

International Law Studies—Volume 50

THE LAW OF WAR AND NEUTRALITY AT SEA

Robert W. Tucker (Author)

The thoughts and opinions expressed are those of the authors and not necessarily of the U.S.

Government, the U.S. Department of the Navy or the Naval War College.

IX. CONTRABAND

A. CONCEPTION OF CONTRABAND

The foundation of the law of contraband must be found in the belligerent claim to prevent an enemy from receiving such goods as will enable him the more effectively to wage war. The law of contraband therefore deals with the extent to which this belligerent claim has been accorded legal recognition. Here, as elsewhere, it will be useful to begin the discussion with a brief statement of the basic features of this law as they appeared in the period preceding the outbreak of World War I.

Purpose and destination have always formed the distinguishing criteria of contraband. With respect to the first of these criteria the traditional law effected a threefold division: articles used primarily (i. e., specialized) for war, articles equally susceptible of use for warlike or for peaceful purposes, and articles either not susceptible of use in war or—though of such possible use—granted exemption on humanitarian grounds. The first category could be seized if found destined to territory belonging to or occupied by an enemy, or the armed forces of an enemy, the nature of the goods making their use for hostile purposes a near certainty once they had entered the belligerent's jurisdiction. The second category, known as conditional contraband, could be seized only if found to be destined for delivery to an enemy government or to its armed forces, thus resolving the uncertainty as to the purpose for which the goods would be used. The third category, known as free goods, were exempt from seizure without consideration of their destination.¹

The foregoing may be taken to represent the basic framework of the traditional law of contraband, and in a sense it is true that this framework remains valid even today.² Susceptibility of use in war and hostile destination still form the essential conditions that must be present if goods are to be seized as contraband of war. It is a different matter, however, to inquire

¹ It is also desirable to note that the law of contraband applies to neutral owned goods shipped aboard either a neutral or an enemy vessel as well as to enemy owned goods shipped aboard a neutral vessel. This for the reason that according to Article 2 of the Declaration of Paris the neutral flag covers enemy goods, with the exception of contraband, and—according to Article 3—neutral goods under an enemy flag are not liable to seizure, contraband excepted. In practice, however, the prevention of contraband carriage is concerned primarily with neutral commerce. This is particularly true in view of recent developments which have rendered Articles 2 and 3 of the Declaration of Paris almost inoperative.

² *Law of Naval Warfare*, Article 631a.

how meaningful it may be to assert that the traditional basis of the law of contraband remains unchanged in view of belligerent practices during the two World Wars. For these practices have succeeded in effecting a radical transformation even while retaining the traditional forms. Whereas in an earlier era the law of contraband tended to represent a compromise between the conflicting claims of neutral and belligerent, recent practice represents the successful realization of the belligerent aim of preventing almost any type of goods from reaching an enemy. In this process the traditional distinction between absolute and conditional contraband, though formally retained, has become a distinction without a difference. The category of free goods, also retained in form, has shrunk to a vanishing point. In both global conflicts the major disputes between neutral and belligerent centered primarily upon the specific methods adopted by belligerents in pursuing the avowed goal of seizing or destroying practically the whole of an enemy's imports. But the legitimacy of this goal became a subordinate question even during World War I, and in the second World War neutral protests against the all-inclusive character of belligerent contraband lists assumed an almost perfunctory character.³

In so reducing the area of freedom formerly enjoyed by neutrals, belligerents received a substantial measure of support from the very uncertainty marking nineteenth century practice. The law of contraband had always provided the controversial core of neutral-belligerent relations, and a number of disputed issues had never been clearly resolved. Once hostilities broke out in 1914 ample opportunity was therefore provided belligerents to pursue courses of action whose unlawful character could hardly be regarded as self-evident, despite neutral, and enemy, assertions to this effect.

This opportunity afforded belligerents can be attributed in part to the absence of any clear restraint upon the admitted right of a state to draw up contraband lists once it became involved in war.⁴ The position of belliger-

³ Thus several neutral states protested against the British contraband list issued in September 1939, though the protests were neither energetically pressed nor seriously received. On October 3, 1939 the Foreign Ministers of the American Republics resolved: "To register its opposition to the placing of foodstuffs and clothing intended for civilian populations, not destined directly or indirectly for the use of a belligerent government or its armed forces, on lists of contraband." *A. J. I. L.*, 34 (1940), *Supp.*, p. 14.

⁴ Apart, of course, from those limitations imposed by treaty. During the 18th and 19th centuries a number of bilateral treaties were concluded defining the articles to be considered contraband in the event of a war in which one of the parties to the treaty was a participant. But the significance of these treaties is now almost entirely historical. At present, the only conventional restrictions of a multilateral character imposed upon belligerents in drawing up contraband lists are those contained in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Article 23 of this Convention obligates the contracting parties to "allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases." But this obligation of belligerents is subject to the conditions that the

ents has been not merely to contend that the precise nature of contraband lists is necessarily dependent upon the concrete circumstances of the war—which is true enough—but that the significance of these circumstances, and hence the particular items to be classified as contraband, must be left to the determination of the belligerents⁵—an altogether different and frequently controverted claim. The latter contention must imply that the only limitations placed upon the belligerent's discretion in devising his contraband lists are those imposed by the general rules defining the nature of contraband goods. On the other hand, states not involved in hostilities have sought to place more precise restrictions upon the discretion claimed by belligerents. At the very least, neutrals have maintained that belligerents cannot act in complete disregard of neutral opinion when devising contraband lists.

In Articles 22 through 29 of the unratified Declaration of London the attempt was made to compromise the issue by listing articles that might "without notice" be regarded as absolute contraband and to which further articles "exclusively used for war" could be added by means of a notified declaration addressed to other states. Similar provision was made for articles that could be treated without notice as conditional contraband and to which further articles and materials "susceptible of use in war as well as

party allowing for the free passage of these goods has no "serious reasons for fearing: (a) that the consignments may be diverted from their destination, (b) that the control may not be effective, or (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the . . . consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or faculties as would otherwise be required for the production of such goods." Article 59 of the same convention provides for the passage of certain goods (e. g., foodstuffs, medical supplies and clothing) to occupied territory "if the whole or part of the population of an occupied territory is inadequately supplied." Nevertheless, the state granting such passage shall have the right "to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power."—These provisions may be regarded as a striking illustration of the extent to which states have granted recognition—in a humanitarian convention—to the virtual absence of restraints upon the belligerent freedom to deprive an enemy of all goods, even those expressly designed to serve humanitarian purposes. For the discretion given to belligerents in Articles 23 and 59 is of such a character as to nullify, for practical purposes, the obligations ostensibly undertaken in these provisions.

Finally, note should be taken of the customary practice of permitting free passage of articles serving exclusively to aid the sick and wounded of the enemy. See Article 631c (2), *Law of Naval Warfare*. Also exempt from seizure, by custom, are articles intended exclusively for the use of the crew and passengers of a vessel.

⁵ Thus the British Government, in replying on November 20, 1939 to earlier protests made by the Netherlands' Government against the former's contraband lists, took the usual belligerent position in declaring that: "It is the undoubted right in international law of a belligerent Power to declare what articles it will consider as contraband, within the general definition of contraband as being any article of use for the prosecution of war." cited in Hackworth, Vol. VII, *op. cit.*, p. 26.

for purposes of peace" could be added by proper notification. Finally, the Declaration contained a list of articles and materials "not to be declared contraband of war."

It would serve little purpose to retrace here the steps by which these provisions, though provisionally adopted by the belligerents in 1914, were abandoned. Within a brief period of time most of the items listed by the Declaration of London as free had been shifted to the category of conditional contraband, and a large number of articles originally listed as conditional contraband were moved to the category of absolute contraband. In each instance belligerent justification for expanding contraband lists followed a uniform pattern. The novel circumstances in which hostilities were being conducted were alleged to have resulted in rendering almost all goods susceptible of use in war. In addition, these same circumstances were held to have resolved the otherwise ambiguous character of numerous articles formerly considered as conditional contraband; the use of these articles for warlike purposes now being considered so probable as to justify their reclassification within the category of absolute contraband.⁶

By the end of World War I it was no longer expedient to list each separate item declared to constitute either absolute or conditional contraband. Instead, the new belligerent procedure—introduced in the 1917 *Instructions For the Navy of the United States Governing Maritime Warfare*—was to list only a few broad categories within which particular items were considered to

⁶ In this manner the "nature" of absolute contraband³ underwent a subtle transformation. It can be argued that the description given absolute contraband always varied to some extent. Nevertheless, the traditional meaning—according to even the most liberal interpretation—was a strict one. Absolute contraband consisted of goods "specialized for war," or, in the words of Article 34 of the U. S. Naval War Code of 1900, of goods "primarily and ordinarily used for military purposes in time of war." Belligerents were not justified, however, in listing items as absolute contraband simply because there was a probability—even a certainty—that a part of these goods would be used for warlike purposes. It was precisely this latter consideration that formed the justification for conditional contraband; the ambiguity attached to the latter being removed when it was once established that they were destined to the armed forces of the enemy. Yet, belligerent practice during the two World Wars was not only to do away with the distinction between absolute and conditional contraband by giving to both a common destination (a point to be dealt with shortly) but also by alleging that a large portion of the goods in question (e. g., fuel and lubricants) would be used for warlike purposes. This latter claim may be readily admitted; a portion of almost any type of goods will be consumed by the military effort. The same was also true of an earlier era, however, though it did not serve to classify goods as absolute contraband. The point of all this is not, as has been suggested, "that while such articles may be of ambiguous use, abstractly speaking, in a particular stage of a particular war and as against a particular enemy there may be no ambiguity whatsoever about the use to which they will be put if they reach that enemy." Stone, *op. cit.*, p. 481. On the contrary, even in "total war" an appreciable uncertainty remains over the use to which a particular shipment of goods may be put. What is not uncertain is that a part of the total quantity of shipments will most assuredly be used for warlike purposes; and it has been on this basis that belligerents have declared such goods to be absolute contraband. But on this reasoning it is difficult to see the logic in placing fuel on the list of absolute contraband and food on the conditional list, though belligerents did just this even in World War II.

fall. Upon the outbreak of war in 1939 this procedure was adopted by several of the major belligerents, although some states retained the former practice of publishing detailed lists. In either case, the central feature common to the belligerent contraband lists was their all embracing character.⁷

B. CARRIAGE OF CONTRABAND: THE PROBLEM OF DESTINATION

Carriage of contraband occurs only when goods whose nature renders them of use in war are found to have a hostile destination. It has earlier been observed that according to the traditional law the hostile destination required of goods before they could be seized and condemned as contraband of war turned upon the nature of the goods. In the case of goods used primarily for war (absolute contraband) the territory belonging to or occupied by an enemy, or the armed forces of an enemy, formed the required

⁷ The contraband list proclaimed by Great Britain in September 1939, and adopted by Canada, New Zealand, Australia and France, was closely patterned after the list contained in Article 24 of the U. S. Navy's 1917 *Instructions*. The British list read as follows:

"Schedule I.

Absolute Contraband

(a) All kinds of arms, ammunition, explosives, chemicals, or appliances suitable for use in chemical warfare and machines for their manufacture or repair; component parts thereof; articles necessary or convenient for their use; materials or ingredients used in their manufacture; articles necessary or convenient for the production or use of such materials or ingredients.

(b) Fuel of all kinds; all contrivances for, or means of, transportation on land, in the water or air, and machines used in their manufacture or repair; component parts thereof, instruments, articles, or animals necessary or convenient for their use; materials or ingredients used in their manufacture; articles necessary or convenient for the production or use of such materials or ingredients.

(c) All means of communication, tools, implements, instruments, equipments, maps, pictures, papers and other articles, machines, or documents necessary or convenient for carrying on hostile operation; articles necessary or convenient for their manufacture or use.

(d) Coin, bullion, currency, evidences of debt; also metal, materials, dies, plates, machinery, or other articles necessary or convenient for their manufacture.

Schedule II.

Conditional Contraband

(e) All kinds of food, foodstuffs, feed, forage, and clothing and articles and materials used in their production." *U. S. Naval War College, International Law Documents, 1944-45*, pp. 91-92.

Article 22 of the German Prize Law Code of August 28, 1939, declared as absolute contraband "all articles and materials which: 1. Directly serve the land, naval or air armament and 2. Are consigned to the enemy territory or the armed forces." This was soon changed, however, by an absolute contraband list that closely paralleled the Allied list. On September 12, 1939, the German Government declared "foodstuffs (including live animals) beverages and tobacco and the like, fodder and clothing; articles and materials used for their preparation or manufacture" to be conditional contraband. — In effect, the major belligerents therefore had a common contraband list.

destination.⁸ Goods possessing an ambiguous nature (conditional contraband) required a destination to the government authorities or to the armed forces of an enemy state.⁹

It is clear that this differentiation in destination must depend, in turn, upon the assumption that belligerents will be able and willing to make a reasonable clear distinction between the combatant forces and the civilian population of an enemy. Once the latter distinction is discarded it is no longer meaningful to distinguish between absolute and conditional contraband, since the destination required of all goods susceptible of use in war will then be assimilated to the destination formerly reserved only for absolute contraband. It was precisely this development that marked belligerent practice almost from the initial stages of World War I. The belligerents contended that given the circumstances it was no longer possible

⁸ And Article 31 of the Declaration of London reflected the customary law in stating that the proof required for establishing hostile destination in the case of absolute contraband is complete "(1) when the goods are documented to be discharged in a port of the enemy, or to be delivered to his armed forces," and "(2) when the vessel is to call at enemy ports only, or when she is to touch at a port of the enemy or to join his armed forces, before arriving at the neutral port for which the goods are documented." According to Article 32 the ship's papers were to be considered conclusive unless the vessel was found to have deviated from her route and unable to account properly for such deviation. But ship's papers have never been regarded as conclusive if facts establish their contents to be false.

⁹ But pre-World War I practice had never clearly resolved the controversy over the presumptions open to belligerents with respect to the destination required for conditional contraband. The importance of this matter is clear, since once a presumption of enemy destination has been made the claimant has the burden of establishing innocent destination before a prize court in order to obtain restitution of goods seized. British practice in the 19th century distinguished between goods destined to an enemy port used primarily for commercial purposes and goods destined to enemy ports serving the armed forces. In the latter instance enemy destination was presumed for goods consisting of conditional contraband. However, Article 34 of the Declaration of London stated that, with respect to conditional contraband, enemy destination is presumed "if the consignment is addressed to enemy authorities, or to a merchant, established in the enemy country, and when it is well known that this merchant supplies articles and materials of this kind to the enemy," or, if goods are "destined to a fortified place of the enemy, or to another place serving as a base for the armed forces of the enemy." These presumptions of enemy destination could be rebutted, but then the burden of proof would fall upon the neutral claimant. There is no question but that as judged by 19th century practice Article 34 represented a considerable concession to belligerent claims and prepared the way for the later practices of belligerents in World War I. Writing shortly before the outbreak of World War I, John Bassett Moore prophetically observed of this provision that: "These grounds of inference are so vague and general that they would seem to justify in almost any case the presumption that the cargo, if bound to an enemy port, was 'destined for the use of the enemy forces or of a government department of the enemy state.' Any merchant established in the enemy country, who deals in the things described, will sell them to the government; and if it becomes public that he does so it will be 'well known' that he supplies them. Again, practically every important port is a 'fortified place;' and yet the existence of fortifications would usually bear no relation whatever to the eventual use of provisions and various other articles mentioned. Nor can it be denied that, with well kept highways, almost any place may serve as a 'base' for supplying the armed forces of an enemy." *The Collected Papers of John Bassett Moore*, (1944) Vol. VI, p. 57 (address on "Contraband of War, February 2, 1912).

to distinguish with sufficient clarity between goods destined for the use of the armed forces and goods intended for civilian consumption. These circumstances were alleged to be the large proportion of the enemy population taking an active part in the military effort and the strict control exercised over all enemy imports through policies of requisition and rationing. The same circumstances appeared in a still more pronounced form in World War II, and belligerents responded by once again making enemy territory the requisite hostile destination for seizure and subsequent condemnation of all goods deemed susceptible of being put to a warlike use.¹⁰

The major problem remains, however, since it is still necessary for a belligerent to establish an enemy destination in order to condemn goods as contraband of war. In the simplest case involving the direct carriage of contraband, where the vessel is encountered carrying goods susceptible of use in war and documented to be discharged in an enemy port, no difficulty will normally arise.¹¹ But experience has shown that under modern conditions the direct carriage of contraband is likely to prove the exception rather than the rule. In the case of a belligerent adjoined by neutral states, as was Germany in both World Wars, the carriage of contraband will almost invariably be indirect, through the ports of adjacent neutrals, and the belligerent's problem of contraband control will center very largely upon the extent of the right to intercept goods documented to neutral ports though having—or suspected of having—an ultimate enemy destination.

¹⁰ The major steps in this development—facilitated by Article 34 of the Declaration of London—may be briefly traced. By 1915 Germany had declared that almost every major port in the British Isles was either a “fortified place” or a base for serving the armed forces. The effect of this action was to abandon the distinction between absolute and conditional contraband, even while claiming—as Germany did so claim—to have upheld it. British practice followed along similar lines, and in April 1916 the British Government openly abandoned the attempt to distinguish between the destinations formerly required of conditional and absolute contraband. But this distinction had already been abandoned by the British Prize Court. Thus in *The Kim and Other Vessels* [1915] it was declared, in condemning foodstuffs held to be destined to Germany, that: “Apart altogether from the special adaptability of these cargoes for the armed forces, and the highly probable inference that they were destined for the forces, even assuming that they were indiscriminately distributed between the military and civilian population, a very large proportion would necessarily be used by the military forces. 3 *Lloyds Prize Cases*, p. 367.

In World War II the issue was never in any doubt, given the total character of each belligerent's war effort. Thus in *The Alwaki and Other Vessels* [1940], the British Prize Court declared, in condemning foodstuffs held to be destined to Germany, that “there is the clearest possible evidence of German decrees which, to put it quite shortly, impose Government control on all these articles and prescribe that they are automatically seized at the moment of crossing the frontier or, to put it more accurately, at the moment of coming into the customs house.” *Annual Digest and Reports of Public International Law Cases* (1938-40), Case No. 223, p. 586.

¹¹ Nor will any difficulty normally arise even when cargo is found to be documented to a neutral port, if the vessel is to touch at an enemy port on its way to the neutral port or if the vessel is encountered having deviated from the route indicated on the ship's papers. In either case the goods on board may be presumed to have an enemy destination; the destination of the goods being assimilated to the least favorable destination of the vessel.

Over the basic principle governing such cases involving the indirect carriage of contraband—and most appropriately termed the principle of ultimate enemy destination—there can no longer be any real doubt.¹² Goods documented to neutral ports and consigned to persons in neutral territory are nevertheless liable to seizure at any time after leaving their port of origin if it can be shown that the ostensible neutral destination serves only as an intermediate point for further transit—whether by land, sea or air—to an enemy.¹³

At the same time, the specific consequences following upon the application of this principle to the carriage of contraband have not only been extremely far-reaching in practice but have provoked controversies between neutral and belligerent that are still far from being satisfactorily resolved. Nor are the reasons that have led to these controversies—in which neutrals have alleged unwarranted interference with their legitimate

¹² The neutral trader's purpose in making such circuitous voyages is clear. Since goods destined for use in neutral territory are exempt from belligerent interference, the risks incurred in undertaking to trade in contraband would be considerably reduced provided only that cargo could enjoy exemption from seizure simply because documented to a neutral port. If the contraband goods are to be carried from the neutral port to an enemy destination by sea, whether in the same vessel (continuous voyage) or after being reshipped in another vessel (continuous transport), the period of liability to seizure would then be reduced to the latter leg of the voyage. If, on the other hand, the goods are to be transported to an enemy, after reaching a neutral port, by land or by inland waterway (continuous transport), no risk would be run at all.

The application to contraband of the principle of continuous voyage, or transport, was first undertaken by American prize courts during the period of the Civil War. However, these decisions were confined to the condemnation of goods consisting of absolute contraband. At the time, the majority of writers—and states—strongly condemned the decisions. But Great Britain, whose trade was the most directly affected, did not protest. In 1900, during the Boer War, the British sought to apply the principle—as a belligerent—against German merchant vessels and met with strong German protests. The matter remained unsettled down to the outbreak of World War I, despite the well known compromise attempted in the Declaration of London to apply the principle of ultimate enemy destination to absolute contraband (Article 30) though not to conditional contraband (Article 35). Great Britain abandoned the compromise almost directly upon the initiation of hostilities, and in taking this action was followed by her Allies. In British prize law rejection of the compromise sought by the Declaration of London came in *The Kim and Other Vessels* [1915], 3 *Lloyds Prize Cases*, pp. 355–9. In April 1915 Germany also abandoned Article 35 of the Declaration of London, though treating her action as a retaliatory measure taken against the unlawful action of the Allies. Paragraphs 69 and 70 of the U. S. Navy's 1917 *Instructions* expressly endorsed the application of the principle of ultimate enemy destination to both absolute and conditional contraband. A detailed treatment of the historical development of the principle of continuous voyage through World War I may be found in H. W. Briggs, *The Doctrine of Continuous Voyage* (1926).

In World War II continued controversy over the application of the principle of ultimate enemy destination to conditional contraband almost disappeared. However, Article 24 of the German Prize Law Code of August 28, 1939 did declare that conditional contraband is not liable to capture if discharged in a neutral port "on condition of reciprocal procedure on the part of the enemy." The "reciprocal procedure" not being forthcoming Germany abandoned this provision.

¹³ See *Law of Naval Warfare*, Article 631c.

trade—hard to trace. It cannot be emphasized too strongly that the traditional system regulating trade in contraband had been based largely upon the assumption that the destination of a cargo would generally be the same as that of the vessel in which it was carried. This assumption goes far in explaining the traditional methods of contraband control as well as the procedure of prize courts. Visit and search at sea—the principal method of contraband control—was confined to an examination of the ship's papers and the interrogation of crew members. If the result of visit and search indicated an enemy destination, or a reasonable suspicion of enemy destination, the vessel and goods could be seized and placed in prize. Before the belligerent's prize court the normal procedure had been to restrict the evidence that could be brought forward in the first hearing to that provided by the vessel herself. The introduction of extrinsic evidence by the captor was generally permitted only if the preliminary hearing did not establish with sufficient clarity a proper case either for condemnation or for restitution. Hence, the primary burden was placed upon the captor to justify his act of seizure, and in this task the evidence he could generally bring forth was of a limited nature.¹⁴

It need hardly be pointed out that this system would seriously limit—if not frustrate altogether—any benefits to be derived from applying to contraband the principle of ultimate enemy destination, particularly in view of the present complexity of commercial transactions. In the case of vessels destined to a neutral port adjacent to enemy territory, carrying goods documented to the neutral port and consigned to persons in neutral territory, the ship's papers will generally reveal nothing concerning the ultimate destination of the cargo.¹⁵ The information required to establish enemy destination will almost always be of a very complex character and can be gathered—if at all—only through the vast intelligence facilities at the disposal of belligerent governments. In these circumstances interception at sea can no longer possess its former significance. Instead of ascertaining through visit and search whether sufficient cause for seizure exists the normal procedure has been to intercept neutral vessels and to divert

¹⁴ This, at least, had been the Anglo-American practice until it was abandoned by Great Britain in the prize rules issued by the British Government shortly before the outbreak of war in 1914. Formally, it still represents the procedure in American prize courts, as Hyde (*op. cit.*, pp. 2378-82) points out, though American courts have been inactive in prize proceedings since the Spanish-American War.

¹⁵ "Modern facilities of communication, as well as the modern system of company organization and finance, have made it possible to conceal the truth of any commercial transaction under a thick coat of legal camouflage, and a boarding officer would merely be wasting his time if he tried to determine the real destination of a cargo from an examination of the manifest and the bills of lading." H. A. Smith, *op. cit.*, p. 124. Of course, the falsification or forgery of papers has always been practiced. However, as Smith observes, the difference between former days and the present period "is that modern commerce and finance have⁸⁸ now made it possible completely to conceal the truth without recourse to such crude methods_{as} forgery."

them to a contraband control base.¹⁶ Here, during the period of detention, information may be collected that will lead either to the release of the vessel and goods or to their seizure as prize.¹⁷

In the latter eventuality the procedure followed in both World Wars has been for the captor to initiate proceedings in prize by introducing any evidence that may serve to justify seizure and—possibly—condemnation. If the evidence introduced is regarded as sufficient to create a reasonable suspicion of ultimate enemy destination the claimant, in order to avoid condemnation, must refute the presumption of enemy destination thus held to arise by a positive showing that the cargo has a genuine neutral destination. Provided, then, that the belligerent can establish circumstances creating a reasonable suspicion of enemy destination the burden of proving an innocent destination is thrown upon the neutral claimant.¹⁸

In this connection the belligerent's task has been facilitated still further by the creation of a detailed set of presumptions governing hostile destination. Thus a presumption of enemy destination has been held to arise where goods are consigned "to order," or if the ships papers do not indicate the real consignee of the goods, or if goods are merely consigned to a dealer or agent and the ultimate buyer is unknown, or if the parties engaged in the transaction—though known—have or are suspected of having enemy

¹⁶ At least this has been the normal procedure followed in the absence of the vessel's cargo being covered by a navicert (see pp. 281-2).

¹⁷ The measures by which belligerents, and principally Great Britain, sought to mitigate the inconvenience thereby caused to neutral shippers through forced diversion and detention in contraband control bases will be considered in later pages. The legality of diversion for search (and even for visit) is now generally accepted, though when initiated in World War I it could not be said to have had legal sanction (see pp. 338-43). Nor should the primary purpose of compulsory deviation be obscured by belligerent claims—although in part justified—that the dangers attending visit and search at sea, as well as the increased size of vessels, required the adaptation of traditional methods to these novel circumstances. For the practice of compulsory deviation was essentially a result of the belligerent need to detain a vessel for a period of time sufficient either to work up an adequate case for seizure in prize or to establish the innocent destination of the cargo.

¹⁸ In British prize law this principle was clearly laid down in World War I in *The Louisiana and Other Ships* [1918], 5 *Lloyds Prize Cases*, p. 252. During World War II the Judicial Committee of the Privy Council reaffirmed the principle in the following terms: ". . . the captor must show that the case is one involving reasonable suspicion. If they do so, and if no claim is made, or if the claim fails, the court will in due course condemn the property as prize, but on the side of the claimants positive proof to the satisfaction of the court is exacted. . . . The contrast between the two sides is sometimes explained as depending on the onus of proof. In a sense that may be a true description, but more exactly the difference depends on what is the case of either side. The captor has to maintain his seizure by showing the case of reasonable suspicion in order to justify what he did. The claimant has to establish by evidence of fact his affirmative case, which he can do in any case like this by showing the precise character of the adventure and showing that the ostensible destination is the real destination." *The Monte Contes* [1943], *Annual Digest and Reports of Public International Law Cases* (1943-45), Case No. 196, pp. 544-5.

connections.¹⁹ In any of the foregoing circumstances the inference of an ultimate enemy destination has been strong and could be displaced only by a positive showing that the goods in question had an innocent destination.²⁰

Nor has it been considered sufficient to establish that neither the shipper nor the nominal consignee intended to supply an enemy with contraband of war. In applying the principle of ultimate enemy destination it is not the intention of the neutral claimant in whose possession the goods are at the time of seizure that has been decisive but rather the intention of those who have—or will have—control over the ultimate destination of the goods.²¹ And so long as an ultimate enemy destination is held to exist at the time of seizure, condemnation has been considered justified.²² This has also implied the abandonment of restraints that formerly resulted from considering the act of contraband carriage as necessarily constituting a single commercial transaction. In considering the question of final destination as decisive goods have been condemned that were intended to pass through a number of intermediate transactions in a neutral state before reaching an enemy. It may be, for example, that goods are immediately destined to a neutral country to be there transformed from raw materials into manufactured articles, then to be re-exported to an enemy. In these circum-

¹⁹ In World War I Great Britain, by a series of Orders in Council, established a number of such presumptions relating to enemy destination. The most comprehensive of these Orders in Council, that of July 7, 1916, declared that: "The hostile destination required for the condemnation of contraband articles shall be presumed to exist, until the contrary is shown, if the goods are consigned to or for an enemy authority, or an agent of the enemy State, or to or for a person in a territory belonging to or occupied by the enemy, or to or for a person who, during the present hostilities, has forwarded contraband goods to an enemy authority, or an agent of the enemy State, or to or for a person in territory belonging to or occupied by the enemy, or if the goods are consigned to 'order', or if the ship's papers do not show who is the real consignee of the goods." *U. S. Naval War College, International Law Documents, 1944-45*, p. 49 (and see pp. 42-69 for a general review of enemy destination in World War I). The Prize Court in Great Britain has added to these presumptions, and an illuminating survey may be found in Colombos, *op. cit.*, pp. 198 ff.

²⁰ Of course, the captor may still fail to establish a case sufficiently strong to warrant condemnation by a prize court. But so long as "reasonable suspicion" can be shown to have existed at the time of seizure the belligerent cannot be held liable for losses incurred as a result of seizure. Nor is it actually necessary, from the belligerent's point of view, to obtain condemnation. It is sufficient merely to obtain possession of the goods and thus to deprive the enemy of their use. This may be accomplished, for example, either by the sale of the goods or by their requisition during the period they are being held in prize. For a further discussion of these—and related—points, see p. 346(n).

²¹ "When an exporter ships goods under such conditions that he does not retain control of their disposal at the port of delivery, and the control, but for their interception and seizure, would have passed into the hands of some other persons, who had the intention either to sell them to an enemy government or to send them to an enemy base of supply, then the doctrine of continuous voyage becomes applicable, and the goods on capture are liable to condemnation as contraband." *The Norne and Other Vessels* [1921], 9 *Lloyds Prize Cases*, p. 427.

²² Though, of course, account has been taken of events occurring after seizure.

stances British prize law has not considered such goods as having been legitimately incorporated into the "common stock" of the neutral country, but ultimately intended for an enemy, hence liable to seizure and condemnation.²³

Finally, a presumption of enemy destination has been held to arise where goods being imported into a neutral country are found to be in appreciable excess of the state's normal import requirements. It is this presumption that has provided the most striking, and certainly the most controverted, development in the expansion of belligerent claims to control neutral trade in contraband. In effect, the belligerent has sought by this method to ration the imports of neutral states. Whereas the presumptions of enemy destination described above still attempt to preserve a connection—however tenuous—with the traditional system, the presumption that has as its basis the fact that a neutral state has exceeded its normal import requirements would appear to have abandoned this attempt altogether. Up to this point the application of the principle of ultimate enemy destination remains based upon the assumption that whatever may transpire between the initial shipment of goods and their final destination the events that must be inquired into form a single chain of occurrences—though not necessarily a single commercial transaction—dealing with a particular shipment of goods. Admittedly this sequence of events has become very complex, and the possibility of establishing—or even inferring—a discernible connection has correspondingly declined. For this reason the number of circumstances held to create a presumption of enemy destination has increased. Nevertheless, these presumptions do relate to a particular shipment of goods.²⁴

In this final presumption, though, based as it is upon the fact of excessive

²³ Thus in one instance it was declared that "the notion that leather, imported to a neutral country (Sweden) for the express purpose of being at once turned into boots for the enemy forces, becomes incorporated in the common stock of the neutral country, is illusory. Instances can be given and multiplied which appear to reduce to an absurdity the argument that if work is done in the neutral country upon goods which are intended ultimately for the enemy, that circumstance of necessity puts an end to their contraband character, and prevents their being confiscable according to the doctrine of continuous voyage." *The Balto* [1917], 6 *Lloyds Prize Cases*, p. 148.—Less certain—though apparently not from the viewpoint of British practice—is the application of the principle of ultimate enemy destination to the practice of "substitution," i. e., of condemning goods destined to a neutral country which—though consumed therein—have the effect of releasing a similar quantity of goods to an enemy. The problem comes very close to the issues involved in "rationing," and may be distinguished from the latter insofar as it is established that the same party receiving a particular shipment of goods was directly responsible for releasing a like quantity of the same goods to an enemy. Hence, it is not any *general relationship* between the import of goods into a neutral country in substitution for the release of similar goods to an enemy that here provides a basis for applying the principle of ultimate enemy destination; it is rather the specific relationship between the import and export—in the form of substitution—of goods.

²⁴ And the "highly probable destination" that has been held to follow if these presumptions are not clearly disproved, and which is sufficient to warrant condemnation, is a probability relating to a particular quantity of goods and based upon the facts attending its shipment.

neutral imports, attention is no longer directed to an enquiry into tracing a particular shipment of goods from its point of origin to its final destination. Instead, attention is directed to quantitative considerations, or, more precisely, to a comparison between what is regarded as a neutral country's normal import requirements for a given commodity and the amount of goods actually being imported. Once it has been determined that the latter exceeds normal requirements a strong presumption has arisen that the surplus goods are either themselves ultimately destined to an enemy or that their importation into the neutral country would serve to release a like quantity of similar goods. In a word, the presumption is in the nature of a statistical probability, drawn from a detailed analysis of a neutral state's trading pattern and applied to a particular shipment of goods.²⁵ And although there are apparently no cases in which prize courts have condemned goods solely on the basis of a "statistical presumption," it is nevertheless certain that such presumption has formed an important, and perhaps even the decisive, consideration in a number of instances. It is clear that prize courts (e. g., in Great Britain) have considered statistical presumptions as providing sufficient basis for seizure and for throwing upon the owner the burden of establishing that effective steps had been taken to insure that goods entering a neutral port would never reach an enemy destination.²⁶

²⁵ It is scarcely possible to discuss in any detail the many problems—legal and political—arising in connection with presumptions having a statistical probability as their basis. In a noteworthy discussion of so-called "rationing" policies (as well as other methods of contraband control), Sir G. G. Fitzmaurice ("Some Aspects of Modern Contraband Control and the Law of Prize," *B. Y. I. L.*, 22 (1945), pp. 89-95) has indicated some of the difficulties involved in fixing—whether through agreement with the neutral country or through belligerent imposition—the neutral's "reasonable domestic needs, having regard to all the circumstances, including manufacture for export to innocent destinations." In wartime "all sorts of factors may operate to justify a neutral in importing *more* than its normal peace-time requirements of a given commodity." Yet it does not appear to carry matters very far by saying of these difficulties that they involve "the question whether some revision of the concept of what constitutes enemy destination is not called for under modern conditions." Given the transformation that has already been effected by belligerent application of the principle of ultimate enemy destination the only "revision" left to belligerents is to consider neutral territory—as such—to be assimilated to the concept of enemy destination—in brief, to cut off all neutral trade on the theory that some part of this trade might eventually find its way to an enemy.

²⁶ "It appears to be settled . . . that an adequate 'statistical' case will *per se* (i. e., even in the absence of any suspicion attaching to the consignment on grounds specially connected with it as such) justify seizure and place upon the owner the burden of proving innocence, so that no damages can be recovered against the Crown in respect of the seizure. On the other hand, no case has as yet occurred where goods have been *condemned* on statistical evidence alone." Fitzmaurice, *op. cit.*, p. 91. Generally speaking, it has been considered desirable, for obvious reasons, to base condemnation on other grounds as well, and not upon a statistical probability alone. Besides, from a practical point of view, it may be quite sufficient only that seizure can be justified, for—as earlier noted—once goods have been seized the likelihood of their ever leaving the captors jurisdiction is small.

C. CONSEQUENCES OF CARRIAGE OF CONTRABAND

Neutral merchant vessels engaged in the carriage of contraband, or reasonably suspected of being so engaged, are liable to seizure.²⁷ This liability begins from the time the vessel leaves a neutral port with the contraband and terminates only upon completion of the voyage.²⁸

In considering the further consequences attached to the carriage of contraband a distinction must normally be made between the vessel and the contraband cargo. With respect to the contraband goods there is no question but that they are always subject to condemnation. Also subject to condemnation, according to the practice of some states, are the non-contraband goods that bear a common ownership with the noxious cargo.²⁹

Less settled are the rules governing the fate of the vessel seized while engaged in the carriage of contraband.³⁰ Whereas some states have traditionally placed primary emphasis upon the element of knowledge on the part of the owner (or master) of the vessel,³¹ other states have stressed the

²⁷ Even if carrying no contraband goods the neutral vessel may nevertheless be liable to seizure if she is herself considered to be contraband. In both World Wars vessels (and aircraft) were placed in the category of absolute contraband.—For a further discussion of visit and search as well as the varying circumstances under which seizure at sea is justified, see pp. 332 ff.

²⁸ See *Law of Naval Warfare*, Article 63rd. Note should also be taken of the British and American practice of holding that seizure of the vessel is permitted even on her return voyage if it is found that the carriage of contraband goods was accomplished by means of fraud, e. g., by false or simulated papers. In this instance condemnation of the vessel will also follow.

²⁹ This according to the so-called doctrine of infection which, as Colombos (*op. cit.*, p. 222) points out, "concerns strictly the ownership of the goods, and it is 'common' ownership which leads to the confiscation of the innocent cargo. Condemnation is an incident of the owner's position. It is not an incident of the quality or nature of the goods." The Declaration of London endorsed the principle of infection, and Article 42 declared that: "Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation." Great Britain has always followed this rule, as has the United States, and despite the traditional opposition of continental countries a number of these states have, in recent years, included the principle in their prize codes. In practice, however, the doctrine of infection can have only a limited significance today in view of developments in the conception of contraband.

³⁰ The loss of freight and other expenses now appears to constitute the minimum common penalty imposed upon a vessel seized for carriage of contraband. It is beyond this point that diversity may be found.

³¹ This has been the position of Great Britain and—in large measure—of the United States. Thus Oppenheim-Lauterpacht (*op. cit.*, p. 826): "Great Britain and the United States of America confiscated the vessel when the owner of the contraband was also the owner of the vessel; they also confiscated such part of the innocent cargo as belonged to the owner of the contraband goods; they, lastly, confiscated the vessel, although her owner was not the owner of the contraband, if the vessel sailed with false papers for the purpose of carrying contraband, or if the vessel was by a treaty with her flag State under an obligation not to carry the goods concerned to the enemy and the owner knew that his vessel was carrying contraband." Yet even where the owner has knowledge of the carriage of contraband Anglo-American practice has generally required such contraband to form a substantial proportion of the whole cargo; hence the element of proportionality is not altogether excluded.

proportion of contraband carried by the vessel.³² The Declaration of London reflected the latter practice in stating that a vessel carrying contraband "may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo;"³³ and although this rule has not yet been endorsed by the prize codes of all states it may be regarded as having succeeded in obtaining widespread acceptance.³⁴

³² Though continental European countries have required that the contraband form a certain percentage of the cargo—whether by volume, weight or value—the proportion required has varied from one-fourth to three-quarters, and in certain states the element of knowledge—through presumption, at least—formed an additional requirement.

³³ Article 40. But Hyde (*op. cit.*, p. 2161) observes that this rule should not "be deemed necessarily to forbid condemnation of the ship if the owner thereof has knowledge that goods constituting a substantial part of the cargo are contraband. Nor should he be permitted to profit from lack of such knowledge if he has chartered the vessel on a time charter to one who is notorious in supplying contraband to a belligerent, if at the time of capture the vessel was being employed as a vehicle of transportation on such a mission."

³⁴ British prize law still insists upon condemnation of the vessel being dependent upon the element of knowledge, despite the fact that the Order in Council of July 7, 1916 declared Article 40 of the Declaration of London as applicable against all vessels seized for carriage of contraband. In practice, this continued insistence upon the complicity of the owner is qualified in its effects by requiring the latter to take reasonable precautions to insure that his vessel is not used for the carriage of contraband. And Colombos (*op. cit.*, p. 225) points out that: "No immunity is, of course, available to a shipowner who charters his vessel and does not concern himself with the cargo. A neutral shipowner must see to it that his vessel is not used for the purpose of conveying contraband goods to one of the belligerents. Feigned or deliberate ignorance on his part does not afford any protection." One important reason for presuming knowledge will be the proportion of the cargo carried that consists of contraband. Hence the rule enunciated in the Declaration of London (which is also based, in a sense, upon a presumption of knowledge on the part of the owner) and the position still maintained in British prize law will frequently lead to similar results. Such divergence as will occur follows from those cases where, on the one hand, contraband is carried without the knowledge and against the will of the owner, and, on the other hand, where carriage of contraband is accomplished by means of fraud in which the owner either actively participates or has an interest. Regardless of the proportion of the cargo that is contraband, in the former instance the vessel is not condemned, whereas in the latter instance it will always be condemned (even if seized on its return voyage after having disposed of the contraband goods).

Finally, brief mention should be made of the circumstance in which a vessel is encountered carrying contraband, though unaware of the outbreak of war or of contraband declarations applicable to the cargo. On this point, Article 43 of the Declaration of London has been generally accepted. Article 43 states:

"If a vessel is encountered at sea making a voyage in ignorance of the hostilities or of the declaration of contraband affecting her cargo; the contraband is not to be condemned except with indemnity; the vessel herself and the remainder of the cargo are exempt from condemnation and from the expenses referred to in Article 41. The case is the same if the master after becoming aware of the opening of hostilities, or of the declaration of contraband, has not yet been able to discharge the contraband.

A vessel is deemed to be aware of the state of war, or of the declaration of contraband, if she left a neutral port after there had been made in sufficient time the notification of the opening of hostilities, or of the declaration of contraband, to the power to which such port belongs. A

D. CONCLUSIONS

As between the belligerents it is doubtful whether any of the developments occurring in the law of contraband since 1914 can be regarded as unlawful, even as judged solely by the standards of the traditional law. It is true that occasionally the argument has been pressed that a belligerent in endeavoring to seize all goods destined to an enemy state, including goods intended for consumption by the civilian population, thereby violates the principle requiring a distinction to be drawn between the treatment of combatants and non-combatants.³⁵ However, to the extent that the distinction in question has served to restrict inter-belligerent behavior in warfare at sea such restriction has sought primarily to prohibit belligerents from endangering the lives of enemy non-combatants by making them the objects of direct attack.³⁶ On the other hand, in exercising his undoubted right to seize and to confiscate enemy private property found at sea a belligerent is not considered to violate the combatant-non-combatant distinction. Nor is this distinction violated by exercise of the belligerent right to blockade the ports and even the entire coast of an enemy; though it is clear that the effects of blockade weigh as heavily upon non-combatants as upon combatants. These measures have long formed an accepted part of the law governing naval hostilities. They are believed to provide a clear answer to the contention that a belligerent violates any obligation toward an enemy in shutting off imports intended for consumption by the civil population.³⁷

As between belligerent and neutral the matter is admittedly altogether different, and no doubt it is from the neutral that the challenge to belligerent practices must come—if at all. In considering the validity of neutral claims, however, it will be useful not only to refrain from finding in the traditional law of contraband general principles where none have existed but also to abstain from imputing a degree of certainty—and precision—to

vessel is also deemed to be aware of a state of war if she left an enemy port after the opening of hostilities.”

Article 43 does not prevent *seizure*, however, where vessels are encountered carrying contraband of war. The ultimate disposition of the vessels and goods—in accordance with Article 43—falls upon the prize courts.

³⁵ “While the exigencies of belligerency must primarily control the definition of contraband, and therefore to a great extent settle the list of contraband merchandise, there is a point at which accepted law offers a barrier to further dictation on their part. Except to the limited degree which has been indicated in treating of belligerent rights, acts of war cannot be directed against the non-combatant population of an enemy state. Hence seizure of articles of commerce becomes illegitimate so soon as it ceases to aim at enfeebling the naval and military resources of the country and puts immediate pressure upon the civil population.” E. W. Hall, *A Treatise On International Law*, p. 656.

³⁶ The status of these restrictions has been examined elsewhere (see pp. 56-70) and bears no direct relation to the contention under present consideration.

³⁷ Assuming, of course, that a reasonably clear distinction can even be drawn between the combatant and the civilian enemy population.

such principles as have existed. The law of contraband has not been the product of any overarching principle, save perhaps the principle of compromise. For this reason it must prove as mistaken to consider the development of this law—whether past or present—from the viewpoint of the neutral's interests as to consider it from the viewpoint of the belligerent's interests. Still further, such general principles as did undoubtedly form a part of this law were frequently marked by controversy, both as to their content and their manner of application. Thus there has never been clear agreement over the discretion allowed a belligerent in determining the character and extent of his contraband lists. Nor has there ever been any marked consensus upon the limits, if any, to the belligerent's right of determining the procedural rules that are to govern the conduct of its prize courts, even though these rules are frequently as important in controlling neutral trade as the substantive rules of prize.³⁸

At the very least, this uncertainty has made it difficult for neutrals to challenge the belligerent contention that the traditional law of contraband provides a broad framework within which specific measures taken by belligerents may vary as the circumstances of war vary. In particular, these circumstances have been held to determine both the scope of articles regarded as susceptible of use in war and the possibility of applying the traditional distinction between absolute and conditional contraband.³⁹

The real difficulty though in any attempt to assess the present status of the law of contraband must be found in the principle—or, more precisely, in the manner of applying the principle—of ultimate enemy destination. As to the validity of the principle itself there can no longer be any real doubt;

³⁸ As might be expected belligerents have usually contended—as did Great Britain in World War I—that changes in prize court procedure form a matter of national—not international—law, and therefore fall within the discretion of the belligerent. The contention has been just as frequently denied by neutral states, though generally without success. Whatever the merits of the controversy it is clear that many changes considered by belligerents as merely procedural in character have had a pronounced bearing upon the effectiveness of substantive rules of prize (admittedly a matter of international concern). If the decision to apply the principle of ultimate enemy destination to contraband represents a change in the substantive law—which it clearly does—then the effective application of this principle has been made possible largely through changes of an allegedly procedural character. Thus the various rules—discussed in preceding pages—establishing presumptions of enemy destination have often been described as of a procedural nature, though it is certain that the effect of these presumptions in facilitating the control of neutral commerce can hardly be exaggerated. And if the Declaration of London is to be regarded as generally reflecting the traditional position in this matter it would appear that the creation of rules in which a presumption of enemy destination can be held to arise (even though rebuttable) is not a matter within the sole discretion of belligerents.

³⁹ And although it is true that the actual practices of belligerents during the two World Wars reduced the traditional framework to an empty shell, this fact probably cannot serve to refute the formal argument that the traditional framework nevertheless retains its validity and would once again be applicable, circumstances permitting. It is, of course, another matter to ask how relevant this formal argument may be in view of the conditions that presently attend war's conduct.

goods ultimately destined for an enemy cannot escape seizure and condemnation merely because their immediate destination is to neutral territory. At the same time, experience has clearly shown that this principle cannot be given effective application by belligerents short of the resort to measures whose validity have been—and still are—seriously questioned. The resulting situation is therefore not without an element of paradox, since acquiescence in the principle of ultimate enemy destination has nevertheless been accompanied by controversy over measures designed to make the principle effective. These measures extend from the initial acts of interception and detention in a belligerent's contraband control base—while information is being gathered concerning the nature and destination of the cargo—to the final act of condemnation by means of a procedure that is admittedly based largely upon conjecture and the "probability" of enemy destination.⁴⁰ Yet it is not difficult to see that the retention of traditional methods in modern conditions would make nonsense of the principle of ultimate enemy destination. The belligerent has been confronted with the choice of either permitting goods to enter neutral ports, part of which are certainly destined to find their way into enemy hands, or to impose rigid controls upon such commerce at the risk of interfering on occasion with what is undeniably legitimate neutral trade.

In practice, this dilemma has been partially resolved (though only partially) by the introduction of measures designed to reduce the inconvenience otherwise caused to neutrals engaged in lawful trade, while at the same time insuring that an enemy is prevented from obtaining any supplies useful in the prosecution of war. Thus agreements have been concluded between the belligerent⁴¹ and associations of merchants in neutral states, whereby the latter have guaranteed that goods consigned to them would not reach an enemy. In turn, the belligerent has undertaken to refrain from interfering (save in exceptional circumstances) with such goods on their way to a neutral destination.⁴²

Perhaps the most notable method—developed principally by Great Britain—for the regulation of trade between neutral states has been the so-

⁴⁰ Thus the presumption of enemy destination that has as its basis a statistical probability may appear as far removed from any reasonable method to render effective the principle of ultimate enemy destination as it is possible to take. In fact, it is not, for it merely represents the final step in a process that has departed in ever increasing degree from a procedure demanding proof as to the destination of contraband goods to one based upon conjecture and the mere probability of enemy destination.

⁴¹ Here again it has been primarily British practice that forms the basis for discussion.

⁴² These agreements were first initiated by Great Britain in 1915 with the Netherlands Overseas Trust. Thereafter merchant associations in other neutral states entered into similar agreements. In 1939 the practice was revived. It should be noted that these agreements did not preclude the inspection and acceptance of particular shipments through the use of the navicert system, discussed below. Nor did it prevent later seizure of cargoes in circumstances indicating an enemy destination.

called "navicert" system.⁴³ By submitting his cargo to investigation prior to sailing a neutral shipper might obtain a certificate, or navicert, from the belligerent's representative in the port of origin, stating that the cargo inspected was of an innocent nature. In the absence of any later circumstances that might raise independent cause for suspicion, a vessel carrying a fully navicerted cargo could expect to pass through the certifying belligerent's contraband controls with a minimum of delay.⁴⁴ The system provided obvious benefits to both parties. To the neutral shipper it provided a means of avoiding the losses incurred through detention and delay at a belligerent contraband control base. To the belligerent the system provided a method for avoiding friction with neutrals, while reducing the burden placed on naval patrols and the work done at contraband control bases.

Prior to July 31, 1940,⁴⁵ the navicert was a facility voluntarily provided by the belligerent to neutral shippers, and one which the latter were under no legal compulsion to accept. The neutral shipper in refusing to make use of this facility was not, for that reason, subject either to seizure or to any other *legal liability* that a belligerent could not in any event already impose.⁴⁶ For this reason it has been argued that there is no legal basis for alleging that neutrals were compelled to obtain navicerts. This being so, it must remain entirely within the belligerent's discretion in deciding

⁴³ Developed in World War I (the best account of the earlier system being H. Ritchie's, *The Navicert System During The World War* (1938)) the navicert system was again introduced by Great Britain in December 1939. For a brief though excellent account of World War II practice, see Malcolm Moos, "The Navicert In World War II," *A. J. I. L.*, 38 (1944), pp. 115-9.

⁴⁴ The full benefits of the system could be realized only if the vessel carried no unnavicerted cargo at all; otherwise navicerted cargo would normally be subject to delay while inquiries were being made into the unnavicerted cargo. And Medlicott (*op. cit.*, pp. 96-7) points out that during the first year of the 1939 war: "There was also the 'Ship Navicert', for which the master of a ship or his agent could apply when the whole cargo of the ship was covered by navicerts, and which was intended to minimize further the formalities of visit and search. Ships so covered could normally count on the formalities of visit and search being reduced to a minimum, and they were in fact usually given clearance at sea by a naval patrol. There was thus an important difference between a ship sailing with fully-navicerted cargo, and a ship sailing under cover of a ship navicert. In the latter case, the ship was not normally subject to any delay or inspection beyond that necessary for her identification; in the former case, the ship would, where possible, be cleared at sea without diversion to a control base, but only if the weather permitted boarding and if the ship were found to be carrying no mails or passengers."

⁴⁵ See pp. 313-5 for the Order in Council of July 31, 1940, which introduced substantial change in the navicert system.

⁴⁶ This, at least, was the belligerent's (Great Britain) argument, though the legal controls it assumes a belligerent already possesses were precisely the measures that neutrals—particularly in World War I—objected to as being in excess of normal belligerent competence. As seen from the neutral's point of view, then, the navicert system frequently was interpreted as imposing an unlawful constraint upon neutral shippers. In British prize law there are no decisions dealing with the navicert system until after the Order in Council of July 31, 1940 came into effect. As this order placed the system on a different basis the relevance of these decisions to the "voluntary" system is limited.

whether to grant or to refuse navicerts to individual neutral shippers.⁴⁷

From the viewpoint of a strictly legal analysis this position would appear sound, although in practice the neutral shipper was under constraint to obtain a navicert, since the consequences following upon a refusal to do so were serious.⁴⁸ Even so, this system of "voluntary" controls exercised by a belligerent raises legal problems both for the neutral state that permits a belligerent to inspect cargoes within its territory⁴⁹ and—much more important—for the neutral trader who "voluntarily" submits to the system. The other belligerent may well consider such cooperation with an enemy's contraband control system as an act of unneutral service on the part of the neutral shipper, thereby making the vessel and cargo liable to seizure and condemnation.⁵⁰ At any rate, the voluntary system of navicerting neutral goods—with the other features attending its operation—ultimately proved insufficient to achieve the purpose of shutting off all overseas imports to Germany. Within less than a year after the outbreak of war in 1939 Great Britain had adopted a far more comprehensive system of controlling neutral trade, and a system that could no longer be termed voluntary in almost any sense of the term. The nature of that system will be dealt with in the following chapter on blockade.

⁴⁷ The above position is forcefully presented by Fitzmaurice (*op. cit.*, pp. 83-85), who also observes: "Naturally, the navicert system is capable of grave abuse at the hands of an unscrupulous belligerent, as for instance if navicerts were refused arbitrarily or capriciously or allocated with a view to the belligerents own commercial advantage, or as a means of bringing political pressure to bear. It would seem, however, that such abuses would be of a political and not a legal character, that they could be made the subject of diplomatic complaint on general and political grounds by the neutral government concerned, but that it would be difficult to allege a breach of any rule of international law."

⁴⁸ In addition to detention in a belligerent contraband control base, these consequences frequently included a denial to the shipper of belligerent controlled facilities.

⁴⁹ Occasionally neutral states have forbidden the operation of the navicert system within their territory. On the whole, British writers assert that the operation of the system in neutral territory should not be construed as a violation of neutrality, e. g., Oppenheim-Lauterpacht, *op. cit.*, p. 855n. (3). Neither in World War I nor in World War II did the United States—while a neutral—ever officially recognize the navicert system, though American shippers were permitted—and frequently encouraged—to cooperate with this system of licensing neutral trade. And for the view that a neutral state in permitting the operation of the navicert system within its territory violates basic obligations of neutrality, namely the obligations to abstain from giving material support to either belligerent and to treat the belligerents impartially, see V. Bruns, "Der britische Wirtschaftskrieg und das geltende Seekriegsrecht," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 10 (1940), pp. 101-2. Certainly, there is much to be said for the opinion that in permitting the operation of the navicert system within its territory a neutral provides the belligerent important assistance in the conduct of war.

⁵⁰ See pp. 322-3, for a more detailed discussion of this point.