also provided the first codification of the presumptions of ultimate enemy destination.⁶² Borrowing largely from World War precedent, hostile destination was to be presumed if the ship was known to be a contraband carrier, if the shipowner or consignees had sufficient commercial ties with the Israelis, or if the consignors or consignees were on the blacklist.⁶³ Hostile destination was also to be presumed for vessels bound for a port "in the vicinity of a port controlled by the enemy."⁶⁴

57.

Since the importation of luxuries and unnecessary commodities is generally prohibited during war, it follows that practically all imports were considered necessary to the economic and military effort of the country shall be condemned as contraband [*sic*].

It has been ironically remarked that every state fixes the list of contraband for her enemy by fixing the list of imports allowed in her territory.

All imports allowed by a belligerent are thereby likely to be considered as contraband by her enemies.

See *id.* at 29.

58. See *The Klipfontein*, [1949] Ann. Dig. 589 (No. 210), 5 R.E.D.I. 147 (secondhand clothing confiscated); *The Bataan*, [1949] Ann. Dig. 590 (No. 211), 5 R.E.D.I. 150 (used footwear and overcoats confiscated); *The Empire Pickwick*, [1949] Ann. Dig. 597, 598 (No. 216) 5 R.E.D.I. 148 (tobacco confiscated); *The Denis Gulu*, [1949] Ann. Dig. 598 (No. 217), 5 R.E.D.I. 145 (cargo of bran held as contraband). In *The Fedala*, [1957] Int'l L. Rep. 992, 13 R.E.D.I. 131, the Royal Decree of 1950 as amended was invoked to permit confiscation of a cargo of meat, hides, and personal effects.

59. *Conclusions du Gouvernement Egyptien*, *supra* note 47, at 251.

60. J.O. No. 36 (April 3, 1950); U.N. SECURITY COUNCIL OFF. REC. 9th year, 662d meeting (S/3179) (1954).

61. [1957] Int'l L. Rep. 992, 943, 13 R.E.D.I. 131.

62. J.O. No. 36 (April 3, 1950).

63. *Ibid.*

64. U.N. SECURITY COUNCIL OFF. REC. 9th year, 662d meeting (S/3179) (1954).

B. THE EGYPTIAN DEFINITION OF CONTRABAND

In 1949 the President of the Egyptian Prize Court stated that during the two World Wars the distinction between absolute and conditional contraband was waived by the prize courts.⁶⁵ In the early cases, the Prize Court adhered, in a somewhat uncertain manner, to the formal distinction while depriving it of content by applying the global war expansive concept of hostile destination. In *The Klipfontein*,⁶⁶ the first case to discuss this issue, a cargo of secondhand clothes consigned to Israel and intended for relief purposes was seized and held confiscable. The court stated:

It cannot be doubted that the clothes consigned to civilians of a belligerent may be used by the armed forces, and, if they are in fact sent to civilians then — by virtue of the mobilization of all the forces of the country and the employment of civilians in defense operations or assisting the military — the clothes assist the war effort and must be regarded as conditional contraband of war.⁶⁷

In *The Triport*,⁶⁸ the court finally discarded the distinction altogether, citing a World War I case, *The Hakan*.⁶⁹ The court concluded that “articles of relative contraband [foodstuffs] have become absolute contraband, becoming thereby liable to capture whether or not destined for the use of the civilian population.”⁷⁰

C. THE EGYPTIAN PRIZE COURT AND THE PROBLEM OF ULTIMATE DESTINATION

The Egyptian military proclamations of 1948 establishing the system of inspection of neutral vessels, incorporated the basic doctrine of continuous voyage by its reference to goods bound indirectly for Israel.⁷¹ As noted, the statutory presumptions of hostile

65. Ahmed Safwat Bey, *supra* note 53, at 30.

66. [1949] Ann. Dig. 589 (No. 210), 5 R.E.D.I. 147.

67. *Id.* at 590.

68. [1949] Ann. Dig. 595, 6 R.E.D.I. 216.

69. [1918] A.C. 544, 548 (No. 196).

70. See *The Triport*, [1949] Ann. Dig. 595, 6 R.E.D.I. 216. For an interesting comment relating to these last three cases, see the remarks of the Egyptian Ambassador to the U.N.:

In making out the list of commodities regarded as contraband, my Government has confined the seizure and confiscation procedure to those foodstuffs which are intended for the use of the Israel armed forces, excluding foodstuffs which are intended for the use of the civil population; . . . [A]dhering to its attitude of scrupulous moderation, my Government has never applied the confiscation procedure to any cargo of foodstuffs.

U.N. SECURITY COUNCIL OFF. REC. 9th year, 658th meeting 30, 31 (S/PV. 658) (1954).

71. J.O. No. 93 (July 8, 1948).

destination provided by the 1950 Royal Decree were modeled substantially after global war precedents.⁷²

Although the majority of Egyptian prize cases have dealt with direct shipments to or from Israel, the global war doctrine of ultimate destination has been applied in several instances. One such case which illustrates Egyptian practice is that of *The Good Hope Castle*.⁷³ There, fifty sacks of coffee had been seized at Port Said en route to Genoa "in transit" by order of an English corporation with an "advice note" to a Milan company which had in turn sold the goods to the Italian claimant. The Milan firm had several branches including Cyprus and Haifa. The court found: (1) the firm was on a blacklist for "dealing in contraband;" (2) the port of Genoa was "notorious as a centre of contraband traffic to Palestine;" and (3) as the goods were shipped "in transit" they were "therefore quite clearly not destined for any locality in Italy."⁷⁴ Finally, an intercepted letter in the hands of the court indicated that at the time of shipment Israel was in need of coffee. All of these factors together, then, supported a presumption of hostile destination.

In *The Flying Trader*,⁷⁵ the court seized tractors bound for New York via Genoa. It stated that given the necessary grounds for a presumption of enemy destination, the burden is on the claimant to prove that the cargo is bound for neutral territory, and "to prove that in no way could the cargo have reached enemy territory after its arrival in neutral territory."⁷⁶

During the World Wars, implementation of the continuous voyage principle was the central concern of the Western Allies in attempting to control neutral trade with the enemy. For the Egyptians, however, it has been a doctrine of clearly secondary importance. Egypt has not engaged in the use of statistical presumptions of enemy destination in an attempt to control certain segments of the intraneutral trade using the canal. And, although Egypt has used the presumptions of enemy destination inherited from global practice, in each case the court has tended to rely on the total factual situation at hand rather than to rest merely on statutory presumptions.

72. *Ibid.*

73. [1949] Ann. Dig. 574, 6 R.E.D.I. 214.

74. *Id.* at 575.

75. [1950] Int'l L. Rep. 440 (No. 149).

76. *Id.* at 443. The court cites *The Louisiana and Other Ships*, [1918] 5 Lloyd's Prize Cases 230.

D. EGYPTIAN "SOURCE" CONTROLS: RESTRICTIONS ON OIL TANKER MOVEMENT

On June 18, 1950, the Egyptian Council of Ministers introduced regulations which required masters of tankers northbound through the canal to specify the port of their final destination at Port Said.⁷⁷ Upon reaching the port of destination, the master was required to obtain a certification from local customs officials countersigned by the nearest Egyptian Consulate that the cargo was being discharged for local consumption.⁷⁸ Finally, this certification of local consumption was to be produced at Suez within one month after discharge.⁷⁹ Tankers southbound through the canal were required to produce their logbooks in order to indicate whether they had previously stopped at an Israeli port. If this were the case, they would be blacklisted and denied fuel, stores, and repair facilities in Egyptian ports.⁸⁰ Egypt justified these new regulations in terms of contraband control: "*C'est pour faciliter les passage de ces cargaisons innocentes que les nouvelles mesures . . . ont ete adoptees par le Gouvernement Egyptien.*"⁸¹

The effectiveness of the measures taken is indicated by the considerable volume of protests which single out tanker restrictions for special comment.⁸² There did not appear to have been any appreciable relaxation of these measures, however, prior to the

77. See N.Y. Times, July 24, 1949, p. 12, col. 3, where it is reported that the Egyptian paper *Al Misri* had announced that henceforth force would be used to detain tankers leaving Port Said without final clearance papers.

78. N.Y. Times, July 28, 1950, p. 37, col. 5.

79. *Ibid.*

80. Israel makes this charge at U.N. SECURITY COUNCIL OFF. REC. 6th year, 549th meeting 3 (S/PV.549) (1951). It is unclear whether this order originated with the June 18, 1950, regulations or with the provisions of J.O. No. 55 (May 19, 1948) which first authorized the withholding of port facilities.

81. Note of the Egyptian Foreign Minister as quoted in *Conclusions du Gouvernement Egyptien*, *supra* note 47, at 256.

82. For examples of a typical early protest, see N.Y. Times, July 28, 1950, p. 37, col. 5, where the American Merchant Marine Institute protests the new restrictions on the grounds that: a) the master has the prerogative to stop at any port en route to destination to save lives and property; b) he is in no position to know if the oil is only for local consumption; c) it is doubtful whether customs authorities ashore would have authority to countersign such a declaration; d) master, owner, and customs authorities have no knowledge of what is ultimately done with the oil; e) the plan is "impracticable, unworkable, objectionable and an unjustified interference with international trade." In the N.Y. Times, August 24, 1950, p. 53, col. 5, it was reported that the

Security Council Resolution of September 1, 1951.⁸³ After this date, increased tanker traffic through the canal was reported.⁸⁴ From that time onward it appears that Egypt continued to regard petroleum as contraband but declined to require the above guarantees of domestic consumption.

It is noteworthy that none of the above neutral complaints saw fit to deal with the tanker restrictions on the grounds that they were an illegal extension of the belligerent right to visit and search. There was no legal comparison of these "source" restrictions with those used by the Allies during the World Wars. This cannot be read, however, as a tacit endorsement of the legality of these measures since the neutrals refused to concede that Egypt had legitimate belligerent status.⁸⁵ Of some significance also is the relative restraint exercised by such injured neutral powers as the United Kingdom which confined itself to the normal diplomatic and United Nations channels of protest without instituting any economic countermeasures for these tanker restrictions.

E. EGYPTIAN "SOURCE" CONTROLS: BLACKLISTING

Since 1951 the primary operative sanction on neutral trade with Israel has been the blacklisting of neutral vessels engaged in the trade. All blacklisted ships have been denied access to Egyptian port facilities.⁸⁶ In reply to neutral protests Egypt has relied on global war precedent as justification for these measures⁸⁷ arguing that: "*Le refus d'aider les navires neutres qui assistent*

Ambassadors to Egypt of the United States, Great Britain, and France had all lodged protests.

83. For reports of neutral protests during the summer of 1951, following the announcement of the relaxation of "unnecessary formalities," see N.Y. Times, August 1, 1951, p. 8, col. 4; N.Y. Times, July 17, 1951, p. 11, col. 1; N.Y. Times, July 13, 1951, p. 6, col. 3.

84. See N.Y. Times, September 18, 1951, p. 5, col. 3, which reported that "tanker traffic through the canal in the past week has increased to more than ten daily." *But see* Israeli statement before the Security Council in 1954 that few tankers go through Suez and stop at Haifa for fear of being blacklisted, N.Y. Times, March 9, 1951, p. 8, col. 6.

85. U.N. Doc. No. S/2298/Rev.1 (1951).

86. J.O. No. 89 (June 28, 1948).

87.

Comment oublier que le Gouvernement Britannique, durant les deux dernieres guerres, privait du charbon et autres combustibles, dans les ports anglais, les navires neutres qui refusaient de se soumettre a son controle, ou d'accepter les restrictions edictees relativement au commerce avec l'Allemagne et ses allies.

Conclusions du Gouvernement Egyptien, supra note 47, at 258.

l'ennemi est tellement dans la nature des choses, qu'il ne saurait être considéré comme contraire à la pratique internationale en la matière."⁸⁸ More specifically, Egypt has contended that despite the international status of the canal, the adjacent port facilities are under Egyptian sovereignty and hence could be withheld from neutral usage.⁸⁹ By December 1950 approximately fifty ships of different nationalities had been blacklisted.⁹⁰

Despite the Security Council Resolution of September 1, 1951,⁹¹ calling for the Egyptians to remove sanctions applied to certain neutral ships which had stopped at Israeli ports, Egypt has since continued to blacklist neutral vessels.⁹² Arguing that the effectiveness of Egypt's sanctions is indicated more by the absence than the presence of incidents, Israel concluded in 1956 that "the blacklist is . . . the most stringent of deterrents."⁹³

F. THE NATURE AND EFFECT OF NEUTRAL PROTESTS

Egypt has not cut back the number of items included on its contraband lists in response to neutral protests.⁹⁴ Rather, Egypt has responded to neutral protests against the exercise of her belligerent rights by relaxing enforcement of those rights while allowing them to remain essentially unchanged. Thus, in June 1949 the British Ambassador was assured that the Egyptian check on suspected contraband bound for Israel would become less rigorous.⁹⁵

88. *Ibid.*

89. N.Y. Times, August 26, 1950, p. 5, col. 3.

90. N.Y. Times, December 21, 1950, p. 55, col. 2. However, Israel charged 88 ships were on the blacklist at that time, N.Y. Times, March 9, 1951, p. 8, col. 6. The discrepancy might be explained by the report in N.Y. Times, September 18, 1951, p. 5, col. 3: "Egypt's blacklist is kept secret. No ship knows she is on the blacklist until actually calling at an Egyptian port, where she may be refused facilities."

91. "And further noting . . . that these restrictions together with sanctions applied by Egypt to certain ships which have visited Israel represent unjustified interference with the rights of nations to navigate the seas and trade freely." U.N. Doc. No. S/2298/Rev. 1, ¶ 9, (1951).

92. For specific incidents, see N.Y. Times, September 21, 1951, p. 49, col. 3 (blacklisted U.S. ship detained but released after protests as a "gesture of courtesy"), N.Y. Times, January 29, 1953, p. 51, col. 3 (Norwegian freighter landing shipwreck survivors refused permission to take on food and water).

93. Letter from the representative of Israel to the President of the Security Council, October 13, 1956. U.N. SECURITY COUNCIL OFF. REC. SUPP. JAN-MARCH at 6 (S/3673) (1956).

94. See text accompanying notes 56, 57, 59, 60, 61 *supra*.

95. See N.Y. Times, June 21, 1949, p. 8, col. 4, which also reports that the Egyptian Government had instructed the Port Said Prize Board "to ease restrictions on foreign shipping passing through the Suez Canal."

It was also reported that since the February armistice the number of ships searched had steadily declined.⁹⁶

Much of this relaxation⁹⁷ appears to have been due to the Security Council Resolution of September 1, 1951,⁹⁸ which expressed many of the neutrals' objections made in preceding months and years and which have since been invoked whenever later complaints have arisen. The resolution found that Egypt had been acting unlawfully in purporting to exercise belligerent rights in view of its obligations under the Armistice of Rhodes and the Security Council resolutions of August 11, 1950⁹⁹ and November 17, 1950,¹⁰⁰ and that their continued exercise would be "inconsistent with the objectives of a peaceful settlement between the parties."¹⁰¹ It does not state that Egyptian contraband law as applied by the Prize Court has been at variance with customary international prize doctrine. Nor does it state that the blacklisting of neutral vessels and the imposition of "source"¹⁰² controls of contraband traffic are violations or overextensions of customary rights accorded belligerents.

Israel has maintained, however, that the decline in incidents involving neutral trade with Israel has been due to the fact that

96. N.Y. Times, June 18, 1949, p. 5, col. 4, where it is reported that while some 5,000 vessels had visited Egyptian ports at that time only 500 had been searched.

97. In March 1954 Egypt stated before the United Nations Security Council that: "Since the Security Council adopted its resolution of 1 September 1951, no ship or cargo has been confiscated by Egypt. Further, . . . since that date . . . only 55 suspected ships have been subjected to the inspection procedure out of 32,047 ships . . ." U.N. SECURITY COUNCIL OFF. REC. 9th year, 661st meeting 17 (S/PV.661) (1954). However, see the incidents involving the vessels *Rimfrost*, *Franca Maria*, and *Laritan* all brought before the Security Council by Israel at U.N. SECURITY COUNCIL OFF. REC. 9th year, 658th meeting 13 (S/PV.658) (1954). Egypt's reply is at U.N. SECURITY COUNCIL OFF. REC. 9th year, 659th meeting 10 (S/PV.659) (1954).

98. U.N. Doc. No. S/2298/Rev. 1 (1951). See debates in U.N. Doc. No. S/PV.658, S/PV.659, S/PV.661 to S/PV.664, as well as the debates concerning *The Bat Galim* incident, S/PV.682 to S/PV.688, all in the 1954 Official record of the U.N. Security Council.

99. U.N. Doc. No. S/1376 (1949).

100. U.N. SECURITY COUNCIL OFF. REC. 5th year, Supp. Jan.-Dec. 1, at 122 (S/1907) (1950).

101. See authorities cited note 98 *supra*.

102. I MEDLICOTT, *THE ECONOMIC BLOCKADE* 416-17 (1952), uses the term "source" control of contraband as an alternative to control on the seas by visit and search of neutral vessels. The term is used here to include any system which controls contraband through measures at the loading points of a ship's voyage.

the very existence of such procedures and regulations has served as a deterrent to neutrals who would otherwise use the canal to trade with Israel, and not to the lack of enforcement of contraband control.¹⁰³ Egypt's reply has been that commerce through the canal has been on the increase since the initiation of belligerent controls and that there has been no restricting influence on total neutral commerce through the canal regardless of the exercise or nonexercise of these belligerent rights.¹⁰⁴

If both Israel and Egypt are right in their statements, then it would appear that a small-power belligerent has applied a rather effective regimen of control over neutral commerce with another small-power belligerent without provoking significant economic or military retaliation on the part of the impeded neutrals.¹⁰⁵

III. GLOBAL WAR PRIZE LAW APPLIED OUT OF CONTEXT

A. THE NEED FOR A REEXAMINATION

In contrast to the global wars, neither Egypt nor Israel has justified any incursion on neutral shipping rights on the basis of reprisals. While in the World Wars the primary controls on neutral commerce were put into effect by comprehensive reprisal measures,¹⁰⁶ in this situation the sole belligerent right exercised is that of contraband control done primarily by visit and search of neutral vessels. Furthermore, this is probably to be the pattern in future limited wars where effective long-distance blockade reprisals will be outside the means and against the best interests of

103. U.N. SECURITY COUNCIL OFF. REC. 6th year, 551st meeting 11 (S/PV.551) (1951); U.N. SECURITY COUNCIL OFF. REC. 9th year, 658th meeting 12, 14 (S/PV.658) (1954); U.N. SECURITY COUNCIL OFF. REC. 9th year, 659th meeting 15 (S/PV.659) (1954).

104. For Egyptian arguments that total tanker traffic in the canal was not curtailed by the new controls, see El-HEFNAOUI, *LES PROBLEMES CONTEMPORAINS POSES PAR LE CANAL DE SUEZ* 229, 234-35 (1951), reporting increasing traffic and tonnage in those years and an increase in tanker traffic. Statistics have been presented by Egypt, U.N. SECURITY COUNCIL OFF. REC. 6th year, 549th meeting 20 (S/PV.549) (1951); U.N. SECURITY COUNCIL OFF. REC. 9th year, 658th meeting 30 (S/PV.658) (1953); U.N. SECURITY COUNCIL OFF. REC. 9th year, 659th meeting 11 (S/PV.659) (1954).

105. The events of October 1956 were the result of Egypt's nationalization of the canal and not her prize relations with Israel except insofar as the heightened tensions between the two at the time served to encourage Western notions of Nasser's bad intentions.

106. See generally 2 OPPENHEIM, *INTERNATIONAL LAW* §§ 247-50 (7th ed. Lauterpacht 1952).

the belligerents and where a close blockade¹⁰⁷ will be impractical or ineffective. Thus Egypt is applying global war contraband law in the absence of those reprisal measures which had superseded judicial prize law in importance in the global context. Taking Egypt as our model, two questions are thus presented. First, of what legal significance is the fact that global war contraband doctrine has now become the primary means of controlling neutral commerce with an enemy in a limited war context? Second, apart from its increased importance, to what extent can the application of this contraband law be fundamentally challenged on the basis that it is being applied out of context—that is, without the presence of more far-reaching reprisal control measures?

If the role of judicial control of contraband has assumed a position of importance in this limited war situation which it did not have in a global war context, it would seem essential to consider whether this might have any bearing on the scope of the belligerent's right to define contraband. Stone categorizes the positions on this issue as, (1) the Groatian view which "posits the proximate relation of the goods to warlike activity" and, (2) the view that the belligerent is free within the boundaries set by effective neutral protest.¹⁰⁸ Assuming the validity of the belligerent's contention that the term "warlike activity" must be vastly expanded to meet modern warfare conditions, it is still open to a limited war neutral to maintain that a belligerent's freedom to designate contraband must be confined at the outer limits by effective neutral protest. Thus, when an inherited contraband list includes items which bear only the most indirect relationship to the activities of war and that listing was made in the absence of effective¹⁰⁹ neutral protest, it is possible for the modern war neutral to maintain that the discretion exercised in that vacuum cannot now be cited as the limits of a belligerent's freedom in defining contraband.

Furthermore, a modern limited war neutral might conceivably

107. As defined by Smith, the traditional or close blockade was generally "regarded as the maritime counterpart of siege by land, with which in practice it was frequently combined. For this reason the original purpose of blockade was purely strategic, the reduction of a defended place by cutting off all supplies." SMITH, *THE LAW AND CUSTOM OF THE SEA* 110 (2d ed. 1950).

108. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 479 (2d impression rev. 1959).

109. As used here, "effective" means that kind of protest which if translated into actual physical resistance would have a reasonable chance of success. Perhaps only the United States could have "effectively" protested the Allied contraband lists prior to its entry into both wars. But this is speculation and we are concerned with the situation as it existed most of the time.

cite the Declaration of London with its sizable "free" list for the proposition that in the nineteenth century limited wars certain definite limits existed on a belligerent's powers to define contraband. Therefore, despite the disappearance of those limits in a global war situation, and notwithstanding subsequent modernization, limited war belligerents must adjust to a limited war standard in defining contraband. This standard should include at least some room for "free" goods. It would seem, then, that the scope of this right to define contraband might once more be made the issue of legal controversy.

Implicit in the idea of granting a more central role to substantive contraband law in limited war than in global war is the possibility of neutral objection to the application of particular substantive global war contraband doctrines in the limited war situation. The neutral in a limited war, when confronted by contraband law evolved during the World Wars, might well argue that this law developed in the shadow of reprisal measures. Therefore there was little direct acquiescence to contraband law as such by the neutrals. That is, the supervening long-distance blockade controls of all goods between overseas and adjacent neutrals meant that the pinch of specific developments in contraband law was not felt. Naturally, such neutral objections as existed were focused on objecting to these more stringent measures and consequently contraband doctrine developed by default. This would be a frontal attack on the whole notion that the contraband law of the World Wars represents the present state of the law as arrived at by the lawmaking process of assertion followed by acquiescence in that assertion.

Alternatively, the limited war neutral might submit that any acquiescence by neutrals to specific contraband measures in a total war context was acquiescence valid only under those particular circumstances. The neutrals concurred in an expansive contraband list and in an elimination of conditional contraband only as this was done by global war belligerents, reserving their rights in unforeseeable future conflicts. In addition, the modern neutral might maintain that this accession was a matter of survival and resulted from an inability to resist the demands of the global war belligerent. In conclusion, the limited war neutral would urge that today he should not be bound by law borne out of the weakness of neutrals of the past.

The belligerent rejoinder to these arguments would be twofold. First, today's objecting neutrals who were belligerents in a past global war are estopped from objecting to substantive doc-

trines which they developed. This is the fact situation in the Egyptian case, but as yet Egypt has not been forced to make this rebuttal. Second, the above objections to the application of global prize law to the limited war situation are not necessarily objections to the substantive content of the law itself. On the merits, the belligerent would argue, this present day contraband law reflects a reasonable adjustment of the traditional law to modern war circumstances.

This progression of arguments leads to the conclusion that the limited war prize court does have a responsibility to reexamine the merits of the global war law it is applying. The neutrals' contentions only throw doubt on the applicability of this law in a modern limited war. The burden should rest on the belligerent to justify its use in his particular and different situation. In seeking to assume the wide scope rights of the global war belligerent, the limited war participant should also assume the burden of explaining why this claim to total war rights is valid.

B. PROBLEMS OF REEXAMINATION

1. *The Need for Standards*

The World Wars differed in more than size from prior wars — in contrast to past history the goal of the belligerents was total and unconditional defeat of the enemy state. Intense economic warfare aimed at a total disruption of the enemy economy was one factor in the expansion of the right of contraband control. While the prize courts modified the old doctrines with reference to the presence of totalitarian state controls, ease of transshipment from an adjacent neutral, and the increased susceptibility of all goods to warlike use, these modifications were also based on the underlying premise that prize law should serve the purpose of total economic warfare.

In contrast to the objectives of the World War belligerents, Egypt has maintained that she has exercised belligerent rights solely for self-defense.¹¹⁰ In effect, Egypt has been engaged in a war limited both geographically and in objective. In this sense, modern limited war is similar to those limited wars of the nineteenth century where:

war was fought for a limited and intelligible purpose and was brought to an end by a reasonable peace settlement of limited effect. All the states which were directly engaged were most anxious to secure the sympathy of neutrals, and the danger of provoking neutral inter-

110. *Conclusions du Gouvernement Egyptien, supra* note 47, at 235.

vention on the enemy side provided a very real sanction for the observance of the laws of war at sea.¹¹¹

Furthermore, it should be assumed it is in the interest of the neutral community to keep such conflicts confined.¹¹² This being the case, we may take the Egyptian example as typical of modern limited wars in the sense that the belligerents seek limited military goals.

If prize law in the limited war is to serve these more limited belligerent objectives, in applying the global war precedents the prize court should disregard doctrines incorporated into the law primarily to serve total economic warfare objectives and use only those changes made better to fulfill a continued purpose in the light of new conditions. Total war doctrines usable in a limited war situation should be applied only if the conditions referred to in the global context are present in the specific limited war situation. This may be illustrated by more specific discussion.

2. *Continuous Voyage*

Global war belligerents expanded the scope of the right to visit and search intraneutral shipping by expanding the grounds on which the prize court could make findings of hostile destination. These new presumptions were made necessary by the problems of proof caused by easy indirect shipment to enemy destinations. They were also justified as the only effective way of totally isolating the enemy economy. These presumptions of ultimate hostile destination were evolved to facilitate the exercise of the traditional right of visit and search, while the procedures for administering them were intended to replace the right.

In exercising her rights of visit and search, Egypt has relied on presumptions and doctrines based on factual probability which were created to implement the global war principle of ultimate destination. Egyptian prize law has also incorporated the burden of proof rules applied by the global war belligerents; like the World War powers, her Prize Court does not feel constrained to look only to the ship itself for evidence. However, Egypt has chosen not to ration or apply statistical presumptions of enemy destination to cargoes going through the canal to Genoa or Cyprus.

The contraband control practices which Egypt has adopted

111. SMITH, *op. cit. supra* note 107, at 75.

112. Reference to the arms embargo which was initially imposed by the great powers on the Middle East in 1948-49 is made in N.Y. Times, June 18, 1949, p. 5, col. 4.

do not relate to or serve economic blockade purposes. Rather they are a means designed to meet the evidentiary problems involved. Thus, the court has not been faced with the duty of ferreting out and segregating any implicit global purpose doctrines. Furthermore, the conditions which justified these new presumptions and rules of evidence during global wars seem to be equally present in a limited war situation.

The tanker restrictions imposed also are an implementation of the doctrine of ultimate destination or continuous voyage. As a compulsory "source" control, they appear similar to the compulsory navicert scheme. Note, however, that the effect of this scheme is only to inhibit direct traffic in a contraband item with the enemy. Passage is denied only if the carrier refuses to agree to guarantee his innocent destination and not because a navicert is withheld for some undisclosed reason. Neither is any quota or rationing used in permitting the tanker passage. If the principle of "source" controls was recognized during the World Wars, then this one use limited to a single contraband item would seem to be justified.

Nevertheless, such techniques may no longer be feasible or desirable in a limited war context. In most cases, an effective system will be beyond the means of a limited war belligerent. Also, submission to such a system may provoke seizures for nonneutral service by the offended belligerent. It would seem Israel might have done so in this case. If the neutral powers' main interest is in limiting such conflicts, it would seem doubtful they would tolerate such a system except in unusual circumstances such as Egypt's control of the Suez Canal.

3. *Definition of Contraband*

Assuming that a modern limited war has more limited objectives than did the World Wars, the term "warlike use" defined so widely by the global war belligerents should be restricted to a more limited military sense. The argument by a neutral in the Egyptian situation might well be that since Egypt claims to be engaged in a defensive war the court has no business confiscating relief clothing, foodstuffs, or other products which can only have an indirect effect on Israel's ability to wage war. This has not been a prolonged war of attrition, and domestic economic strength should not prove determinative. Egypt, however, seems justified in asserting that the technological changes in waging warfare present in global war also exist in mechanized limited wars. How-

ever, while this may be true it should not justify seizing goods as contraband merely because their introduction into the enemy economy will permit release of some other item for military usage. The introduction of this principle¹¹³ into limited war contraband usage brands everything as contraband and in so doing incorporates global war economic strangulation purposes into a limited war.

In summary, it seems in a war of limited or defined military objectives the definition of contraband should be limited to items of direct military usage. The exact definition depends on prize court findings as to the state of technology of the enemy.

The present distinction between conditional and absolute contraband may also require reexamination before it can be used in a limited war situation. Although many items of conditional contraband were reclassified as absolute contraband for a number of reasons, the change was effected primarily under the theory that the total controls exercised by a totalitarian belligerent meant that all goods destined for the country were, in fact, destined for the belligerent government. Thus, if a belligerent involved in a future limited war has a totalitarian government, the doctrine would seem to be useable in its present form. However, a prize court faced with shipments to a nontotalitarian enemy will have to reappraise the relevancy of the distinction.

It should be noted that the Egyptian Prize Court saw no duty to make specific findings as to particular war measures employed by the Israelis. Nor did it consider the extent to which the Israeli Government was exercising total control of the national economy such that ostensibly civilian destinations were in fact to be used militarily. Moreover, even if the seizing of conditional contraband is viewed as a reasonable adaptation to new circumstances (rather than as an incorporation of more far-reaching total war doctrines), it is still essential that a prize court determine whether the enemy's war measures and the degree of government control present justify blurring the distinction between absolute and conditional contraband. Similarly, if a prize court chooses to seize conditional contraband because the entire enemy population is engaged in the war effort, specific findings of fact are again required.

C. THE EFFECT OF NEUTRAL — BELLIGERENT CONFLICT

Assuming a situation where a limited war belligerent diverts neutral shipping to its own ports for purposes of contraband con-

113. See COLOMBOS, PRIZE 182-97 (3d ed. 1949).

trol, and assuming also a substantial volume of neutral protest, it appears that three main paths of reaction to neutral protest are open to the belligerent.

First, it can do nothing about the neutral protests and continue the practice of diversion. However, Egyptian reaction indicates even a belligerent possessed of substantial countervailing power vis-à-vis powerful neutrals will act when the volume of neutral protests becomes loud enough. The first choice marks the most dangerous course for the belligerent — one where the risks may well outweigh the advantages of a strict policy against the enemy belligerent.

Second, it can relax the enforcement of the expansive global war doctrine which it refuses to discard or modify. This is basically what Egypt has done in applying the law of contraband. Rather than attempt to tailor down a global war doctrine to fit a limited war situation by narrowing the contraband definition or restoring the conditional-unconditional distinction, Egypt has merely allowed contraband to pass through when conditions warranted. If this is the pattern for the future application of global war doctrine to limited war settings, certain problems are presented.

This irregular exercise of belligerent rights is done at the discretion of the belligerent without notice to the neutrals. In the long run, such a pattern would tend to aggravate belligerent-neutral tensions. Furthermore, it is incompatible with any system of public international law which seeks to achieve predictability as to the legal consequences of state actions. Nevertheless, this may be the only alternative where the body of law itself has not developed substantive distinctions between large scale and small scale conflicts.

Finally, the belligerent can exercise, on a regular basis, substantive rights of a more limited scope. This procedure of adaptation, however, would require a constant assertion by both parties of their conflicting versions of the scope of their respective rights. A global war doctrine will be hammered into a new limited war shape only through constant, conflicting pressures. If the limited war belligerent chooses to stop enforcing his rights altogether when the pressure from neutrals becomes too heavy, rather than to modify the scope of those rights, it seems doubtful that any distinct limited war prize law can develop.

Thus to mold a new doctrine the neutrals must have more than an interest in merely confining the conflict. They must have an interest in expanding the scope of their right to trade with belligerents. While it may be expected that neutrals will seek confinement,

it is not altogether clear they will always be compelled to pursue expanded trade rights. Today, when the great commercial powers have interests throughout the world, a limited restriction is not likely to prove disastrous. Furthermore, while the balance of power may weigh in favor of the neutrals in a limited war, it must also be remembered that it will take considerable belligerent pressure to bring about concerted neutral reaction. When Great Britain was faced with a loss of three-fourths of the oil supply to its Haifa refinery it protested through normal diplomatic channels. When it was threatened with a cut off of all oil shipments through the canal it invaded Egypt.

It is in this very important way that modern limited war differs from the localized conflicts of the nineteenth century when neutral commercial rights dominated prize law. In the nineteenth century undiversified economic structures could be unbalanced by the severance of one of a few major trade routes. Thus, neutral trading rights were to be jealously protected. Increased trade in the twentieth century has mitigated the effect of the economic loss caused by the foreclosure of a single trade route or market.

CONCLUSION

Despite the renewed importance of the prize doctrine of contraband seizure in a limited war context, it appears there has been little in the way of development of a separate standard in that law for limited war belligerents. This is due in part to the fact that the expansive grounds for seizure of neutral commerce have only been infrequently applied. In part, it would also seem to be due to the fact that some of the reasons which led to the expansion of these doctrines by global war belligerents are also present in a limited war context. Thus, Egypt can claim that mechanized warfare, whether large or small scale, must necessarily lead to a broader definition of contraband.

Assuming contraband law will continue to be of central importance in future limited wars, the responsibility lies with the prize courts to reexamine World War contraband doctrine. Such a judicial reconsideration, however, must await the diligent assertion of a more expanded version of neutral rights by the neutrals themselves. Diplomatic protest rather than prize court argument has been the means of neutral objection in the Egyptian situation, thus making development of new prize doctrines difficult. Although global war doctrines have been found to be oversized, there has been little attempt made to modify them down to scale.

