

INTERNATIONAL
LAW
OPINIONS

Selected and annotated by
LORD M^cNAIR

VOLUME THREE
WAR & NEUTRALITY

CAMBRIDGE UNIVERSITY PRESS

INTERNATIONAL LAW OPINIONS

SELECTED AND ANNOTATED

BY

LORD MCNAIR
Q. C., C. B. E., LL. D., F. B. A.

*Fellow of Gonville and Caius College
Bencher of Gray's Inn
formerly President of the
International Court of Justice*

VOLUME III

WAR AND NEUTRALITY



CAMBRIDGE
AT THE UNIVERSITY PRESS

1956

INTERNATIONAL LAW OPINIONS

PUBLISHED BY
THE SYNDICS OF THE CAMBRIDGE UNIVERSITY PRESS

London Office: Bentley House, N.W. 1
American Branch: New York

Agents for Canada, India, and Pakistan: Macmillan

*Printed in Great Britain at the University Press, Cambridge
(Brooke Crutchley, University Printer)*

CONTENTS

PART I: LAW OF WAR

SECTION XIX

WAR IN GENERAL

1. Capture, seizure and confiscation of enemy property	<i>page</i> 4
2. Trading with the enemy. Enemy character. Commercial domicile	14
3. Position of subjects of one belligerent in territory of its opponent	31
4. Military occupation during, and after the end of, hostilities	35

SECTION XX

THE PERMITTED AREA OF MARITIME WARFARE. CLAIMS OF TERRITORY

The permitted area of maritime warfare: claims of territory	43
---	----

SECTION XXI

PRIZE COURTS

Prize courts	61
--------------	----

SECTION XXII

PRIVATEERS. THE DECLARATION OF PARIS. CONVERSION OF MERCHANT SHIPS INTO SHIPS OF WAR

1. Privateers	81
2. The Declaration of Paris, 1856	90
3. The conversion of merchant ships into warships by arming them and using them as part of a belligerent navy	99

CONTENTS

SECTION XXIII

MISCELLANEOUS

1. Condemnation of allies' ships for previous trading between enemy ports	page 103
2. Declaration of war	105
3. Embargoes	107
4. Armistice	111
5. Spies	113
6. Expulsion of enemy nationals	114
7. The Red Cross Geneva Conventions	114
8. Prisoners of war	115
9. Contributions and requisitions	123
10. Rescue and recapture of ships	126

PART II: LAW OF NEUTRALITY

SECTION XXIV

SOME GENERAL PRINCIPLES OF THE LAW OF NEUTRALITY

Some general principles of the law of neutrality	133
--	-----

SECTION XXV

VIOLATIONS OF NEUTRALITY BY PERMITTING HOSTILE EXPEDITIONS

1. Introductory	161
2. Permitting the dispatch of hostile expeditions and the building and equipment of ships destined for hostile operations	162
3. The <i>Alabama</i>	171
4. Recruitment on neutral territory	188

CONTENTS

SECTION XXVI

THE USE AND ABUSE OF NEUTRAL PORTS AND WATERS BY BELLIGERENTS

The use and abuse of neutral ports and waters by belligerents page 195

SECTION XXVII

CONTRABAND

Contraband 223

SECTION XXVIII

BLOCKADE

- (a) Circumstances of permitted egress 247
- (b) Meaning of 'effectiveness' 247
- (c) No obligation upon a neutral State to assist a belligerent in a blockade 249
- (d) Rights and risks of neutral subjects 252
- (e) How long a blockade-runner remains *in delicto* 253
- (f) Question of notifying blockade-running ships individually 255
- (g) Distinction between blockading ports and closing them by decree 257
- (h) Application of blockade against neutral public ships, subject to courtesy 258

SECTION XXIX

UNNEUTRAL SERVICE

- 1. The carriage or transmission of dispatches to a belligerent Government or its forces or servants 265
- 2. The carriage of enemy persons by neutral ships and their removal therefrom; the *Trent* and other cases 274
- 3. Neutral merchant ships operating as military transports: the *Kow-Shing* 306
- 4. Miscellaneous 315

CONTENTS

SECTION XXX

THE DOCTRINE OF CONTINUOUS VOYAGE. THE RULE OF THE WAR OF 1756. CONVOY

1. The doctrine of continuous voyage	page 319
2. The Rule of the War of 1756	335
3. Convoy	341

SECTION XXXI

MISCELLANEOUS

1. The sale of merchant ships carrying the flag of a belligerent to neutral purchasers, <i>imminente</i> or <i>durante bello</i>	351
2. The legality of the sinking of neutral merchant ships by a belligerent, and the question whether the remedy should be sought in the prize court or diplomatically	359
3. Loans and contributions of money obtained from neutral territory	362
4. The status of neutral subjects in, or falling into, the hands of a belligerent	366
5. The entry upon, or passage through, neutral territory, of troops, prisoners of war or wounded; transit of munitions	370
6. Telegrams, cablegrams and cables	379
7. Angary	398

<i>Appendix I: List of Law Officers of the Crown</i>	402
--	-----

<i>Appendix II: The debt of international law in Britain to the civil law and the civilians</i>	407
---	-----

<i>Index</i>	431
--------------	-----

PART I: LAW OF WAR

SECTION XIX

WAR IN GENERAL

1

Capture, Seizure and Confiscation of Enemy
Property *p.* 4

2

Trading with the Enemy. Enemy Character.
Commercial Domicile *p.* 14

3

Position of Subjects of one Belligerent in Territory
of its Opponent *p.* 31

4

Military Occupation during, and after the end of,
Hostilities *p.* 35

Note on Selection of Documents

I have considered whether or not I should exclude from this collection Reports upon questions of war and neutrality, and I have decided not to do so for the following reasons:

(i) to exclude them would be to neglect many important Reports which, though their immediate cause may have been a question of war or neutrality, illuminate principles of the law of nations possessing a wider application;

(ii) in spite of the continual changes in weapons and modes of warfare the legal principles remain fundamentally the same and have shown themselves to be capable of dealing with new situations by means of reasonable modifications.

Nevertheless, in the Sections which follow, I have been more exacting in my selection. Moreover, I have exercised much economy in the field of prize law, because that is the part of the law of nations that has received the largest impression from judicial decisions; they are very numerous and carry great weight, so that the primary and most authentic source of British opinion in that field is the reported decisions of the prize courts and of the superior tribunals to which appeals lie from them.

It will be noticed that on the eve, and after the outbreak, of the Crimean War there was considerable uncertainty in the minds of some of the Crown's legal advisers as to many of the rules of war and neutrality. There had been a long spell of peace.¹

¹ There is a volume in the Foreign Office Library (Confidential 3576), entitled *Law Officers' Reports on Questions arising out of the Crimean War, 1853-1856*, printed in 1878, in which the relevant Reports extracted from the FO. 83 series of volumes have been assembled. It will be referred to as *Crimean War Reports*.

² The following suggestion by Harding, in a Report of 4 April 1854 in the *Crimean War Reports*, may be the germ of the subsequent agreement with France to concur in adopting a common policy on certain points for the joint prosecution of the war:

'I would further venture to suggest the expediency of forthwith coming to some understanding with the French Government both as to the general principles upon which, and as to the particular instances in which, licenses or specific instructions are or may be issued, in order to insure a uniform line of action on the part of both Governments in such cases, without which serious confusion, inconvenience, and mischief may result, inasmuch as a licence from one belligerent will not protect the ship from capture by an ally in the war.'

Capture, Seizure and Confiscation of Enemy Property¹

¶ The following is a Report² dated August 1757, by Hay, Pratt and Charles Yorke to the Rt. Hon. William Pitt (the elder, later Earl of Chatham), upon the subject of territory and movable property captured in the course of joint operations in India by the Crown and the East India Company against the Nawab of Bengal. The Company had petitioned the King to give effect to something in the nature of an 'equal shares' agreement made between it and the commanders of the Crown's forces in India.

To the Right Honble Wm. Pitt Esq. One of his
Majesty's Secretaries of State
Sir,

In Obedience to your Commands Signified to Us, by your Letter of the 19th of July last, Acquainting Us, that the Secret Committee of the East India Company had requested You to Assist them in an Application to be made to His Majesty for his Approbation of the Agreement made between his Majesty's Admiral and Officers in India in regard to the Division of any Plunder, which may be made in India and taken from the Moors and the Company's Governor and Council at Fort Saint George; And that in Consequence of such Agreement His Majesty will be Graciously pleased to Grant to the Company The Moiety of the Booty, which was to be Deposited till his Majesty's Royal Pleasure should be known; And in the said Letter inclosing the Abstracts delivered to you by the said Committee And further desiring that We will report to you, for his Majesty's Information Our Opinion, how far the King can comply with the Company's request.

We have taken the said Agreement into our Consideration, And have herewith returned all the said Extracts, And We are humbly of Opinion, that this Case does not in any part of it fall within the Provisions made by the Statute of the 29th Year of his Majesty's Reign, for the Encouragement of Seamen, in as much as that Law relates only to Captures made in the present War between his Majesty and the French King, and has no Concern with the Disputes and Hostilities between the East India Company and the Nabob of Bengall.

It must therefore be judged of by general Rules of Law and his Majesty's Prerogative.

And We are humbly of Opinion, 1. That all such places as are retaken return

¹ Which includes the produce of an enemy colony belonging to a person who is a national of, and domiciled in, a neutral State; Report of 30 July 1799 (FO. 83. 2338: Saxony), and *The Phoenix* (1803), 5 C. Rob. 20.

² P.R.O. 30. 8. 99 (East India Company, pp. 1-11). Another copy is dated 18 August 1757. This seems to be 'the law officers' adverse decision' referred to in Basil Williams, *Life of William Pitt, Earl of Chatham*, II, 29. It is followed by a Report of 31 August 1757, accompanied by the draft of a warrant for a bill and a Report of 24 December 1757, upon a petition by the East India Company. Pitt's dealing with the company appears to have been more generous than strict law required.

CAPTURE OF ENEMY PROPERTY

to the Old Dominion, and Consequently that the Town and Settlement of Calcutta within the former Territorial Limits must be restored to the East India Company.

2. That all such places as may be newly Conquered in this Expedition accrue to the Sovereign, and are vested in his Majesty, by right of Conquest.

3. That with respect to the Moveable Goods retaken, the property of all such was altered by the Capture and totally lost to the Original Owners, after a Possession by the Enemy for a Limited time; And consequently every thing within that Description belongs to his Majesty, in whose Name, and under whose Protection, & by the Assistance of whose Fleet, the same is regained.

4. That by stronger Reason, all Moveables and Plunder of every kind first taken and Acquired from the Enemy, either by Land or Sea, are Vested in his Majesty Subject to his power of Disposing, by Virtue of his known Prerogative.

Upon these Grounds We concur in Opinion, that his Majesty, if he shall think fit, in his Royal Wisdom, may comply with the Company's request.

G. HAY
C. PRATT
C. YORKE

August 16th, 1757

¶ The following, undated Report, probably by Marriott, when King's Advocate, 1764-78(?), states the principles underlying the right of the Crown to property captured in war by its forces—apparently, in land warfare.¹

It is certain that the right of war is lodged in the Sovereign. Wars are undertaken either to recover the rights of private subjects, which the enemy wilfully refuseth to pay, or upon some public cause. In the first case, the principal thing to be taken care of is, that the persons upon whose wrongs the war began may be restored to their rights of the overplus in this instance; and in wars that begin from a public cause, all that is taken is acquired to the Sovereign, whatever hands it first fell into—whether the mercenary soldiers, or subjects obliged to military service without receiving pay. But because war lies heavy upon the subjects, whether they are only taxed to support it, or are obliged to serve in it themselves, it is no more than a good prince that had a love for his subjects would yield to, that the subject should be allowed, in return, to make some advantage by the war, either by assigning them pay from the public when they go upon any expedition, or by sharing the booty among them, or giving every one leave to keep the plunder he gets himself, or else, by giving the booty to the public, to ease the subjects of taxes for the future. Mercenary soldiers have no right to anything above their pay. What is given them above that is matter of bounty or reward to the good service, or encouragement to their valour.

As to Grotius's distinction of acts of hostility in public and private acts, it may be very justly questioned whether everything taken in war by private hostilities, or by the bravery of private subjects, that have no commission, belongeth to them that take it. For this is also part of the right of war, to appoint what persons are to act in a hostile manner against the enemy, and

¹ Forsyth, 478, 479.

no other. Consequently, no private person hath power to make devastations in an enemy's country, or to carry off spoil, or plunder, without permission from his Sovereign. And the Sovereign is to determine how far private men, when they are permitted, are to use that liberty of plunder, and whether they are to be sole proprietors in the booty, or only to have a part of it. For to be a soldier, and to act offensively in a hostile manner, a man must be commissioned by public authority: and therefore Cato used to say, 'that no man has any right to fight an enemy that was not a soldier'.

¶ William Scott, in 1798, reporting upon the consequences of the capture of the Cape of Good Hope from the Dutch, drew a distinction between corporeal and tangible property which fell to the captors under 'the general law of capture' as prize or booty, and incorporeal property such as debts due to the Dutch East India Company which fell to the Crown by right of conquest.

Sir,

January 26, 1798¹

I am honoured with Your letter dated the 19th inst. in which you signify to me His Majesty's Commands that I should take into my consideration the Papers received from the Earl of Macartney His Majesty's Governor of the Settlement of the Cape of Good Hope on the subject of a Claim instituted by the Agents of the Captors of that Settlement to a large share of the debts due to the late Dutch East India Company and that I should report to you for His Majesty's information my Opinion how far the captors can under His Majesty's Order of Council of the 15th of Sept. 1795 be considered as entitled to claim such debts as captured Property, and in case such claim should appear to be substantiated that I should further state my opinion as to the steps which will become necessary for preventing the consequences of the extension of such claim to the arrears due to the said Dutch East India Company at the time of the capture and which have since been remitted by His Majesty's Commands.

In dutiful obedience to His Majesty's Command so signified I have taken the Papers into my consideration and report my opinion to be, that no principle contained in the General Law of Capture gives to the captors of the Cape of Good Hope a title to claim for themselves any share of the debts due to the late Dutch East India Company. By that Law as I understand it to be recognised and tolerated in its Practice by civilised States, corporeal and tangible Property, of which bodily possession can be directly taken and maintained by the hand of force, is the peculiar subject of the Right of Booty or Prize; and Incorporeal Property, such as debts due to the conquered State or Its Representatives, have not been deemed the subject of those Rights, although it may be transferred to the New Government under whose Authority the victorious force was applied, and which, by the General Right of Conquest, becomes entitled to all the internal Rights of every species that were possessed by the subdued Government to which it has succeeded.

His Majesty's Order of Council of the 15th of Sept. 1795, drawn conform-

¹ CO. 323. 92; see also Report by the Law Officers of 23 July 1801, in the same volume.

CAPTURE OF ENEMY PROPERTY

ably to all former Orders of His Majesty and His Royal Predecessors applying to the same subject, I conceive to have been framed with the intention of conveying to the Captors that species of Property alone which by the General Law is the object of Prize or Booty, and not to have been construed to impart to them an Interest in Property of any other species.

And I most humbly report my Opinion, that although His Majesty is unquestionably enabled by his Prerogative to make a grant conveying the Benefit of these Debts to the Captors if in His Royal Discretion He saw meet, yet that such a Grant could not be countenanced by the Authority of former Usage, and could tend to confound the Rights of Conquest, hitherto reserved to the State, and the Rights of Capture, usually communicated by the Crown to Its military servants, in a degree that would operate with an evil effect upon important Interests of His Majesty's Government.

I have the honour to be etc.

The Rt. Hon. Henry Dundas etc.

WM. SCOTT

¶ Debts due from persons in one belligerent country to persons in an opposing belligerent country would revive after the end of the war, unless in the meantime they have been confiscated by the debtor's Government.

DOCTORS' COMMONS

My Lord,

18th November, 1813¹

I am honoured with Your Lordship's Commands signified in Mr Hamilton's Letter of the 15th Instant, transmitting for my consideration and opinion, the copy of a letter from Messrs Jarman and Co. relative to Debts due to them from Danish Subjects.

In Obedience to Your Lordship's directions, I have considered the same, and have the Honour to Report, that by the regular principle of the Law of Nations, Debts owing from Individuals of one belligerent Country, to Individuals of the other, would revive at the restoration of Amity between the two Countries, provided they have not been seized by the Sovereign.

It is possible that such an objection may be raised in this instance, in consequence of the Danish Sequestration of the Debts due to British Merchants. In that Case it would be desirable to provide for the payment of such Debts by Treaty, for the protection of the British Creditors if it can be done.

But there may be danger of drawing into the question the Seizure of Danish Property afloat in this Country before Declaration of Hostilities, though they stand in reality on different grounds.

¹ FO. 83. 2259: Denmark. In *Wolff v. Oxholm* (1817), 6 M. and S. 92, it was held that the Danish laws confiscating debts due to enemies afforded no defence to an action brought after the end of the war by a British subject in England against his Danish debtor.

There is a Report by Robinson of 29 May 1812 (FO. 93. 2264: France) concerning the sequestration by the French Government of estates in French or French-controlled territory belonging to Admiral Bentinck who was a British subject. Robinson advised that a belligerent had a right to 'sequester [by which he appears to mean 'confiscate'] on his own territory property belonging to an alien enemy or debts owing him', and that while 'the principle is considered to extend equally to moveable and immoveable property... this distinction is observed that with respect to the latter, it has not been usual to do more than to sequester the rents and profits for the use of the State during the war'. 'Sequester' is often used as equivalent to 'confiscate', but it also has the meaning of temporary control or detention.

INTERNATIONAL LAW OPINIONS

Under these observations, I am humbly of Opinion, that the subject is one which will require Your Lordship's particular Consideration before any positive assurances can safely be given to the Petitioners respecting it.

I have the honour to be etc.

The Rt. Hon. Lord Viscount Castlereagh

CH. ROBINSON

¶ Effect of sequestration of the property of British subjects by an enemy Government.

DOCTORS' COMMONS

My Lord,

December 24, 1818¹

I am honoured with Your Lordship's Commands signified in Mr Hamilton's letter of the 16th instant transmitting a letter from Mr Banfill enclosing three letters from the Members for Devonshire and Exeter relative to the British property sequestered in Spain in the years 1804 and 1805 together with a dispatch from His Majesty's Ambassador at Madrid upon the subject, and the draft of Your Lordship's Instruction to which it is an answer.

And Your Lordship is pleased to request that I would take the same into consideration and report to Your Lordship my Opinion thereupon.

In obedience to Your Lordship's directions, I have the honour to report that the reasons assigned by the Spanish Government for not removing the Sequestration imposed on British Property in 1805 appear to me not to be consonant to just principles. The Treaty of Amiens (Article 14) had stipulated that all the Sequestrations imposed by any of the parties on funded Property, or Debts of whatever description should be taken off *immediately*. The effect of that Article expressly distinguished such Sequestrations from captures of War, which were concluded² in the general operations of the Treaty, and it appears to have been an original departure from the due execution of that Treaty on the part of the Spanish Government, that in the proceedings before the Junta of Reprizals for the examination of British Claims in 1802 instructions were given by the Spanish Government 'not to proceed to the actual Restitution of the part corresponding to each claimant until similar Justice should be administered by the British Tribunals to Spanish Subjects for captures which were made previous to the Declaration of War'.

The practice of confiscating the debts or property of individuals in the possession of the subjects of the Belligerent Powers has been generally disused in modern Warfare, and, where there has been a provisional Sequestration of such property without actual confiscation, the spirit of reconciliation in which Peace is restored, seems to require that it should be removed, since a reservation of such provisional Acts, to be further enforced, or to be made the basis of future retaliatory Measures, is inconsistent with the Mutual Amnesty which a Treaty of Peace naturally implies. This observation is rendered unnecessary, as applied to the Instructions of 1802, by the positive engagement of the Treaty of Amiens; since it was manifestly against the good faith of that Treaty to renew complaints on antecedent captures, not mentioned in the Treaty, as a reason for declining to execute a positive Article of the Treaty. It may however, I humbly submit, be considered as applicable to the more recent proceedings of the Court of Spain, in opposing the capture of the Spanish

¹ FO. 83. 2365: Spain.

² *Quaere*: included.

CAPTURE OF ENEMY PROPERTY

Frigates in 1804 to the claims for the removal of the Sequestration of 1805, which (as seems to be implied) would otherwise have accompanied the return of Peace.

It is not to be denied that the Spanish Government might by strict right of War have confiscated such Property. But not having acted on that principle during the War, it has not the same right to enforce that forfeiture in time of Peace. In that respect the cases of the Spanish Frigates are very distinguishable. The capture of those Frigates has always been maintained and defended both in the proceedings had upon them in the Court of Admiralty, and in the public Councils of this Country, as a seizure of War. The Property was confiscated as such and distributed, and therefore those cases stand on grounds very different from property under Sequestration. The Article of the Treaty of the 14th January 1809, stipulating 'for an entire and lasting oblivion of all Acts of hostility', would naturally include the one, but is not so applicable to the other.

On these grounds I am humbly of Opinion that the refusal to remove the Sequestration imposed on British Property in 1805 is not justified by the Reasons assigned for that Measure by the Spanish Government.

I have the honour to be etc.

*The Rt. Hon. Viscount Castlereagh*¹

CHRIST. ROBINSON

¶ In the course of the negotiation (in 1827) of a proposed Convention between Great Britain and the United States of America regarding the rules governing, or which should govern, the seizure and confiscation of enemy private property in time of war, Robinson was instructed to report upon certain answers given by Mr Gallatin, the United States Minister in London,² to British proposals.

*Report on the answers of Mr Gallatin to 9 Articles of Conventional
Arrangement between Great Britain and the United States,
as proposed by the British Plenipotentiaries*

Queries [submitted to Robinson]

First

You are requested to state distinctly the principle of the Law of Nations, under which, upon the breaking out of War, the private Property of an Alien Enemy is confiscated, if found *afloat* within any Dock, Harbour, or Port of

¹ There are Reports of 2 April and 2 and 17 September 1823 (FO. 83. 2291: Holland) by Robinson on the subject of certain property belonging to British merchants which was on board His Britannic Majesty's ship the *Lutine*—built for the French navy, and captured by the British—which was wrecked off the coast of Holland in 1799. (Her bell hangs in Lloyd's today and is 'used to obtain silence for any announcement of special interest, especially if relating to overdues': Wright and Fayle, *History of Lloyd's*, 1928, 387–9.) Holland, being at that time under French domination, was at war with Great Britain. The main question discussed was whether the title of the British merchants had been legally divested, having regard to the fact that there had been no judicial proceedings in Holland appropriating the *Lutine* to the Dutch Government. Robinson answered this question in the negative. Sir William Scott, in *The Nostra Senora de Los Dolores* (1809), Edw. 60, was quoted.

² This appears to have arisen out of one of the many attempts of the United States to secure the adoption of the principle of the exemption of private property at sea from capture: see Moore, *Digest*, vii, pp. 461–73.