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THE LAW OF WAR AND NEUTRALITY AT SEA

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XII. VISIT, SEARCH, SEIZURE AND DESTRUCTION OF NEUTRAL VESSELS AND AIRCRAFT

A. VISIT AND SEARCH OF NEUTRAL VESSELS

Visit and search forms what has long been regarded as an ancillary right of belligerents, and serves the purpose of enabling the latter to determine the character of merchant vessels, the nature of their employment, and any other facts that may bear upon their relation to the war.[1] Generally speaking, the traditional justification urged on behalf of the belligerent right to visit and search neutral merchantmen remains unchanged today. So long as neutral states are placed under no obligation to prevent their subjects from rendering certain forms of assistance to a belligerent they cannot complain if belligerents, in turn, make use of a procedure designed to prevent an enemy from receiving such assistance.

At the same time, the unquestioned right of belligerents to check the activities of neutral merchantmen through visit and search does not indicate with sufficient precision the scope of the measures belligerents may resort to in order to render their preventive efforts effective. It is only natural that belligerents have sought to interpret a right long accorded them by the customary law in a manner intended to achieve maximum effectiveness in preventing contraband carriage, blockade breach and the performance of unneutral services. Inevitably this has led to the belligerent plea that changed conditions necessitate alterations in a procedure that is no longer wholly applicable to these conditions. Equally natural, however, has been the reticence of neutrals to yield to novel procedures which—though perhaps justifiable from the viewpoint of the belligerent's

[1] See, generally, *Law of Naval Warfare*, Article 502. Article 31 of the U. S. Naval War Code of 1900 defined the traditional purpose of visit and search as follows: "The object of the visit or search of a vessel is: (1) to determine its nationality (2) to ascertain whether contraband of war is on board (3) to ascertain whether a breach of blockade is intended or has been committed (4) to ascertain whether the vessel is engaged in any capacity in the service of the enemy." The early history of visit and search is given detailed treatment in Jessup and Deák, *Neutrality:* Vol. I, *The Origins*, pp. 157 ff. A thorough survey of state practice through World War I may be found in A. P. Higgins, "Le droit de visite et de capture dans la guerre maritime," *Recueil Des Cours*, 11 (1926), pp. 70–166. World War II developments are briefly traced by S. W. D. Rowson, *op. cit.*, pp. 202 ff., and the British system is described at length by Medlicott, *op. cit.*, pp. 70 ff. United States opinion and practice is reviewed in Hyde, *op. cit.*, pp. 1958 ff., and *U. S. Naval War College, International Law Situations, 1926*, pp. 43–73.

interests—clearly result in granting belligerents a far greater measure of control over neutral commerce than the traditional rules permitted. In consequence, both World Wars have witnessed a continuing controversy between neutrals and belligerents over the detailed interpretation and application of a right whose legitimacy—in principle—has long been sanctioned by international law.[2]

The visit and search of neutral merchantmen may be exercised anywhere outside of neutral jurisdiction [3] by the warships and military aircraft of a belligerent. Although the legitimacy of visit and search by military aircraft, and even by submarines as well, occasionally has been questioned by writers, it is clear that no valid objection can be posed to belligerent utilization of these instruments if they are otherwise used in conformity with the rules governing the conduct of surface warships. Controversy as to the use of aircraft and submarines in belligerent operations directed against neutral shipping has its real basis in the claim that the special characteristics of the latter may serve to justify departure from rules appli-

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[2] Here again, as in the case of neutral-belligerent controversies over contraband and blockade, the nature of the difficulty is readily apparent. The belligerent has maintained that the detailed interpretation and application of a right (i. e., to visit and search neutral merchantmen) must be determined in the light of the general purpose the right is intended to serve (i. e., the prevention, through seizure, of contraband carriage, blockade breach). Hence if changed conditions—or at least what the belligerent alleges to be changed conditions—threaten to frustrate the effective exercise of an established right the detailed rules must be altered to meet these changed conditions, while still preserving the basic purpose. But the neutral has either denied the legitimacy of the plea of changed conditions or has disputed that the novel measures introduced by belligerents represent a reasonable interpretation of the essential purpose served by a right whose validity is not denied. In the light of earlier remarks it need hardly be stated that "in logic" there is no satisfactory way out of the situation, save by an examination of state practice and the possible efficacy of novel belligerent measures in altering traditional procedures.

[3] In practice this has meant the territorial waters of neutral states, though it has earlier been observed that there is a discernible tendency on the part of neutral states to extend the prohibition against the belligerent commission of hostile acts—including visit and search—to waters adjacent to the maritime territorial belt (see pp. 224–6). It may also be noted that the visit and search—as well as the seizure—of neutral merchantmen is permitted only during a period of belligerency, recognized as such by third states. The record of third states in denying this right either during a period of civil war (where the insurgents have not been yet accorded the status of belligerents) or in a situation of "armed conflict" (where the parties involved make no declaration of war and deny any intent to wage war) is reasonably consistent. Whether the right to visit and search—and seize—neutral merchantmen extends into the period following the conclusion of a general armistice, and prior to the formal termination of the war, is not entirely clear. Undoubtedly, as between the belligerents the exercise of the right of prize during this period may be regulated by the provisions of the armistice. But it is difficult to see how the latter agreement could affect in any way the rights and duties of neutrals. For an affirmative answer to this question, see Oppenheim-Lauterpacht (*op. cit.*, pp. 848–9): ". . . since an armistice does not bring war to an end, and since the exercise of the right of visitation is not an act of warfare, it may be exercised during the time of a partial or general armistice." It must be admitted, however, that actual practice in this regard is almost non-existent.

cable to surface warships, a claim that is more properly dealt with in a later connection.[4] Here it is necessary merely to emphasize that the subjects of the right of visit and search must be strictly limited to craft formally commissioned in the armed forces of a belligerent, and thereby generally permitted to exercise belligerent rights at sea.

The objects of the belligerent right of visit and search include all privately owned neutral vessels. It is equally settled that neutral warships, as well as other public vessels operating in the service of the neutral's armed forces, may not be made the objects of visit and search. Beyond this point, however, a measure of uncertainty prevails both as to the liability to visit and search of other publicly owned and operated neutral vessels and of privately owned neutral merchantmen sailing under convoy of neutral warships bearing the same nationality.[5] In either case, belligerent recognition of the neutral's claim to exemption from visit and search of necessity entails the latter's acceptance of full responsibility for insuring that the vessels so exempted will abstain from rendering any form of assistance to a belligerent.

Prior to World War I attention had been directed principally to the status of privately owned neutral merchantmen sailing under convoy of neutral warships. Despite persistent opposition on the part of Great Britain the opinion and practice of most states during the nineteenth century was to accord exemption from visit and search to convoyed vessels provided adequate assurance—based upon thorough examination—could be obtained from the commander of the convoy concerning the cargo carried by, and the innocent employment of, all vessels in the convoy.[6] This broad consensus of the so-called neutral "right of convoy" was accorded recognition in Articles 61 and 62 of the unratified 1909 Declaration of London, and, at the time, received even the approval of Great Britain.[7] However, in the

[4] See pp. 35–24. Thus the absence of any provision in the 1923 Rules of Aerial Warfare governing the visit and search of merchant vessels by aircraft was not due to an inability to agree upon the right, as such, when applied to aircraft, but upon the specific rules that were to govern the exercise of this right (see p. 342). In the case of submarines a similar distinction is relevant, though here Article 22 of the 1930 London Naval Treaty expressly regulated the matter by declaring that in their actions with respect to merchant vessels submarines must conform to the rules applicable to surface vessels.

[5] A clear distinction must be drawn between sailing under neutral convoy and sailing under belligerent convoy. It has already been observed (see pp. 321) that acceptance of the protection of belligerent warships renders neutral vessels liable either to attack or to seizure and subsequent condemnation.—It would also appear that neutral merchantmen under convoy of warships of another neutral have not been considered exempt from visit and search.

[6] See E. Gordon, *La Visite des Convoies Neutres* (1935).

[7] Articles 61 and 62 of the Declaration of London read:

"Neutral vessels under convoy of their national flag are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent ship of war, all information as to the character of the vessels and their cargoes, which could be obtained by visit and search.

If the commander of the belligerent ship of war has reason to suspect that the confidence

course of the 1914 war Great Britain reverted to her traditional position and insisted upon a right to exercise visit and search over neutral merchant vessels, even though the latter might be found sailing under convoy of warships of their own nationality. At the same time the vast majority of states have continued to endorse the practice which grants exemption to this category of vessels.[8]

In practice, the question of neutral convoys has decreased in importance, since neutral states have manifested little desire in recent naval hostilities to convoy their merchant vessels.[9] Much more important is the status of publicly owned and operated neutral vessels engaged in ordinary commercial activities. Liability of the latter to visit and search remains a matter that has yet to be clearly resolved by state practice, though it is true there

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of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to conduct an investigation. He must state the result of such investigation in a report, of which a copy is furnished to the officer of the ship of war. If, in the opinion of the commander of the convoy, the facts thus stated justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels."

Prior to the Declaration of London, Article 30 of the U. S. Naval War Code (1900) had provided that: "Convoys of neutral merchant vessels, under escort of vessels of war of their own State, are exempt from the right of search upon proper assurances, based on thorough examination, from the commander of the convoy." Later, the 1917 and 1941 *Instructions* substantially followed Articles 61 and 62 of the Declaration of London. And see *Law of Naval Warfare*, Article 502 as well as note 10 thereto.

[8] E. g., Article 110 of the 1934 French Naval Instructions, Articles 187 and 188 of the 1938 Italian Laws of War and Article 34 of the 1939 German Prize Law Code.—If the commander of a belligerent warship is dissatisfied with the assurances given him by the commander of the neutral convoy the proper action is to report the incident to his government. The latter may then complain to the neutral state and press for proper redress at the diplomatic level.

[9] There are only two or three instances of neutral convoy during World War I and apparently none at all in the 1939 war. See Hackworth, *op. cit.*, Vol. VII, pp. 208–12. See also Benjamin Akzin ("Neutral Convoys in Law and Practice," *Michigan Law Review*, 40 (1941), pp. 1–23), who attributes this atrophy of neutral convoys to the all inclusive character of modern contraband lists and the belligerent creation of so-called "blockade" zones covering vast areas of the high seas. Thus, in the case of apparently innocent goods having a neutral destination, application of the principle of ultimate enemy destination would give rise to uncertainty and controversy unless the neutral state were prepared to guarantee that the cargoes being convoyed were intended only for neutral consumption. Even then, the problem of barred zones would remain. Neutral convoys have never been permitted to pass through blockaded areas, and belligerents might well insist that in the case of barred zones or war zones—particularly when established as a measure of reprisal—neutral vessels could not be accorded passage under any circumstances. To these considerations must be added the unwillingness of neutrals to assign a substantial portion of their naval strength to the task of convoying merchant vessels. In this connection, mention may be made of the convoys undertaken by United States naval forces in the Atlantic during the final months prior to this country's entrance into hostilities in 1941. By this time the United States had openly abandoned any attempt to observe the duties laid upon neutrals by the traditional law. The American merchant vessels under convoy carried war materials to Great Britain, and, on occasion, these convoys also included British merchant vessels. Whatever the justification that may otherwise be urged on behalf of this abandonment of neutral duties (see pp. 167–8), it is clear that American policy during this period can have little relevance to the problem of neutral convoys in the sense indicated above.

is a growing opinion that these vessels ought to be assimilated—at least for the purpose of visit and search—to the status of privately owned merchant vessels.[10]

1. *The Traditional Procedure For Conducting Visit and Search*

Customary international law does not lay down detailed rules governing the mode of conducting visit and search and belligerents have always enjoyed a certain discretion in this regard. In general, however, a substantial measure of uniformity came to characterize the traditional practices of states, and this uniformity was reflected in the special instructions issued by maritime powers to their naval forces. Before calling upon a neutral merchantman to submit to visitation a belligerent warship is required to show its true colors. In addition, visitation must be preceded by a clear signal on the part of the warship that the merchant vessel is expected to stop and bring to. The notification of intention to visit may be accomplished by any of several means, e. g., by firing a blank charge, by international flag signal, or even by radio. Nor does international law prescribe the distance a belligerent warship must keep from the vessel being visited, which may vary according to the conditions of the sea, the size and character of the visiting warship, and many other factors.

If a neutral vessel complies with the summons the belligerent is forbidden to resort to forcible measures. However, if the neutral vessel takes to flight she may be pursued and brought to, even though this may require the resort to measures of force. In addition, a neutral vessel that responds to a belligerent summons to lie to by measures of forcible resistance may be made the object of a degree of force necessary to compel the neutral vessel to submit to visit and search.[11] Acts of forcible resistance on the part of a neutral vessel, justifying the employment of force by a belligerent warship,

[10] See p. 214 and note 44 thereto. The uncertainty that presently prevails over the status of publicly owned merchant vessels engaged in ordinary commercial undertakings can hardly be regarded with anything but dissatisfaction. Nevertheless, there is very little that may usefully be said on this subject other than to stress that it does remain unsettled in state practice and offers but one further example of the growing obsolescence of the traditional law and the unwillingness of states to agree upon changes in that law. Nor is the experience of World War II of material assistance in this respect, since the clearest lesson to be drawn from that experience is the reticence of belligerent and neutral to bring the question to a head. In principle, the belligerent claim to visit and search neutral public vessels other than those making up a part of the neutral's armed forces is only reasonable, for it is difficult to see any other method whereby the former could be assured that the neutral state was not undertaking to supply an enemy with war materials. It is beyond this point that the more serious question arises and that state practice to date provides almost no real guidance.

[11] A number of points arise in this connection which deserve at least cursory treatment. It is quite usual to encounter the opinion that although neutral vessels may attempt to evade visit and search (and possible seizure) through flight they may not offer forcible resistance to a summoning warship. The ostensible reason for this is that since belligerents have a *right* to visit and search neutral vessels the latter have a *duty* to submit to this procedure. On the other hand, a contrast is generally drawn between the position of neutral merchant vessels and of enemy merchant vessels. Since the latter are always liable to seizure and condemnation as

may take a variety of forms, e. g., the attempt to fire upon or to ram the summoning warship, the sending of position reports to an enemy warship, or even the attempt to scuttle the neutral vessel in order to prevent seizure.[12]

prize they may resist attempted visit and search (or seizure), though by doing so they incur the risk of being fired upon and possibly destroyed. But this manner of formulation may easily prove misleading. A merchant vessel (whether enemy or neutral) may be considered as having a *duty* to submit to visit and search (or, possibly, seizure) if the attempt either to evade or to resist permits belligerents to take measures *not otherwise permitted by law*. These measures may then be regarded as sanctions, imposed as a consequence of attempted evasion or resistance. In the case of enemy merchant vessels resistance to seizure permits the enemy to attack and even to destroy such vessels without insuring the prior safety of passengers and crew, a requirement otherwise demanded by the traditional law. In the case of neutral merchant vessels the attempt to evade visit and search may lead not only to such forcible measures as are necessary to require submission, but to seizure and even to confiscation of vessel and cargo. At least this is true of the practice of many states, including the United States. Forcible resistance on the part of neutral merchant vessels must always lead to the risk of destruction, and once seized to condemnation of vessel and cargo. It has been contended by some writers that acts of forcible resistance to lawful visit and search may place the crew of a neutral merchant vessel in the position of *franc-tireurs* and allow a belligerent to treat them as war criminals. But there is little positive support in state practice for this opinion. In any event, it is clear that neutral merchant vessels neither have a right to evade nor a right to resist visit and search, though the sanctions attending the commission of these acts may vary.

[12] No question will arise with respect to the first of the examples cited above. It should be equally apparent that a neutral merchant vessel in sending position reports to enemy forces (on whose behalf it may be performing certain services) performs a serious act of resistance, entitling the summoning vessel to use any means at its disposal to stop. The last example—that of scuttling a neutral vessel—is somewhat questionable, since although scuttling is clearly an attempt to prevent or frustrate visit and search it hardly seems to constitute "forcible resistance" in the sense in which that term is normally used. It is of interest to note, however, that in a prize decision rendered during World War II the Supreme Court of Sierra Leone did decide that the attempted scuttling of a neutral (French) vessel constituted "forcible resistance" to visit and search, thereby justifying seizure and condemnation. *The Indo-Chinois* [1941], *Annual Digest and Reports of Public International Law Cases* (1941–42), Case No. 173, pp. 594–8. Distinguish, though, between "forcible resistance" on the part of neutral merchant vessels prior to visit and search and certain acts of resistance once the vessel has been brought to and visited (e. g., refusal to show papers or to unlock boxes). The latter may result in seizure and—perhaps—in subsequent condemnation, though there is no justification for the belligerent to resort to forcible measures. Finally, it is of importance to emphasize that a neutral vessel may not be considered as intending forcibly to resist visit and search simply for the reason that she is armed in order to defend herself against *unlawful attacks* on the part of a belligerent. The duty to submit to visit and search cannot be interpreted as forbidding the carrying of arms for use against a belligerent that persists in attacking neutral vessels without warning and in disregard of the safety of lives of passengers and crew. In both World Wars the United States, while still a non-participant, placed naval armed guards on board American merchant ships, equipped them with guns and authorized the defensive use of armament against attack from German submarines. On both occasions, however, the arming of American merchant vessels came within a month of United States entrance into hostilities. This experience would appear to indicate that a belligerent intent upon waging unrestricted submarine and aerial warfare against both enemy and neutral shipping is not likely to be deterred by the neutral's policy of arming its merchant vessels. Still further, it seems clear that a neutral equally intent upon taking defensive measures against unlawful attacks made upon its merchant vessels will soon find itself an active participant in the hostilities.

Once a summoned vessel has been brought to the usual procedure is for the visiting warship to send a boat with an officer to conduct visit and search.[13] In a formal sense visitation is limited to an examination of the ship's papers, and the evidence furnished by papers against a vessel has always been regarded as justifying her immediate seizure.[14] It may happen, however, that although a ship's papers are seemingly in order the visiting officer nevertheless remains dissatisfied with the innocence of the vessel. It has always been true that regularity of papers and evidence of innocence of cargo or of destination are not necessarily conclusive, and if doubt persists a visiting officer may question the master and crew members and conduct a search of the vessel and cargo.[15] If the result of search does not dispel suspicion, and the visiting officer considers that reasonable cause for seizure exists, he may seize the vessel and send her into port. On the other hand, if the result of search and the interrogation of crew members satisfies the visiting officer of the innocence of vessel and cargo, the vessel may be released and allowed to continue on her voyage.

2. *Visit and Search Today: The Consequences of Diversion*

Normally, the traditional procedure of visit and search, as briefly outlined above, resulted in a minimum degree of interference and delay. The entire process—even if involving search—generally took no more than several hours. If the condition of the sea prevented visitation at the time of encounter the usual practice was for the belligerent warship to escort the neutral vessel to waters where visit was possible, and for this purpose belligerents could require a neutral vessel to undertake reasonable deviation from her normal course. Even so, deviation—however slight—was regarded as an unusual measure, justified only by exceptional circumstances.

It is equally necessary to emphasize that the result of visit and search, according to the traditional law, was either to release the neutral vessel or to seize (capture) her as prize. A belligerent was thus confronted with two

[13] Though the traditional practice of some states has been to require the master of the merchant vessel to bring his papers on board the visiting warship. Many writers still object to this practice of requiring a master to leave his ship.

[14] Thus if a ship's papers indicate carriage of contraband or the performance of any kind of unneutral service the vessel may at once be seized. Seizure is also justified if a vessel is found to be carrying double papers, or false papers—though instances involving such behavior are now rare. A clear deficiency of papers also may constitute sufficient cause for seizure, as well any attempt to spoil, deface, destroy, or conceal papers.

[15] In conducting search at sea the belligerent is obliged to prevent any damage to vessel or cargo. The master of the vessel is required to assist in the search and to open all holds, lockers and strongboxes. If he refuses to do so these spaces may not be forced open. But upon refusal to assist in the search the visiting officer is provided with sufficient cause for seizure of the vessel. It is also relevant to note that according to nineteenth century practice search consisted ordinarily in the "sampling" of the cargo and not in an intensive search of the entire cargo—even if this were possible. Upon completion of search everything removed must be replaced, and the officer conducting the search should enter the time, date and place of the visit and search in the ship's log.

clear alternatives. If he elected to seize the vessel and take her into port the action had to be justified before the prize court, and in order to escape claims for costs and damages arising from unlawful seizure the captor was obliged to show that the evidence found on board the seized vessel at the time of visit and search was of such a character as to furnish "probable cause" for capture.[16]

It was to this traditional procedure that the United States appealed as a neutral when it protested during World War I against the British practice of diverting neutral vessels into port for search.[17] There can be little doubt that the position taken at that time by the American government was in substantial accord with the then recognized practice of states.[18] Nevertheless, there can be even less doubt that given the conditions characterizing that conflict belligerent efforts to prevent contraband carriage would have been rendered largely futile if the traditional rules governing visit and search (and seizure) had been rigidly followed—a point Great Britain was not slow in making.[19]

In large measure, however, the principal causes that led to diversion were obscured through the belligerent contention that search in port was rendered essential by the increased size of merchant ships, which made concealed contraband difficult to detect at sea, and by the danger of attack from enemy warships, particularly submarines. Undoubtedly these were contributing

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[16] For further remarks on the "probable cause" justifying capture or seizure, see pp. 271–2, 346 (n). Of course, condemnation before the prize court did not necessarily follow, but so long as a captor could show probable cause neutral claims to costs and damages were barred. Observe, also, that the traditional procedure required evidence justifying seizure to come from the vessel herself ("out of her own mouth") and not from external sources. Although British prize law never followed this procedure as rigidly as did the continental powers, it is not inaccurate to state that up to World War I the requirement was generally adhered to.

[17] Convenient texts of the detailed exchange of notes between Great Britain and the United States may be found in *A. J. I. L.*, 9 (1915), *Spec. Supp.*, pp. 55 ff. and 10 (1916), *Spec. Supp.*, pp. 73 ff. and 121. A summary of this exchange is given in Hackworth, *op. cit.*, Vol. VII, pp. 182 ff.

[18] The American position was succinctly stated in a note of November 7, 1914, in which it was observed that: ". . . the belligerent right of visit and search requires that the search should be made on the high seas at the time of the visit and that the conclusion of the search should rest upon the evidence found on the ship, and not upon circumstances ascertained from external sources. That evidence, in the view of this Government, should make out a *prima facie* case to justify the captor in taking the vessel into port. To take vessels into custody and send them into a port of the belligerent without *prima facie* evidence to impress the cargo with the character of absolute or conditional contraband, constitutes, in the opinion of the United States, a justifiable ground for complaint by a neutral government, and a basis for a legal claim for damages against the belligerent government which has detained the vessel for the purpose of inquiry through other channels as to the ultimate destination of the cargo, or as to the intended action of the government of the neutral country of destination."

[19] This formed the essential feature of the British argument in support of diversion—that in no other way could the right of search be exercised effectively, and that if diversion were abandoned then search itself might just as well be abandoned.

factors in prompting the belligerents to the practice of diversion. But the substantial and compelling reason for diversion was that little or no evidence to support a case for seizure—let alone for later condemnation—could be worked up by restricting attention to the ship's papers and to the nature of the cargo carried. In the vast majority of instances where vessels were encountered bound for a neutral port, and carrying cargo to be delivered to a neutral consignee, the ship's papers themselves furnished no real assurance of the ultimate destination of the cargo. Instead, the evidence necessary to justify seizure normally could come only from external sources. Not infrequently, this information was collected prior to the act of visit. More often, however, it could be gathered only after a vessel had been diverted to a belligerent contraband control base.[20]

In view of the experience of the two World Wars it does not appear very realistic to continue to question the legitimacy—in principle—of diverting neutral merchant vessels into port for search.[21] Indeed, by the time of the 1939 war nearly all the major naval powers recognized diversion as a lawful measure, at least where there was reason for believing [22] that a neutral vessel might be found liable to seizure, and if search at sea was considered either impossible or impracticable.[23]

The real difficulty, however, has been that of determining the limits to what may presently be regarded as the belligerent right of diversion. In theory, it is easy enough to insist that diversion must not be undertaken indiscriminately, in the hope that once a neutral vessel is in port further evidence of contraband carriage—or other unlawful acts—may be found

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[20] In part, the passages in the text above form a restatement of observations made earlier in connection with the problem of establishing enemy destination in the case of contraband (see pp. 270 ff.). It can hardly be stressed too strongly that acceptance of the principle of ultimate enemy destination is at the root of the practice of diversion. Indeed, to insist upon rigid observance of the traditional procedure of visit and search, and the confining of evidence necessary to justify seizure to the vessel herself, would clearly have the effect of reducing the principle of ultimate enemy destination to a shadow, altogether devoid of real substance.

[21] Though, of course, it is quite possible to question the legitimacy of many of the specific measures resorted to by belligerents under the pretext of rendering diversion effective. But for a continued denial of the lawfulness of diversion, see *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, pp. 578–601. Also P. C. Jessup, "The Diversion of Merchantmen," *A. J. I. L.*, 34 (1940), pp. 312–5. And see the noncommital position of Hyde, *op. cit.*, pp. 1965–70. The majority of writers, however, now concede a belligerent right of diversion—at least in principle.

[22] Whether through evidence obtained as a result of visitation or obtained from external sources prior to visit.

[23] Thus—in addition to Great Britain—Articles 107–109 of the 1934 French Naval Instructions, Articles 60–63 of the 1939 German Prize Law Code, Article 182 of the 1938 Italian War Regulations and Article 120 of the Japanese Naval War Law (1942). Although the 1917 *Instructions* issued to United States naval forces made no allowance for diversion, the 1941 *Instructions* declared in paragraph 52, that "if for any reason . . . search at sea is impracticable, the vessel may be escorted by the summoning vessel or by another vessel to the nearest port where search may conveniently be made." Finally, see *Law of Naval Warfare*, Article 502b (5).

and a case for seizure worked up that would satisfy a prize court.[24] In practice, this is very nearly the precise result to which diversion has led. Nor is this development—so clearly apparent during World War II [25]—any cause for surprise in view of the more profound causes that prompted belligerents to resort to diversion in the first place. In addition, it must probably be admitted that once diversion into port is granted it may be exercised in circumstances which justified search at sea according to the traditional law. But according to the traditional law the circumstances justifying search at sea—not to be confused with the circumstances justifying capture [26]—could be very slight. On this basis, the same slight reasons may serve to justify diversion into port for search. And if this is true then the difference between the indiscriminate diversion of merchant vessels and diversion in circumstances (usually derived from external sources) held to create sufficient reason to justify search is surely one bordering on sophistry.[27]

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[24] Even the majority of British writers—who have never looked askance at the practice of diversion—continue to insist upon this limitation as retaining at least a formal validity. In 1927 the Naval War College concluded, after an extensive review of the problem, that diversion into port "presupposes a suspicion of liability to prize proceedings based on information in possession of the visiting vessel at the time. Suspicion that all vessels may be found liable is not sufficient ground for indiscriminately sending in of merchant vessels." *International Law Situations, 1927*, p. 71. But see the further remarks in the text above.

[25] The British system has been extensively reviewed by Medlicott, *op. cit.*, pp. 70–105. At the outbreak of hostilities in September 1939, neutral vessels carrying goods to neutral ports adjacent to Germany were invited to call voluntarily at British contraband control bases for examination. Vessels attempting to avoid calling at these bases were liable to be compelled by naval patrols to undergo diversion. Within a very short time, as Medlicott notes, "all ships bound for adjacent neutral countries were sent in unless they had a naval clearance" (p. 71). Once in port the vast intelligence facilities at the disposal of the Ministry of Economic Warfare would go into operation, and a decision would be reached either to release the vessel and cargo or to seize the cargo—and perhaps the vessel as well—as prize. In November and December of 1939 the United States protested this forcible diversion of American vessels, particularly in view of the fact that contraband control bases were within "combat areas" defined by the President and into which American vessels were forbidden to sail by the Neutrality Act of 1939. However, the right of a belligerent to compel diversion in circumstances justifying suspicion was never clearly challenged. Instead, it was alleged that since American vessels were forbidden to sail within "combat areas" no reasonable suspicion of contraband carriage could arise thereby necessitating their diversion. Obviously this argument could easily be challenged, and was so challenged, on the ground that the cargoes carried to neutral ports might ultimately find their way to enemy territory. The real criticism that could be made of the British system of diversion—and which many neutrals did make during the early months of the war—was that it was obviously indiscriminate in character.

[26] See p. 346 (n). As a matter of fact the circumstances now held to justify seizure are themselves very slight.

[27] From the point of view of a strict legal analysis the considerations adduced above would appear very difficult to deny—once the bare right of diversion is conceded. And it is for these reasons that the scope of the belligerent right of diversion has proven so difficult to define. It is an interesting fact that in British prize law the question of diversion—as such—has never been adequately reviewed. In *The Zamora* [1916], the Judicial Committee of the Privy Council

Furthermore, once the right of diversion into port is granted the traditional procedure of visitation threatens to become little more than a formality devoid of any real meaning. Exceptionally, a formal visit may yet serve the purpose of bringing to light facts heretofore unknown to the visiting belligerent. Normally, however, the visiting belligerent will already possess that information he may obtain from an examination of the ship's papers, and he may even possess a good deal more. If so, he will gain nothing from visit, and if there is the slightest reason for believing that any of the vessel's cargo is ultimately destined to enemy territory he will almost certainly order her into port.[28] Under these circumstances continued insistence upon visitation prior to diversion can only serve the purpose of denying to aircraft the right to order the diversion of merchant vessels, owing to an inability to conduct visit. It is difficult to see the logic of this position, since the insuring of proper identification—without formal visit—and the communication of instructions to the master of a vessel can as readily be carried out by aircraft as by warships. In permitting military aircraft to order the diversion of merchant vessels, without undertaking prior visit, belligerents will not be conceded substantially greater control over neutral shipping than that which they already claim (and neutrals seem no longer seriously disposed to resist) on behalf of surface warships.[29]

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merely held diversion to be a justifiable practice "because search at sea is impossible under the conditions of modern warfare," 4 *Lloyds Prize Cases*, p. 110. In *The Bernisse and The Elve* [1920]—(9 *Lloyds Prize Cases*, pp. 243 ff.), the Privy Council expressly refrained from reviewing the scope of the belligerent right of diversion, though the decision did make clear that under certain circumstances diversion could be held by the Prize Court as unjustified, and thereby giving rise to a liability of the Crown for costs and damages sustained by neutral claimants. More recently, in *The Mim* [1947] (*Annual Digest and Reports of Public International Law Cases* (1947), Case. No. 134, pp. 311–6), the British Prize Court held that "in the absence of reasonable suspicion the ship must be allowed to proceed. If she is detained, for example, by mistake . . . or if she is detained for some ulterior reason unconnected with search, the Crown cannot rely on the belligerent right of visit and search as an answer to the plaintiff's claim." At the same time, the clear implication of the decision in *The Mim* was not only that diversion could be ordered for the same reasons as would justify search at sea, but that very little reason was required to justify search. The same point was made by the Privy Council in *The Bernisse*.

[28] But writers remain—on the whole—reluctant to admit that recent developments have reduced the present significance of visit at sea almost to a vanishing point, and continue to insist upon formal boarding and visit as a requirement for diversion. Thus Erik Castren (*op. cit.*, pp. 357–8) expresses the rather anomalous view that "a merchant ship may not be diverted from its route except for good reasons. In practice this would mean that at least some kind of cursory visitation must be made at the actual place of meeting unless the merchant ship flies the flag of the enemy or the warship has ascertained its enemy character in some other way." But why does "cursory visitation" constitute a "good reason" for diversion unless good reasons are conceived in the retention of procedures that no longer serve a substantive purpose.

[29] It should be clear from the statements above, that there is no intent to argue on behalf of the desirability of two sets of rules for neutral shipping—one governing the action of warships and the other governing the action of aircraft. On the contrary, the rules governing warships are also applicable to aircraft. But the essential point is that the denial of the right

To date, it can hardly be said that the difficulties ensuing between neutral and belligerent as a consequence of diversion have been satisfactorily resolved. The belligerent's claim that the functions formerly served by the traditional procedure of visit and search at sea would be rendered almost wholly ineffective under modern conditions without a right to compel diversion has been met by the neutral's claim that the inconvenience and loss caused to legitimate neutral shipping through lengthy delay in contraband control bases represents an unreasonable—if not an unlawful—hardship.[30] It has already been noted [31] that in practice this conflict was partially resolved by the introduction of a system of passes which enabled neutral vessels—upon approval by the belligerent—to avoid diversion into port for search. Neutral vessels have also been able to avoid a period of delay in port by giving prior assurance to a belligerent that upon reaching a neutral destination the cargo would be held until the belligerent's representatives could examine and pass upon it.[32] But whatever the precise nature of the arrangement the essential purpose has been to shift the pro-

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of diversion to aircraft, merely because the latter cannot conduct visit, makes very little sense when visit itself is a mere formality precedent to diversion, or—as the events of World War II indicate—simply omitted altogether by belligerent warships. It is true that the jurists which met at The Hague in 1923 were unable to agree upon whether aircraft should have a right to divert merchant vessels without prior visit or search or whether they should be required to board *sur place* before ordering diversion. The American delegation argued that although diversion might be "exceptionally" permitted to surface ships, "a similar concession to aircraft, with their limited means of boarding, would readily have the effect of converting the exception into the rule." General Report, Commission of Jurists on 1923 Rules of Aerial Warfare, *U. S. Naval War College, International Law Documents, 1924*, p. 138. But the present relevance of this argument must be questioned, since the exception has already been turned into the general rule in the case of surface ships. Nevertheless, most writers continue to insist that if aircraft cannot undertake the visit of neutral merchant vessels at the place of encounter they may not order their diversion. Even H. A. Smith (*op. cit.*, pp. 166–8), who points out that under modern conditions boarding has largely become "an idle formality," observes that unless an aircraft "is capable of alighting on the water, the visit must obviously be carried out by a warship, which must therefore be within reasonable distance of the ship visited." And this supposedly for the reason that "aircraft in flight can only assist naval forces in exercising the right of visit and search, a right which by its nature can only be exercised by ships of war."

[30] It seems quite clear that the real bone of contention between Great Britain and neutral states during the fall of 1939 and the early months of 1940 did not primarily concern the legality as such of diversion, but rather the losses incurred by neutral traders through lengthy delays in contraband control bases. To alleviate this situation Great Britain sought to shorten the period in port and to bring into operation as quickly as possible the navicert system, whereby diversion into port might be avoided altogether.

[31] See pp. 280–2.

[32] Known variously as "black-diamond" and "hold-back" guarantees, Medlicott (*op. cit.*, p. 87) writes that the "essential feature of the 'hold-back' system was that in certain circumstances a ship might be allowed to proceed to a neutral destination after giving a guarantee not to deliver to the consignees any cargo which was still under consideration by the Contraband Committee, and to return to an Allied port any items of cargo which the committee had decided should be seized."

cedure of search from the high seas and belligerent ports to neutral territory, and has necessitated the voluntary cooperation both of neutral states and of private neutral traders. Quite apart from the tentative character of such arrangements, it is not easy to see how—from the viewpoint of the traditional law—either the neutral state or the neutral trader can acquiesce without raising serious questions. The neutral state in permitting a belligerent to inspect cargoes within its territory thereby renders a definite form of assistance to the belligerent. The neutral trader by actively participating in a system that eases the belligerent's task of contraband control risks the charge of performing an unneutral service.[33] Yet the alternative in both World Wars has been either enforced diversion, attended by costly delays, or belligerent "reprisal" measures, whose effect has been to render compulsory that action on the part of neutrals previously elicited on a voluntary basis.[34]

B. SEIZURE AND DESTRUCTION OF NEUTRAL VESSELS

It is of importance to distinguish as clearly as possible between the formal act of seizing or capturing [35] a neutral vessel and acts which, though apparently resembling seizure, nevertheless must receive a quite different interpretation. In particular, a clear distinction should be drawn between

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[33] See pp. 322–3.

[34] See pp. 313–5. Small satisfaction can be derived in terminating a discussion of visit and search on so uncertain a note. Little more can be said, however, while remaining within the confines imposed by a legal analysis. It may be argued that even though a right of diversion must now be accorded belligerents the scope of this right remains unsettled. From this point of view, at least some of the belligerent measures taken in the two World Wars have yet to be recognized as the lawful consequences of the right of diversion. There is no real incompatibility between this position and the tentative conclusions that have been reached here. In either case, the precise limits of the right of diversion remain unsettled. Finally, it may be relevant to observe that the controversies attending recent developments in the belligerent right of visit and search will not be resolved short of a clear change in the largely obsolescent distinction between neutral state and neutral trader, and the imposition upon neutral states of the duty to insure that their subjects refrain from acts which they themselves have long been obligated to abstain from performing. And for the proposal that neutral states issue certificates covering cargoes carried on board ships of their nationality, see *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, pp. 487–530.

[35] Mention has already been made (see p. 105 (n)) of the possible ambiguity that may result from the indiscriminate use of the terms "capture" and "seizure" when applied to the act of asserting control over enemy vessels. In part, these earlier observations are also applicable to the present discussion. However, in the case of enemy vessels the need is to distinguish between those vessels (e. g., warships) which—in order that legal ownership may be transferred—do not require condemnation by a court of prize, and vessels (e. g., privately owned enemy merchant vessels) which require such condemnation before transfer of title can be effected. The same holds true with respect to enemy owned cargo found on board enemy vessels. In the case of neutral vessels the need is to distinguish between the act of taking control in order that a prize court may determine whether the vessel or cargo, or both, is liable to condemnation, and the act of taking control in order to determine through further search whether sufficient

the seizure of a neutral vessel and her detention by a belligerent in order hat search may be carried out in port. In either case the belligerent may exercise very nearly the same degree of control over the neutral vessel and subject her to similar measures of compulsion in the event his orders are not followed [36] In addition, the belligerent's prize courts may assert the right to entertain neutral claims entered against the captor for compulsory diversion and detention in port without sufficient cause in the same manner as they may entertain neutral claims for compensation as a result of unlawful seizure.[37]

In view of the apparent similarities between acts constituting seizure (or capture) and acts amounting to no more than diversion into port for search, it would appear that seizure must be distinguished primarily by the intent of the belligerent. Such intent may be manifested not only by the fact that the belligerent has succeeded in imposing his will upon the neutral vessel, thereby compelling her to abide by his orders, but also by the fact that he has done so because he is in possession of evidence which appears

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cause exists to charge vessel or cargo as liable to condemnation before a court of prize. The terms "seizure" and "capture" may be—and are—applied to the former act, though it must be made clear that the control exercised is merely provisional until the prize court has finally adjudicated upon the seizure. Furthermore, in either case (i. e., whether seized (captured) or merely diverted into port for search) the vessel is "detained," though the legal significance of detention differs according to the intent of the belligerent.

[36] In seizing—or capturing—a neutral vessel the belligerent may place a prize crew on board, whereas in merely diverting the vessel into port for search he may place on board an "armed guard" to insure his orders are carried out. In both cases, however, the belligerent may simply order the neutral vessel to proceed into port under escort of a belligerent warship, or military aircraft. A neutral vessel under diversion that resists the orders given her by the escorting belligerent not only becomes immediately subject to seizure but to the use of forcible measures on the part of the belligerent.

[37] At least this seems to be the case in British prize law, though the practice in the prize courts of many continental countries has been to refuse to assert jurisdiction over, or take legal cognizance of, acts committed by the belligerent prior to formal seizure as prize (and particularly if such acts as diversion do not later result in a formal seizure or capture). A degree of uncertainty still prevails, however, as to the precise status in British prize law of a vessel that has been detained for search in port. Normally, the act of diversion must be interpreted simply as a prolongation of the act of visit and search; the diverted vessel is under detention in the same sense as a vessel being visited and searched at sea. In *The Netherlands American Steam Navigation Co. v. H. M. Procurator-General* [1926]—(1, Kings Bench, pp. 93–5; cited in Hackworth, Vol. VII, pp. 187–8), the Court of Appeal held that the placing of an armed guard on a neutral vessel and her compulsory diversion to a British port amounted to seizure, or capture, and thus gave the Prize Court authority to entertain a claim for compensation—whether on the ground that the compulsory diversion and detention was itself unjustified, or on the ground that the captor was negligent in insuring proper care of the vessel and cargo, or was unduly dilatory in carrying out the search. But in *The Mim* (cited above, p. 342 (n)) the Prize Court cast some doubt on the use of the term "seizure" (or capture) as applied to cases of diversion, and was content to declare that "the question is whether the act of the Crown was wrongful or not." The main point is that the British system does permit judicial review by the Prize Court of allegedly wrongful acts of the captor in cases of compulsory diversion, although it must be added that to date the "protection" thus afforded neutrals has proven to be largely of formal significance.

to him as probable cause for condemnation of vessel or cargo by a court of prize.[38]

At the same time, seizure need not lead to the condemnation of the vessel or of her cargo. The lawfulness of the act of seizure is not dependent upon later condemnation by a prize court. It may well be that the circumstances held to justify seizure will not be regarded by a prize court as sufficient to justify condemnation. It may even be that later information brought to the attention of a belligerent prompts him voluntarily to release a vessel that earlier had been seized as prize. Nevertheless, the captor may not be made liable to claims for costs and damages—as would follow upon an unlawful seizure—if he can establish that at the moment of seizure circumstances were such as to warrant suspicion of enemy character, whether of vessel or of cargo, or of the performance of acts held to constitute contraband carriage, blockade breach, or unneutral service.[39]

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[38] As in the case of enemy merchant vessels (see pp. 103–4) so in the case of neutral vessels capture is, as Colombos (*op. cit.*, p. 305) points out, "the act whereby a belligerent warship compels a vessel to conform to her will." But a neutral vessel may be compelled to conform to the will of the captor for more purposes than one. Effective control takes on the meaning of a capture or seizure when the intent is to seek adjudication of vessel or cargo before a court of prize. See, in this respect, the remarks of Hyde, *op. cit.*, pp. 2021–3. It may also be noted that when a neutral vessel is undergoing diversion she may not be required to lower her flag, since she has not been captured. See *Law of Naval Warfare*, Article 502b (5). Seizure or capture does indicate that the vessel is for the time in the possession of the captor, and the latter may require the neutral vessel to lower her flag, or—if the neutral flag is flown as usual—the flag of the captor may be exhibited at the fore.

[39] See *Law of Naval Warfare*, Article 502b (7) and—for an enumeration of acts justifying seizure or capture of neutral vessels—Article 503d. Indeed, any of the various acts a neutral vessel may resort to in order to frustrate visit and search—reviewed in the preceding section of this chapter—give rise to a right of seizure. Of course, the real problem arises where the neutral vessel has not attempted to resist or frustrate the belligerent and where her papers (and cargo) do not indicate that she is evidently engaged in contraband carriage, blockade breach, or the performance of unneutral service. The Supreme Court of the United States (sitting in prize) has defined "probable cause"—sufficient to justify seizure—as existing "where there are circumstances sufficient to warrant suspicion, though it may turn out that the facts are not sufficient to justify condemnation. And whether they are or not can not be determined unless the customary proceedings of prize are instituted and enforced." *Olinde Rodriguez* [1899], 174 U. S. 510. But although "probable cause" depends upon the existence of circumstances deemed sufficient to "warrant suspicion," the question remains unanswered as to the nature and extent of the circumstances required in a given period to warrant suspicion—and hence to justify seizure. The practical importance of this question can hardly be overstated since a belligerent may well accomplish his purpose of cutting off all supplies to an enemy merely through seizure, and quite without the necessity of obtaining condemnation by a prize court. In this respect, the actual significance of seizure has undergone far-reaching change since the nineteenth century. During this earlier period the failure of a belligerent to obtain the condemnation of cargo seized as prize normally meant that the neutral owner was at liberty to re-ship his goods. This being so, the belligerent had no assurance that goods released by a prize court would not ultimately reach an enemy. Today, however, the belligerent need not suffer under any such apprehension, so long as he is able to justify his original act of seizure. One reason for this is the power of prize courts either directly to dispose of goods held in prize (e. g., because of perishability or

In seizing neutral vessels the belligerent incurs certain duties that have long enjoyed the sanction of state practice. Unless the neutral nationals serving as officers and crew of neutral vessels have taken a direct part in the hostilities they may not be treated as prisoners of war.[40] Nor is there any justification for placing the personnel of neutral prizes under any special restraint, unless this is shown to be necessary for the security of the prize crew. The captor may request the master and crew to assist him in navigating the prize into port, though he cannot compel them to render any assistance. And if not temporarily detained as witnesses in prize court proceedings the personnel of neutral prizes must be released at the earliest possible time by the belligerent undertaking capture.

The duties imposed upon the captor with respect to the seized neutral property follow largely from the fact that the seizure of neutral vessels and cargo does not serve to effect transfer of title in favor of the captor, but only places him in temporary possession of the property. The determination of title remains the sole responsibility of the prize court, which is charged

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the shortage of storage space) or to authorize their requisition in response to a request by the executive that they are urgently needed for the national defense (see p. 348 (n)). In either event the neutral owner must receive compensation, but the belligerent has achieved his principal aim of preventing the goods from ever falling into enemy hands. Even if goods that have been lawfully seized are finally released—whether through failure by the belligerent to obtain condemnation or merely through the prize court ordering release with the executive's consent—the neutral owner may find himself unable to remove them from the belligerent's jurisdiction. Thus, in examining modern British practice of contraband control Fitzmaurice (*op. cit.*, p. 75) points out that: "The decision rendered in 1921 by the Judicial Committee of the Privy Council in the case of *The Falk* . . . established the principle that an order for the release of goods seized in Prize only operates to place the owner of the goods in possession of them in this country and does not of itself entitle him to remove them from the realm. . . . In fact, the position which appears to result from this decision is that goods seized in Prize (as opposed to those merely detained pending investigation) are deemed to have actually entered the country and, on release from Prize, automatically fall under the general legislation governing the export or removal of goods from the country and can therefore only be exported or removed by complying with the requirements of this legislation." Fitzmaurice further observes that the drop in the activity of the Prize Court during the 1939 war was due to this "shift in emphasis as between the condemnation of goods and their initial seizure." Medlicott (*op. cit.*, p. 84), in surveying these same developments, declares that: "The practical effect of seizure in perhaps the majority of cases was . . . that, whether condemned or released, they would never reach the country to which they were originally destined." Even this cursory review should prove sufficient to indicate the importance of the nature and scope of the circumstances held to "warrant suspicion," and to justify seizure. If the consistent practice of belligerents during the two World Wars is to be regarded as law-making in character these circumstances are now such as almost to preclude successful neutral claims for damages arising from unlawful seizures—save in the most flagrant instances. Colombos (*op. cit.*, p. 309), writing of the 1914 and 1939 conflicts, states that: "The cases where a Prize Court has taken the view that no 'circumstances of suspicion' could be invoked by the captor in justification of the seizure are extremely few." And for a brief survey of the principal circumstances held to give rise to a presumption of contraband carriage, see pp. 272–5.

[40] See *Law of Naval Warfare*, Article 513. As to the disposition of enemy nationals found on board neutral vessels, see pp. 325–30.

with the task of investigating the circumstances attending seizure and deciding whether or not there is sufficient cause for confiscating vessel or cargo—or both. In consequence of his purely provisional possession the captor must take reasonable measures to preserve the vessel (and cargo) intact and to take her into the nearest convenient port without undue delay, there to be turned over to the custody of officers of the prize court.[41]

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[41] On the procedure to be followed by United States naval forces when sending neutral prizes in for adjudication, see the references given on p. 106 (n). A special problem arises should the captor desire to requisition seized neutral vessels or cargoes for his public use prior to final adjudication of the seizure by a court of prize. In British prize law the right of a belligerent to requisition vessels or goods in the custody of its prize court, pending adjudication, was upheld by the Judicial Committee of the Privy Council in *The Zamora* [1916]—(4 *Lloyds Prize Cases*, p. 108), though subject to the following limitations:

"First, the vessel or goods in question must be urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable."

Fitzmaurice (*op. cit.*, p. 81) observes that the justification for requisitioning is "(a) that it would be unreasonable that goods . . . urgently required for national use, should have to be kept *in specie* to await the outcome of the proceedings, and (b) that the rights of the claimant are not prejudiced since, if an order for release is made in his favor, he will obtain, if not the goods themselves, their value." Since the word of the Crown is conclusive in testifying that the vessel or goods in question are urgently required, the function of the Prize Court—according to *The Zamora*—is to insure that there is a "real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the vessel or goods." Hence the purpose of requiring application to the Prize Court is to prevent the requisitioning of neutral vessels or goods simply for the reason that the Crown desires their use, but against which there is no real case. In this respect, British practice would appear to offer greater protection to neutrals than does the practice of other states. For while the right of a belligerent government to requisition seized neutral vessels and cargoes, pending adjudication, is now generally recognized, similar limitations upon its exercise are not imposed by the prize courts of other countries. The Prize Statutes of the United States have long permitted the requisition of seized vessels and goods, whether *before or after* such property comes into the custody of the prize courts (U. S. Code, Title 34, Sections 1140–41; also the 1942 Prize Act, 56 Stat. 746 (1942), which broadened the procedure whereby the United States can make immediate use of a captured vessel, without awaiting the institution of prize proceedings and without applying to the prize court for requisition). In all cases of requisitioning the government department for whose use the vessels or goods are taken "shall deposit the value thereof with the Treasurer of the United States or public depository nearest to the place of the session of the court, subject to the order of the court in the cause" (34 U. S. C. 1140). This procedure has always been regarded as of an exceptional nature, however, and to be resorted to only under compelling circumstances, since indemnification must follow if the prize court fails to condemn the neutral property converted to public use (see 1917 *Instructions*, paragraph 85; 1941 *Instructions*, paragraph 89; *Law of Naval Warfare*, Chapter 5, note 16).

The requisitioning of seized neutral vessels or goods brought into belligerent territory may be regarded as forming a special aspect of the more general right of belligerents to requisition any neutral property found within their jurisdiction. Normally, such property will be present *voluntarily* in belligerent territory, and the objections that are still occasionally voiced against the requisition of neutral prize, pending adjudication, arises mainly from the fact that this

As in the case of enemy prizes, however, occasions may frequently arise when the sending in of neutral prizes proves either impossible or highly inconvenient to the captor. Under these circumstances the customary practice of states has always drawn a distinction between the destruction of enemy prizes and the destruction of neutral prizes. Whereas belligerents admittedly enjoy a broad discretion in resorting to the destruction of enemy prizes the circumstances in which neutral prizes may be destroyed are considerably more restrictive. Indeed, during the nineteenth century there was substantial support for the position that if for any reason a captured neutral vessel could not be taken into port for adjudication the captor was obliged to release her, and that if instead he resorted to the destruction of a neutral prize the owners of the vessel and cargo were always entitled to receive full compensation.[42] This opinion still finds some support even today.[43]

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property has been *forcibly* brought into belligerent territory. With respect to neutral property voluntarily present (even though such presence is only temporary), requisition by the belligerent is frequently based upon a "right of angary," though it has been observed that "in reality little distinction is drawn in principle between the exercise of the power of eminent domain or expropriation for public use in time of peace, and requisitions in time of war, including requisitions of vessels or cargoes, in spite of this latter practice being sometimes based on a distinct 'right of angary'. In all these cases, the practice is based on the right of the sovereign to control property within his jurisdiction." *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, pp. 384–5. But see Lauterpacht, "Angary and Requisitions of Neutral Property" (*B. Y. I. L.*, 27 (1950), pp. 455–9), who contends that "requisition" applies to neutral property "permanently and voluntarily residing" in belligerent territory—and requires only "reasonable compensation"—and that "angary" applies to neutral property brought to belligerent territory either "without the neutral's consent or . . . brought there for purely temporary purposes"—and requires "full compensation." And see, generally, C. L. Bullock, "Angary," *B. Y. I. L.*; (1922–23), pp. 99–129; J. E. Harley, "The Law of Angary," *A. J. I. L.*, 13 (1919), pp. 267–301; *U. S. Naval War College, International Law Situations, 1926*, pp. 65–87; Hackworth, *op. cit.*, Vol. VI, pp. 638–55; and Hyde, *op. cit.*, pp. 1760–9. On the requisitioning of Dutch merchant vessels by the United States and Great Britain in 1918, see G. G. Wilson, "Taking Over and Return of Dutch Vessels, 1918–1919," *A. J. I. L.*, 24 (1930), pp. 694–702.

[42] A review of nineteenth century practice and opinion is given in *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, pp. 559–75. The traditional British position, in particular, inclined very strongly toward release if neutral prizes could not be sent in, and compensation to the owners of vessel and cargo in the event of destruction. It has been pointed out on more than one occasion that the traditional British position was strongly influenced by the numerous bases maintained by Great Britain throughout the world. However that may be, even the British view seems to have allowed that in certain exceptional cases, involving unneutral service and blockade running, destruction might be permitted if absolutely necessary. No other major maritime power took so consistent and so strong a position against the destruction of neutral vessels.

[43] E. g. Colombos (*op. cit.*, p. 303) declares that: "The destruction of neutral ships must, as a rule, be altogether prohibited. If the captor is unable to bring a neutral vessel into port for adjudication, he must release her. Reasons of urgent military necessity or other exceptional circumstances are strictly excluded." Nevertheless, Colombos does make exception for unneutral service or blockade running.

It would be difficult to assert, however, that the traditional law prior to 1914 strictly forbade the destruction of neutral prizes. In fact, a number of maritime powers had never accepted the rule that would have denied to them, as belligerents, the right to destroy under any circumstances captured neutral vessels engaged in the supply of war material to an enemy.[44] In the provisions of the Declaration of London the attempt was made to clarify the problem and to resolve the diverse attitudes of states. Although declaring that—in principle—a captured neutral vessel was not to be destroyed by the captor, but instead must be taken into port for adjudication,[45] it was nevertheless provided that exceptionally a neutral prize—otherwise liable to condemnation—could be destroyed if taking her into port "would involve danger to the ship of war or to the success of the operation in which she is at the time engaged." [46] Before destroying the neutral prize all persons on board were to be removed to a place of safety and all ship's papers and other relevant documents were to be taken on board the belligerent warship.[47] If the captor who destroyed a neutral vessel could not establish to the satisfaction of a prize court that he acted only in the face of "exceptional necessity" the interested parties would be entitled to receive compensation, without regard to whether or not the capture itself was valid.[48] Finally, even though the captor might show that he resorted to the destruction of a captured neutral vessel only in the face of an exceptional necessity, the interested parties would remain entitled to compensation if

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[44] It is true that prior to the Russo-Japanese War, at the beginning of this century, there had been very few incidents involving the destruction of neutral vessels. But during that conflict Russian naval forces did sink an appreciable number of neutral vessels. Despite British protests that the sinkings were unlawful the Russian Government refused to render any compensation to the owners of vessels her prize courts later found to have been liable to condemnation.

It is also relevant to note that Article 50 of the U. S. Naval War Code of 1900 declared:

"If there are controlling reasons why vessels that are properly captured may not be sent in for adjudication—such as unseaworthiness, the existence of infectious disease, or the lack of a prize crew—they may be appraised and sold, and if this can not be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there should be no doubt that the vessel was a proper prize. But in all such cases all of the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered."

A substantially similar order was given to American naval forces during the Spanish-American War. Yet in 1905 the Naval War College concluded—in a review of the question—"that if a seized neutral vessel cannot for any reason be brought into port for adjudication, it should be dismissed." *International Law Topics, 1905*, p. 62. In a still later study it was contended that although "the treatment of neutral vessels in time of war is not yet a fully settled question," nevertheless, "destruction, on account of military necessity, of a neutral vessel guilty only of the carriage of contraband entitles the owner to fullest compensation. Before destruction all persons and papers should be placed in safety." *International Law Situations, 1907*, pp. 107–8.

[45] Article 48.

[46] Article 49.

[47] Article 50. It is interesting to note that no further definition was given as to what would constitute "a place of safety."

[48] The "exceptional necessity" is a reference to the conditions earlier cited in Article 49.

it were subsequently shown that no adequate grounds existed for condemning the destroyed property.[49]

Although never ratified, these provisions of the Declaration of London indicate that in the years immediately prior to World War I most of the major maritime powers were willing to concede that under certain circumstances the destruction of captured neutral vessels—otherwise liable to condemnation—was not unlawful, and, if resorted to, ought not to give rise to an obligation of compensating the owners of the destroyed property. At the same time, the Declaration can hardly be regarded as clarifying the nature of the situations in which destruction was to be permitted. Instead, the formula provided was sufficiently vague to allow belligerents any number of possible interpretations, as the later events of World War I clearly demonstrated.[50]

[49] Article 52. The compensation Article 52 would have required was evidently intended to be applicable despite the fact that the captor could show "probable cause" for capture. The "validity" of the capture referred to the later condemnation by a prize court, and if such condemnation did not follow compensation had to be given. Article 53 declared that: "If neutral goods which were not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation." And Article 54 allowed the captor the right "to require the giving up of, or to proceed to destroy, goods liable to condemnation found on board a vessel which herself is not liable to condemnation, provided that the circumstances are such as, according to Article 49, justify the destruction of a vessel liable to condemnation."

[50] The possible interpretations of Article 49 of the Declaration of London offered belligerents a latitude in destroying captured neutral vessels that was not too dissimilar from the license granted in the destruction of enemy prizes (the only substantial check being the obligation to compensate if a prize court later found that adequate ground for condemnation did not exist). It may of course be argued that this possible latitude opened to belligerents was not the intent of the drafters. If so, the true intent was hardly realized in the wording of Article 49, since it would be difficult to find a much broader formula. Nor is this conclusion altered by the fact that Article 51 required destruction only "in the face of an exceptional necessity"—a phrase broadly synonymous with "military necessity." For these reasons, it is difficult to accept the opinion that according to Article 49 of the Declaration "a neutral prize might no longer be destroyed because the captor could not spare a prize crew, or because a port of a Prize Court was too far distant, or the like." Oppenheim-Lauterpacht, *op. cit.*, p. 864.

Although the Allied Powers refrained during World War I from pursuing a policy of destroying captured neutral vessels, it can not be maintained that this policy was expressive of established law. For a review of the relevant provisions of the German and Italian prize regulations during the two wars—which did permit destruction in a number of circumstances—see Hackworth, *op. cit.*, Vol. VII, pp. 256–8. Paragraph 96 of the 1917 *Instructions* issued to U. S. naval forces declared that unless a neutral prize had engaged in a form of unneutral service, which stamped it with enemy character, it "must not be destroyed by the capturing officer save in case of the greatest military emergency which would not justify him in releasing the vessel or sending it in for adjudication." A substantially similar provision was made in paragraph 101 of the 1941 *Instructions*. And see the review of practice and opinion presented in *U. S. Naval War College, International Law Documents, 1943* (pp. 38–50) where the conclusion is drawn that: "Although there has still been some discussion since the World War as to whether or not a neutral prize should be destroyed, practice and documents indicate that the destruction of neutral vessels and aircraft captured as prizes may be destroyed only if warranted by the extreme seriousness of the military situation and by the utter impracticability of bringing the prize in for adjudication. In the case of destruction, passengers (if possible, their personal effects also), the crew, and the craft's papers must be placed in safety."

As matters presently stand it does not appear possible to define with any real precision the circumstances in which neutral prizes lawfully may be destroyed.[51] Undoubtedly it remains true, however, that the destruction of neutral prizes involves a much more serious responsibility for a belligerent, as well as for a belligerent commander, than does the destruction of an enemy prize. If it is later found that either the vessel or the cargo was not liable to condemnation indemnification of the innocent property must be made. For this reason, among others, the destruction of neutral prizes ought to be avoided whenever possible.

If destruction is nevertheless resorted to the captor is obliged—prior to the act of destruction—to provide for the safety of passengers and crew, and to insure that all documents and papers relating to the neutral prize are removed and saved in order that a prize court may later adjudicate upon the validity of the capture. These duties of the captor have long formed a part of the customary law, though the latter was not entirely clear as to what could be reasonably interpreted as a place of safety for passengers and crew. This point was clarified in Article 22 of the London Naval Treaty of 1930,[52] and in the subsequent London Protocol of 1936, which, in reaffirming the customary law as valid for both surface vessels and submarines, declared that "the ships boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board."

In an earlier chapter some of the measures resorted to by belligerents—and particularly by Germany—in the attempt to evade these restrictions have been reviewed and analyzed.[53] At that time it was submitted that despite the persistence of these belligerent measures during the two World Wars there is still no substantial warrant for asserting that the traditional law has lost its validity.[54] If so, this must mean that apart from certain

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[51] "Neutral prizes," let it be noted, and not neutral vessels undergoing detention for search in ports. Destruction of the latter, save in the case of forcible resistance, is in any event forbidden.

[52] See p. 63 for text of Article 22.

[53] See pp. 296–305.

[54] Although this conclusion may admittedly prove of little comfort in any future conflict attended by the conditions that characterized the two World Wars. Nevertheless, this consideration can not be regarded as sufficient reason for asserting that the rule forbidding the destruction of neutral vessels, without first resorting to seizure and removing passengers and crew to a place of safety, is no longer binding. Whatever the possible justification that may be urged on behalf of unrestricted submarine and aerial warfare against enemy merchant vessels (see pp. 67–70), there is no similar case to be made for the destruction of neutral vessels without complying with the obligation laid down by the traditional law, save perhaps the extravagant belligerent claim that the economic isolation of an enemy justifies the destruction of neutral shipping intended for the enemy, whatever the means employed. It is this latter point that Professor Stone (*op. cit.*, p. 604) places emphasis upon, when he observes—in a stimulating and perceptive analysis of recent developments—that "the traditional distinction, for purposes of

limited exceptions—persistent refusal to stop upon being duly summoned, any form of forcible resistance to visit and search, taking a direct part in the hostilities on the side of an enemy [55]—a belligerent may not proceed to the destruction of neutral vessels without having first captured them and removed passengers and crew, as well as ship's papers, to a place of safety.[56] Nor does the inability of submarines or aircraft to comply with these obli-

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the right of capture and destruction, between goods carried in enemy and neutral bottoms has only a faded meaning when the acknowledged objective is 'annihilation of the enemy commerce.' " But there are methods and methods for accomplishing this "acknowledged objective," in itself not unlawful. To argue, however, that this objective must determine the rules that are to regulate belligerent conduct toward neutral shipping is to reduce this law to a mere simulacrum. No doubt there is a very large grain of truth in Professor Stone's criticism that: "Anglo-American publicists have regarded air and submarine craft as interlopers in naval warfare, which must play the game according to surface rules, or not at all, with no ground of complaint if the rules forbid their effective use." At the same time, it is one thing to insist upon a rigid observance by submarines and aircraft of rules whose denial does not involve the taking of neutral lives (e. g., diversion prior to visitation), and quite another thing to insist upon submarines and aircraft observing rules whose denial does involve the taking of neutral lives. There is little warrant for the rather deceptive categorization of the latter as merely part of the "game according to surface rules."

[55] To the acts enumerated above may be added the special control a belligerent may exert within an immediate area of naval operations (see pp. 300–1). The failure of a neutral vessel to conform to the special regulations established by a belligerent within this restricted area, and even to avoid it altogether, may well give rise to a liability to being fired upon. But even in those circumstances where a belligerent is permitted to fire upon, and possibly to destroy, a neutral vessel, without first seizing her and removing passengers and crew to a place of safety, the obligation remains to take all possible measures to search for and to rescue survivors. Insofar as the so-called "Laconia Order" (see pp. 72–3) was intended to apply to *both enemy and neutral merchant vessels* its unlawful character is patent.

[56] See *Law of Naval Warfare*, Article 503c.—In this connection it may be relevant to cite a rather curious—and obscure—passage in the judgment of the International Military Tribunal dealing with Admiral Doenitz. After condemning the establishment of operational zones within which neutral vessels were sunk without warning by submarines, and declaring that the contents of the "Laconia Order" (see pp. 72–3) "were undoubtedly ambiguous and deserve the strongest censure," the Tribunal went on to declare:

"The evidence further shows that the rescue provisions were not carried out and that the defendant ordered that they should not be carried out. The argument of the defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue and that the development of aircraft made rescue impossible. This may be so, but the protocol [i. e., the 1936 London Protocol] is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Doenitz is guilty of a violation of the protocol." For text of judgment, *U. S. Naval War College, International Law Documents, 1946–47*, pp. 300–1.

The statement is confusing in that it appears to imply that so long as the submarine can and will rescue survivors, neutral merchant vessels may be sunk without warning. But the rule to which the Tribunal had reference clearly obligates belligerents not to "sink or render incapable of navigation a merchant vessel without having first placed passengers, crew, and ship's papers in a place of safety." Thus, under the 1936 London Protocol the problem of rescue does not even arise, since belligerents are under the obligation *to capture* the neutral vessel before resorting to its destruction (exception being made for those circumstances enumerated above).

gations serve to confer upon them any right to depart from the rules heretofore applicable—and still applicable—to surface vessels.

C. VISIT, SEARCH, SEIZURE AND DESTRUCTION OF NEUTRAL AIRCRAFT

In preceding pages [57] attention has been directed to some of the difficulties involved in the assumption that the rules regulating seizure and destruction of enemy vessels may be applied by analogy to the treatment of enemy aircraft. Similar difficulties are apparent in the further assumption that the position of neutral aircraft may be assimilated to the position of neutral vessels, the rules applicable to the latter being considered as generally applicable to neutral aircraft.[58] Here again—as in the case of enemy aircraft—the practice of states through World War II is far too slight to provide sufficient basis for discerning the emergence of specific rules grounded in the behavior of belligerents and neutrals. In the absence of either conventional regulation or of state practice that may be regarded as constitutive of customary rules any discussion of the specific limits imposed upon belligerents in interfering with neutral aircraft necessarily must prove of limited utility. It is possible, however, to indicate in broad outline the nature and scope of the measures permitted to belligerents.[59]

Undoubtedly, the various forms of assistance neutral aircraft may render belligerents justifies the latter in claiming the right to check the activities of neutral civil aircraft encountered anywhere outside of neutral jurisdiction.[60] Nor has there been any disposition to question the right of belligerent military aircraft to require neutral civil aircraft to deviate from their

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[57] See pp. 108–11.

[58] An assumption that formed the basis of the relevant provisions (Articles 49, 53–6) of the 1923 Rules of Aerial Warfare.

[59] In part, the measures permitted to belligerents against neutral aircraft engaged in certain forms of unneutral service have already been indicated (see pp. 319 ff.).

[60] As in the case of warfare at sea, visit and search of neutral aircraft must be limited to aircraft formally commissioned in the armed forces of a belligerent. Less certain are the objects of the belligerent right of visit and search. Although it is generally assumed that this right extends to aircraft owned by the state, but operated for commercial purposes, the matter has yet to be resolved in practice. Even less certain is the right of a belligerent to capture and condemn neutral state-owned commercial aircraft found engaged in assisting a belligerent. The 1923 Rules of Aerial Warfare assumed that the law of prize would apply not only to privately owned aircraft but to publicly owned aircraft other than military aircraft and aircraft employed for customs or police purposes. The same assumption is reflected in *Law of Naval Warfare*, Section 500b. On the other hand Rowson (*op. cit.*, pp. 211–2) points out that: "This assimilation of certain neutral public non-military aircraft to private aircraft . . . overlooks . . . that for a neutral state to permit its own commercial aircraft to engage in activities which would render them liable to condemnation if they were private property is a breach of neutrality against which a belligerent should be allowed to protect himself without reference to a prize court."

course to a suitable locality where visit and search may be carried out.[61] At the same time, there is little indication of the procedure that is to be followed in ordering the diversion of neutral aircraft or the measures available to a belligerent in the event a neutral aircraft is unable to undertake diversion.[62]

It is clear that the substantive grounds justifying the capture of neutral aircraft are at least as broad as the rules justifying the capture of neutral vessels.[63] Thus neutral aircraft engaged in the carriage of contraband, breach of blockade (extended to the air), or the performance of unneutral service may be seized as prize. In principle, the duties incurred by a belligerent in seizing neutral vessels would appear to be equally applicable when

[61] Article 50 of the 1923 draft Rules permitted diversion for visit and search "to a suitable locality reasonably accessible." Failure to obey such orders would expose an aircraft to the risk of being fired upon.

[62] Of course, if a neutral aircraft attempts to flee upon being summoned, or offers any form of resistance to a belligerent military aircraft, then the latter is entitled to resort to force and even—if necessary—to destroy the neutral aircraft. The critical—and as yet unanswered—question concerns the measures available to a belligerent if the neutral aircraft is unable to undertake diversion, e. g., because of want of sufficient fuel. Although this question was not specifically dealt with in the 1923 Rules of Aerial Warfare it is indirectly covered by the stipulation in Article 50 that neutral aircraft may be deviated only to a "suitable locality reasonably accessible." In the comment to Article 50 it is declared that: "It would be a hardship to the neutral if he was obliged to make a long journey for this purpose and the locality must, therefore, not only be suitable, but must be reasonably accessible—that is, reasonably convenient of access. A more precise definition than this can scarcely be given; what is reasonably convenient of access is a question of fact to be determined in each case in the light of the special circumstances which may be present. If no place can be found which is reasonably convenient of access, the aircraft should be allowed to continue its flight." General Report of The Commission of Jurists, cited in *U. S. Naval War College, International Law Documents*, 1924, p. 141. It is not difficult to conceive of circumstances in which the course of action advocated above would result in the belligerent surrendering—or practical purposes—his right to suppress neutral aircraft engaged in rendering assistance to an enemy. Nor is it to be expected that belligerents will readily acquiesce to this solution, particularly if future conflicts witness rapid developments in air transport.

[63] Indeed, this would appear as a very conservative assumption, and it is quite likely that future developments in this area of the law will see an extension (as compared with the maritime rules) of the grounds justifying capture. Even Article 53 of the 1923 Rules of Aerial Warfare, although applying to neutral aircraft the rules already applicable to neutral merchant vessels, went beyond the latter rules in certain respects. Thus "neutral private aircraft" were held liable to capture not only for the carriage of contraband, breach of blockade and the performance of unneutral service, but also if "armed in time of war when outside the jurisdiction of its own country," or if found bearing no external marks or using false marks. Violation of a belligerent's prohibition against entering an area of operations—as defined in Article 30—constituted a further ground for capture.—And see *Law of Naval Warfare*, Article 503d for an enumeration of acts held to create a liability to capture if performed either by neutral vessels or aircraft.—Distinguish, however, between acts of neutral aircraft resulting in a liability to capture and acts which result not only in a liability to capture but to the destruction—if necessary—of the aircraft prior to capture. Liability to destruction prior to capture may arise either from the attempt to evade or to resist the exercise of belligerent rights, or from the performance of several types of unneutral service.

capturing neutral aircraft.[64] Unless the neutral nationals serving as crew members have taken a direct part in the hostilities against the captor (or are found to be serving in the enemy's employ) they may not be made prisoners of war. With respect to the seized aircraft and cargo the captor is placed only in temporary possession pending adjudication of the capture by a court of prize. In consequence of his provisional possession reasonable measures must be taken to preserve the seized property intact and to turn it over to the custody of the officers of the prize court without undue delay. Finally, it does not appear that a captor is under any greater restriction in resorting to the destruction of neutral aircraft seized as prize than he is in resorting to the destruction of captured neutral vessels.[65]

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[64] See pp. 347–8.

[65] See pp. 349–53. Also *Law of NavalWarfare*, Article 503e.—It is of interest to note that Articles 58 and 59 of the 1923 Rules of Aerial Warfare, concerning the destruction of captured neutral aircraft, were—if anything—more strict than the corresponding provisions of the Declaration of London, dealing with the destruction of neutral vessels seized as prize. Article 58 would have permitted the destruction of neutral aircraft seized for unneutral service, or for having no marks or bearing false marks, only when sending the aircraft in "would be impossible or would imperil the safety of the belligerent aircraft or the success of the operations in which it is engaged." Apart from these cases destruction was held to be justified only in the "gravest military emergency, which would not justify the officer in command in releasing it or sending it in for adjudication." In any case—according to Article 59—all persons on board an aircraft were to first be removed to a place of safety and the aircraft's papers preserved. If the captor later failed to show sufficient cause for destruction the interested parties were to be entitled to compensation—even though the capture was held to be valid. Finally, if the capture was later held to be invalid, though the act of destruction held to have been justifiable, compensation would also follow.