

WAR, COMMERCE, AND INTERNATIONAL LAW

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INTRODUCTION

Modern international law has repudiated war between States except in the exceptional instances of self-defense and collective authorization by the UN Security Council. In addition, since the early twentieth century, pillage, plunder, and confiscation of private property and contract rights have been prohibited during wartime. This is equally true in the context of occupation.[1]

However, these prohibitions are less the rule than the exception in the wars and conflicts that continue to characterize the first part of the twenty-first century. In addition, these rules are seldom applied with uniformity from war to war or from one occupation to another. Sometimes, security concerns are cited as requiring destruction or seizure of private property and contracts, even if they are not tainted with an enemy status.

Thus, the relationship between war and commerce invariably involves relationships of power between militarily powerful and less powerful States; between occupying and occupied States; between private military companies and weak and poor States; between countries in the center and on the periphery of the world system; and lately, between lawless bandits and a myriad of other non-State actors, on the one hand, and States and alliances of States, on the other.[2] For the

1. The same could be said in the context of conquest, but conquest is no longer permissible under international law. *But see,* Eugene Kontorovich, *International Responses to Territorial Conquest*, 102 Am. Soc'y Int'l L. Proc. (2009) (examining five episodes of territorial conquest in the post-World War II era and arguing there are at least 12 to 18 cases of forcible conquest since the UN Charter came into force).

2. The underlying tension that I address in this book between powerful and less (weak, poor) powerful countries is not aimed at suggesting that these two groups of States are homogeneous among themselves and totally different between themselves. For example, a less powerful State in the center periphery system may nevertheless be powerful relative to its constituent groups. Similarly, the exercise of power by a State is seldom unilateral and unchallenged both within and without it. My strong versus weak State axis is informed by the secular absolutism of the external relations of a State that has

most part, international law provides rules to justify the primacy of a belligerent's right to defend its security interests as it does to defend the rights of a neutral to engage in safe commerce during war.

To explore the relationship between commerce and international law this book addresses the following questions. In what respects are commerce and war two sides of the same coin?; in what respects do they depend on or complete each other? Can the two exist in contradiction? In essence, I am interested in the changing definitions of war and commerce in international law; their historical connections; their changing applications and interpretations in different places at the same time and at different times; as well as their functional linkages and slippages. The materials studied in this book show that commerce and war do not necessarily "exclude each other, but rather they frequently blur with and into each other."[3] Within such a relationship, war and commerce appear less as sharp antidotes to each other. Rather, they appear to depend on and complete each other. Thus in the resource wars of the contemporary period, the commercial benefits that go to the various actors involved predispose them to continuing rather than stopping resource-extraction wars. In short, the relationship between war and commerce is not fixed and unchanging. Thus when rules of international law seek to separate the two with a view to giving commerce safe passage from and during war, such compartmentalization is often tenuous.[4]

The study of the fluid relationship between war and commerce lays the backdrop against which I trace the extent to which the legacy of colonial disempowerment has continued into the era of decolonization. Indeed, although the doctrines and rules of international law relating

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arisen in modern international law recently articulated by ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW (2007).

3. *See* GIORGIO AGAMBEN, STATE OF EXCEPTION 23 (Trans. K. Attell, 2005).

4. In Chapter 1, I summarize four relationships between war and commerce that emerge in this book: war trumps commerce (where belligerents justify their confiscation of enemy property as the spoils of war or as justified on security grounds); commerce trumps war (where rules permit the continuation of commerce during wartime); a balance between war and commerce (embodied in rules such as those relating to neutrality), and the extraordinary circumstances doctrine under which a powerful belligerent justifies conquest or confiscation of the property or territory based on the perceived backwardness of a people.

to war and commerce and the historical record covered do inhere fairness between all States, particularly because of the modern guarantees of sovereign equality and self-determination, I am able to show that at various times these rules and doctrines nevertheless simultaneously carry forward within them the legacy of imperial and colonial conquests.

This analysis of continuity and discontinuity involves investigating how rules of international law relating to war and commerce are crafted, applied, and adjudicated from several perspectives and in a variety of contexts, including those involving conquest, occupation, resource wars, and the regulation of private military companies. This analysis is conducted by examining not only the rules themselves, but also the choices made between alternative meanings ascribed to a particular rule in its application in one context as opposed to another.[5] In so doing, I discuss the choices made in crafting rules relating to war and commerce one way as opposed to another or applying and adjudicating these rules in a manner that precludes equally legitimate conclusions that may, for example, be consistent with the interests of militarily less powerful countries. Thus, in this book I have sought to consistently expose these outcomes rather than merely focus on the content of the rules and doctrines of international law relating to war and commerce.

The materials covered in the book roughly fall into three historical periods. In the pre-1850 period, the United States is the periphery while the center of the international system in Europe. We thus see in the diplomatic history and in the emerging jurisprudence of the U.S. Supreme Court in this period, moral condemnations of the interference of its commercial ventures by the naval powers that Great Britain, Germany, and France were. While in this period, the United States was declaring that advances in the morality and conscience of nations gave commerce safe passage over the rights of belligerents to interfere with it, the United States was also declaring that discovery and conquest gave it good title to Native American territory.

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5. The kind of bias I am interested in is therefore not that the origin of these rules is European or from the United States. In addition, I am not making the claim that bias is merely traceable to the fact that "the big countries seldom play by the rules."

Similarly, the pre-1850 period is the era of ascendance of natural law in the law of nations. Hugo Grotius argued that natural law justified the slavery of prisoners of war because it was a milder punishment than the previous practice of killing them. Natural law thus justified one inhumanity because it was superior to another. Indeed, the pre-1850 period is one in which the right to conquer and the results from conquest could be as much justified as they would have been rejected under the law of nations. This was, after all, international law's natural law period where distinctions between law and morality and between the public and private spheres had yet to be sharply separated in international law. Positivists who followed the natural law tradition foregrounded sovereign consent as the basis of obligation in international law and began the process of its systematic codification.

In the second period, from the mid-nineteenth to about the mid-twentieth century, positivism contributed to the consolidation of the separation of public authority and private right and rearranging the rules and doctrines of international law accordingly. For example, the Berlin Conference of 1875 covered in Chapter 6 sought to extend the most liberal rules of free commerce as an antidote to the illegitimate slave trade; the Hague Peace conferences resulted in a series of important rules including those proscribing confiscation of private property during wartime and prohibiting the use of force in the collection of State debt—a theme that I address in Chapter 5.

Period three began with the post-World War II period of a move to self-determination for all peoples and the accompanying United Nations guarantees of the equality of all States, as well as the prohibition of the use of force in international relations. It was also the golden era of international institutions with the birth of the United Nations and the Bretton Woods institutions—with their aspiration of the universal membership of all States and of the functional separation of their respective political and economic mandates. It was also the period when the center of the international system was indisputably the United States.

Moving forward to this early period of the twenty-first century, this post-World War II order witnessed renewed challenges to its State centeredness. It was a period in which the role of private actors and commercial interests in contemporary warfare—the privatization of warfare and the role of mercenaries gained unprecedented ascendance.

Conventional warfare between States is therefore no longer the only or always the most significant type of conflict on the international scene. Weak and poor States, in particular, no longer have a monopoly of the use of violence, if they ever had any. This period is in some ways therefore reminiscent of the period before 1850, where the distinction between public and private uses of violence had not crystallized as it eventually did in twentieth-century European and American history.[6]

This book, however, is less about these historical periods; rather, a primary aim of this book is to investigate how the rules of international law relating to war and commerce show the differences between doctrinal and legal arrangements, and their applications in the center and periphery of the world system in each of these periods particularly in relations between militarily powerful and weak States. It is also a study of the normative relativity of the kind of soft law and self-regulatory regimes that have powerfully emerged in the context of resource wars and the regulation of private military companies covered in Chapters 6 and 7 respectively.

Looking at these three historical epochs, I see less a history of continuity or progress in which commercial and trade relations are freed from the vagaries of war than a messy story in which the relationships between law and morality, on the one hand, and violence on the other, produced and continue to produce new rules, soft norms, and doctrines of international law as well as replaying old rules, norms, and doctrines. These three periods therefore represent changing ideas about the relationship between public power and private right that challenge the claim that international law today stands undoubtedly "forward of subjugation, in independence and equality."[7]

This book shows that it is not infrequent that in times of strength, States favor not being bound by restraints of international law to make war and confiscate or destroy the property of their enemies, whereas in times of weakness they rely on it to argue against instances of plunder, pillage, and confiscation of private property by powerful States. Stronger States do not necessarily repudiate this modern regime of prohibitions in such cases. Instead, they rely on traditional

6. See Chapter 2 for the full discussion.

7. David Kennedy, *Remarks by David Kennedy: On Panel on International Law and Religion*, 82 AM. SOC'Y INT'L L. PROC. 200 (1988).

doctrines that embrace the absolutist rule by which a successful belligerent has a right to confiscate the property of a defeated belligerent. Under extreme interpretations of this doctrine, successful war justifies the taking of the private property of a defeated belligerent government and its supporters particularly in wars between European and non-European peoples.

As a young nation in the late-eighteenth and early-nineteenth centuries, the United States often deferred to the naval and military superiority of the British and French. Concurrently, the U.S. Supreme Court enunciated the most liberal rules announcing the prohibition of interference of its commerce from being subject to confiscation, sequestration and attacks by countries that had superior naval abilities. The Court was also instrumental in developing concepts of neutrality in commerce well in advance of the Hague Peace Conferences of the early twentieth century. Thus as I show in Chapter 4, military weakness was a crucial factor in predisposing the United States to favor strong anticonfiscation rules and rules of neutrality during wartime as a way of safeguarding its interests as an independent commercial nation in the wars between other countries in that period.

By examining the jurisprudence of the Marshall court, I show the controversies that surrounded prize law required judicial innovation, because they presented issues without clear answers under the pre-1850 law of nations or in the precedents of the court at the time. For example, it was unclear if recaptured neutrals were liable for salvage or whether a neutral had the right to condemn or confiscate the goods of a neutral if carried in a hostile vessel—questions that touched on the interests and sensitivities of citizens from the militarily more powerful European States in relation to the United States. The Court more often than not decided such cases in favor of the most liberal rules that permitted the continuation of commerce in the face of war—notwithstanding the fact that those cases would equally have been decided in favor of belligerent rights with the consequence of frustrating free commerce by confiscating and sequestrating the cargo of neutrals and those from militarily weak States.

Similarly, Chapter 5 shows how Venezuela, a militarily weak State, in the early part of the twentieth century strongly advocated against collection of State debts through forcible means, a principle that

also came to be recognized in Hague Peace Conferences. The Drago doctrine, named after the Venezuelan Foreign Minister at the time, was enshrined in the codification of the laws of war in the Hague Peace conference of 1907. Thus, military strength and weakness with regard to the early United States and Venezuela in the early-twentieth century played a role in the articulation and development of rules surrounding commerce and war.

What is also remarkable is that, although international weakness of the early United States was consistent with supporting strong anticonfiscation and antidepredation rules, at home, the United States supported conquest as a justification for taking the lands of Native Americans without compensation. Similarly, weak and poor countries at the international level today often exhibit this dual sensibility—support for strong anticonfiscation rules internationally and disregard for such rules at home in dealing with local populations and peoples in the context of war and rebellion. This is exhibited by the example of the Sri Lankan government's military offensive against the Tamil Tigers, which resulted in damage to the property of a foreign investor discussed in Chapter 5. The foreign investor then successfully sued the Sri Lankan government for war damage under a bilateral investment treaty. The liability of the Sri Lankan government for war destruction while exercising a right to defend its national security also illustrates the asymmetric differences in the entitlements protecting the rights of foreign investors, on the one hand, and the prerogatives of poor States hosting those investors to protect their national security interests, on the other.

A similar, although not perfectly analogous, example is the U.S. support for strong anticonfiscation rules in its commercial relations with European States of the late-eighteenth and early-nineteenth centuries at a time when the U.S. Supreme Court was declaring war was necessary to deal with Native Americans, because regular commercial contact could not be established with them. These two foregoing examples show that the relationship between war and commerce cannot easily be categorized into epochs where commerce prevails over war or vice versa.

Even now, in the early part of the twenty-first century, the U.S. support for freedom of commerce particularly for its business and commercial interests occurs simultaneously with restrictions on commerce insofar as it is inconsistent with its national security

interests.[8] What brings these two examples together is the relationship of a militarily powerful State on the one side and a militarily weaker one on the other—in the late eighteenth to early nineteenth century, the same relationship between a militarily weak United States on the one hand, and the naval powers that the Netherlands, Great Britain, France, and Germany were, on the other hand. In addition, between the United States, on the one hand, the Native Indian populations that had been militarily defeated in the course of building the United States, on the other.

I offer one other example showing differential applications of the rules prohibiting interference with the private property. The protection of the private property of Italians and Germans during the Allied occupation after World War II, for example, stands in sharp contrast with the widespread disregard of these rules in non-Western societies, such as Japan, after the World War II, for example, and more recently in Iraq following the U.S.-British–led war that began in early 2003.[9] The confiscation of Jewish property by the German Nazi government also demonstrates how racist arguments justified the disregard not only of private property rights, but also of the lives and dignity of a people.

The foregoing example has similarities with the justifications used to justify the seizure of Native American territory by the Marshall court alluded to earlier. The occupation of Iraq in 2003 and accompanying de-Baathification, which involved taking the property of the Baathists, and the justifications for assuming title over Native American Indian territory were not simply based on the absolute power of the U.S.-led coalition. Rather, in both instances the presumed backwardness of the Indians and the Iraqi Baathists respectively, as well as the proclaimed superiority of the values of the early American republic and the U.S.-British–led occupying coalition played into the equation. As I argue in Chapter 1, there is a genealogical similarity in the racially charged jurisprudence with respect to

8. *See, e.g.*, Marjorie Florestal, *Terror on the High Seas and the Trade and Development Implications of US National Security Measures*, 72 Brook. L. Rev. 385 (2007) (discussing the adverse economic and development outcomes of security measures aimed at reducing the risk of terrorists from using shipping containers arriving in the United States to attack the United States).

9. See Chapter 3 for the full discussion.

non-Christians and non-Europeans in the encounter between metropolitan policy and local colonial encounter.[10] In this book, I show that the extraterritorial expansion of metropolitan authority in the context of war and commerce produced predictable routines for ordering relations between powerful and less powerful States and entities, between public and private power as well as between peoples from vastly different cultural and racial backgrounds.

The key to my analysis in this book is therefore to identify the extent to which the legacy of colonial disempowerment has continued into the era of decolonization in the relationship between war and commerce in international law. I show that, although the doctrines and rules of international law relating to war and commerce and the historical record covered inhere fairness between all States, the application, interpretation, and adjudication of these rules and doctrines in a variety of contexts nevertheless simultaneously carry forward within them the legacy of imperialism or colonial conquest.

Although international law carries within it this legacy of imperialism and colonial conquest, its guarantees of the equality of all States and of the human rights of all individuals continue to offer hope for poor and weak States and individuals everywhere. This is equally true in the war and commerce context. Indeed, as I argue in Chapter 7, although current definitions of mercenaries in international law do not explicitly prohibit mercenaries motivated by ideological or religious reasons or the prospect of getting paid with natural resources, it would be foolhardy to argue that mercenaries motivated for unprohibited reasons are therefore automatically unregulated. This would effectively acquiesce to the permissibility of mercenarism inconsistently with the prohibition of the use of force especially given that this prohibition is recognized both as *jus cogens* norm[11] as well as

10. On this, I borrow from ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 2005.

11. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, [1986] I.C.J. Rep. 14, at 100, *available at* http://www.icj-cij.org (follow "Cases" hyperlink; then follow "List of All Cases" hyperlink; then follow "More . . . " hyperlink under "1984: Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America)"; then follow "Judgments" hyperlink).

a cornerstone principle of the UN charter.[12] In addition, mercenaries still pose the threat of deposing governments in weak States, which is inconsistent with current antimercenarism international law rules, or providing arms to rebel groups that pose a threat to governments that reign terror on citizens. The payment of mercenaries or private security and military companies by governments with natural or mineral resources is also inconsistent with both the letter and spirit of the international legal norms on permanent sovereignty over natural resources, and the principles relating to the right to development. In short, although I have focused on exposing the legacy of imperialism and colonialism in the context of war and commerce, I firmly believe that the liberal guarantees of international law have much to offer to counter these inegalitarian tendencies. Exposing the tendency in international law toward inegalitarian consequences in the war and commerce context is, in my view, a useful step toward moving in a positive direction.

12. *Case Concerning Armed Activities on the Territory of the Congo*, [2005] I.C.J. Rep. 1, ¶ 148, *available at* http://icj-cij.org (follow "Cases" hyperlink; then follow "List of All Cases" hyperlink; then follow "More . . . " hyperlink under "1999: Armed Activities on the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda)"; then follow "Judgments" hyperlink).

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