

**INTERNATIONAL LAW IN
HISTORICAL PERSPECTIVE**

NOVA ET VETERA IURIS GENTIUM

PUBLICATIONS OF THE INSTITUTE FOR INTERNATIONAL LAW
OF THE UNIVERSITY OF UTRECHT

Editorial Board

L.J. BOUCHEZ

W.P. HEERE

H.H.G. POST

A.H.A. SOONS

SERIES A: MODERN INTERNATIONAL LAW
NUMBER 16

MARTINUS NIJHOFF PUBLISHERS

DORDRECHT / BOSTON / LONDON

1992

INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE

BY

J. H. W. VERZIJL[†]

*Late Professor of International Law
Utrecht University*

W. P. HEERE

J. P. S. OFFERHAUS

PART IX-C

THE LAW OF MARITIME PRIZE



Library of Congress Cataloging-in-Publication Data

(Revised for volume 11, pt. 9C)

Verzijl, J. H. W. (Jan Hendrik Willem), b. 1868.

International law in historical perspective. By J. H. W. Verzijl.

(Nova et vetera iuris gentium. Series A, Modern international law, no. 4, 6-9, 12-14)

Vol. edited by W.P. Heere, J.P.S. Offerhaus.

Vol. published: Dordrecht ; Boston : M. Nijhoff.

Contents: v. 1. General subjects. -- v. 2. International persons. -- [etc.] -- v. 11, pt. 9c. The law of maritime prize.

1. International law--History. I. Heere, Wybo P. II. Offerhaus, J.P.S. III. Title. IV. Series: Nova et vetera iuris gentium. Series A, Modern international law ; no. 4, etc.

JX3695.D8v47

341

68-26728

ISBN: 0-7923-0944-8

Published by Kluwer Academic Publishers,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

Kluwer Academic Publishers incorporates the publishing programmes
of D. Reidel, Martinus Nijhoff, Dr W. Junk and MTP Press.

Sold and distributed in the U.S.A. and Canada
by Kluwer Academic Publishers,
101 Philip Drive, Norwell, MA 02061, U.S.A.

In all other countries, sold and distributed
by Kluwer Academic Publishers Group,
P.O. Box 322, 3300 AH Dordrecht, The Netherlands.

Printed on acid-free paper

All Rights Reserved
© 1992 Kluwer Academic Publishers

No part of the material protected by this copyright notice may be reproduced or
utilized in any form or by any means, electronic or mechanical,
including photocopying, recording or by any information storage and retrieval system,
without written permission from the copyright owner.

Printed in the Netherlands

TABLE OF CONTENTS

Preface to Part IX-C	1
Introduction — The law of maritime prize	6
 Chapter I. The sources of the law of prize	10
General introduction	10
Section 1. Regional codifications	11
Introduction	11
Les Rhodia de jactu (Νομός Ροδίων ναυτικός)	12
The Assises de Jerusalem	13
Tabula Amalphitana	14
Rôles d'Oléron	16
Black Book of the Admiralty	18
The Consulate of the Sea	22
The maritime laws of the Baltic and the North	27
Dutch and Flemish sources	29
Section 2. Bilateral treaties dealing with the law of prize	30
Section 3. National laws and ordinances	34
Introductory	34
England	35
France	42
The Edict of March 1584	44
The Ordonnance of 1681	45
The Règlement of July 1778	49
The Arrêté of an XI (1803)	52
Spain	53
Portugal	54
The United Netherlands	54
The United States of America	58
Section 4. Instructions for the Admiral or for privateers	60
Section 5. Admiralty and prize court decisions	61
The French collections	62
The British collections	69
A. The English collections themselves	69
B. The types of issues determined in decisions during England's successive wars	84
The formative period	85
Retrospect	102
Stare decisis	102

VIII

Issues concerning other States	106
The Netherlands	106
American collections	111
Italian cases	114
The second half of the nineteenth century	115
Section 6. Customary practice	116
Section 7. Arbitral awards	117
Section 8. Collective treaties	118
 Chapter II. A brief history of the law of prize	120
General introduction	120
A. The Armed Neutrality Alliance, followed by the Continental System	124
B. The Declaration of Paris	128
C. The Second Hague Peace Conference and the London Conference on Naval Warfare	130
D. Developments after the Naval Conference of London of 1908/1909	131
Private codifications of the law of maritime prize	
1. Institut de droit international	133
2. The Harvard Research Draft (1939)	134
A. Substantive prize law	136
B. Formalities to be observed in the exercise of the rights of visit and capture	143
C. Prize jurisdiction	145
 Chapter III. The pre-codification period up to 1907-1909	146
Preface	146
Preliminary section I. General issues	147
Section 1. Who are qualified to exercise the right of prize? ..	148
Introductory	148
A. State organs	149
1. Warships and other State ships	149
2. Port authorities	150
3. Customs officers	150
4. Land troops	152
5. Exceptional old instances: towns as captors	152
B. Privateering	152
(a) Piracy	152
(b) The grant of letters of marque	153
(c) Conversion of merchant ships to warships	154
(d) The arming of (non-commissioned) merchant ships ..	155
General introduction	156

(a) Historical	156
(b) Bibliographical	158
I. Legislation	159
England	159
France	160
The Netherlands	163
Spain	163
The United States	164
II. Treaty provisions or international complications	164
(a) Requirement of a commission	165
(b) Prohibition to accept a commission from an enemy government	165
(c) Instruction to hand-in the commission after return to the home port and prohibition of its further use	166
(d) Obligation imposed upon masters and owners of privateers to give surety against misbehaviour ...	166
(e) Obligatory modalities of visit and seizure	167
(f) Sanctions on irregularities and abuses	167
III. Attempts to abolish privateering	168
C. Captors other than State organs and privateers	171
Section 2. When may the right of prize be exercised?	173
A. Captures made prior to the outbreak of war	174
B. Captures made after the cessation of hostilities	176
Section 3. Where may the right of prize be exercised?	180
A. Places where the exercise is normal	180
Open sea	180
Territorial waters of the belligerents	180
Internal waters of inland lakes	180
Seizures on land	181
B. Places where the exercise is disputable	182
Neutral or neutralised waters	182
I. Illegality of captures in neutral or neutralized waters in general	183
II. The judicial treatment of cases of capture in neutral waters: illegality or also invalidity?	190
III. Adjudication of prizes lying in neutral waters	193
Section 4. What objects are liable to seizure in prize?	197
Preliminary section II. The problems of the enemy or non-enemy character of prizes	203
Prefatory	203
Sub-Division I. Enemy or non-enemy character of ships	205
Introductory section	205
Section 1. Criteria for the determination of the enemy or non-enemy character of ships: ownership, flag or possibly additional other	206

Old English case law	206
Old French legislation and jurisprudence	211
Section 2. External factors which may thwart the normal effects of the allocation of enemy or non-enemy character to ships	219
1. Impact of some form of intertwinement of neutral and enemy interests in the same vessel	220
(a) Mixed enemy and non-enemy co-ownership	220
(b) Other than proprietary rights of neutrals	221
2. Impact of a change of the territorial situation during the vessel's voyage	225
(a) Territorial cession	225
(b) Belligerent occupation	227
3. Impact of a peace treaty on the character of a prize	229
Section 3. Transfer of enemy ships to a non-enemy flag during or in contemplation of war	229
Introductory remarks	229
1. Old French legislation and jurisprudence	230
2. Old Anglo-American case law	232
(a) Seven Year's War	232
(b) The fourth Anglo-Dutch naval war	232
(c) Revolutionary Wars of France	232
(d) The Crimean War	238
(e) The American Civil War	241
Conclusions	243
Sub-Division II. The enemy or non-enemy character of cargoes	244
Introductory paragraph	244
Section 1. Legal ownership or (also) other, non-proprietary interests?	251
Mixed co-ownership	251
(a) Other than proprietary interests of neutrals	251
(b) Mixed enemy and non-enemy property	253
Section 2. Determination of enemy or non-enemy ownership	254
(a) Decisive moment	255
(b) Requirement of proof	256
(c) Nationality of the owner versus his domicile as the criterium for his enemy or neutral character	257
Section 3. Special cases of transfer	268
Section 4. Produce of the enemy soil (<i>crû ennemi</i>)	271
Chapter IIIA. The substantive law of prize	273
Prefatory	273
Section 1. Enemy property at sea. The principle, attempts to abolish it, its gradual mitigations	275

(a) The principle of confiscability of enemy property at sea	275
(b) Attempts to abolish the age-old rule	275
(c) Gradual mitigation of the principle of confiscability ..	279
§ 1. Vessels sailing under a belligerent licence	281
§ 2. Cartel ships	289
§ 3. Days of grace	290
§ 4. Small fishing vessels, etc.	293
§ 5. Hospital ships	296
§ 6. Ships sailing for scientific, charitable or religious purposes	297
§ 7. Postal correspondence	297
§ 8. Personal property of the master, crew or passengers of an enemy vessel	298
§ 9. Enemy goods under neutral flag	299
Section 2. Enemy goods on neutral ships and neutral goods on enemy ships	299
Introductory	299
The contradictory system	301
(a) Treatment of the goods according to their own nature	301
(b) The system of "unfree ship, unfree goods"	306
Specific categories of goods	309
General	309
0. Warships as contraband	311
1. Ships' materials and naval stores	311
2. Sulphur and saltpetre	315
3. Foodstuffs or "provisions" (commeatus)	315
4. Coal	319
(c) The system of "free ship, free goods"	320
(d) The double-edged system of hostile infection	326
Section 3. Contraband of war	331
General Introduction	331
§ 1. Categories of goods subject to treatment as contraband of war	333
Introduction	333
Treaty provisions enumerating contraband goods ...	337
The Institut de Droit International	342
Quasi-contraband	343
§ 2. The destination of contraband goods to the enemy	
Proof and the system of presumptions. Destination of the ship and destination of the contraband cargo.	
Growth of the doctrine of continuous voyage	344
1. The formative period	345
Introductory observations	345

French jurisprudence during the formative phase	350
English jurisprudence during the formative phase	352
2. Further developments during the consolidation phase	358
Introduction	358
(1) the European variant	359
(2) the American variant	359
§ 3. Sanctions against the transportation of contraband	371
Introduction	371
The formative period	372
A. Extension of the sanction of confiscation to objects other than the contraband goods themselves	372
1. The treaty basis of the sanctions regime	373
2. The bases of the sanctions regime in municipal legislation and case law	376
I. The situation in France during the formative period	376
II. The situation in England during the formative period	377
B. Relaxations of the sanctions	394
Introduction	394
(i) Contraband intercepted at sea shortly after the outbreak of hostilities or other cases of ignorance of relevant facts	395
(ii) Ships intercepted at sea after the delivery of their contraband cargo on the return voyage	397
(iii) Produce of the neutral shipper's native soil	401
(iv) Pre-emption or requisition in lieu of confiscation	413
(v) The quantity of contraband goods	414
Section 4. Blockade and its breach	414
Preface	414
Part A. Legal problems concerning blockades	415
Sub-section 1. Origin of blockade as a separate legal institution and the main elements of its regime	415
Sub-section 2. War blockade as opposed to pacific blockade	419
Sub-section 3. Paper blockades as opposed to effective blockades	421
Part B. The case law concerning blockade	423
Introductory remarks	423
§ 1. From early days up to the middle of the 19th century	424
(a) Old British precedents	424
(b) Old French legislation and jurisprudence	442

§ 2. The Crimean War (1853-1856)	444
§ 3. The American Civil War	448
§ 4. The last decades of the pre-codification period ..	451
Section 5. Unneutral service	456
General	456
The case law	458
1. Transport of troops or military men	458
2. Carriage of despatches	461
Section 6. Rule of the war of 1756. Closed trade. Navigation <i>réservée</i>	470
(a) Colonial trade	471
(b) Coasting trade	477
Section 6A. Slave trade, trading with the enemy and other infractions of international or municipal law ...	477
(a) Slave trade	478
(b) Trading with the enemy	479
(c) Other rare encroachments on municipal law which led to prize court decisions	481
Section 7. Irregularities committed by non-enemy vessels encroaching upon the policing rights of the belliger- ents	482
The three main grounds of condemnation	483
(a) Special caution against all forms of fraud	484
(b) Resistance to visit and search	485
(c) Jettison or "spoliation" of ship's papers	485
Chapter IIIB. Modalities of the exercise of the right of capture	488
Section 1. Ship's papers	489
General Introduction	489
English practice	497
French practice	497
Section 2. Visit and search	504
Section 3. Possible measures following visit and search	511
(a) Permission to continue the voyage	511
(b) Formal seizure (capture), followed by bringing the ship into a convenient port for adjudication	513
(c) Bringing the prize into port for search without formal seizure	518
(d) Delivery of the contraband goods to the captor at sea, instead of seizure of the transporting vessel	519
(e) Destruction of the prize	520
(f) Release of the prize before adjudication	520
(g) Ransoming of the prize	522
(h) Abandonment of the prize	523
Section 4. Neutral convoy	523

XIV

Section 5. Destruction of prizes	528
Section 6. Joint capture	533
Section 7. Recapture. Salvage	539
General Introduction: doctrinal and historical	539
§ 1. Recapture proper and other forms of a second capture	541
§ 2. Literature on recapture	544
§ 3. Treaties	546
§ 4. Municipal legislation	548
§ 5. Admiralty judgments	550
Introduction	550
Old British case law	551
Old French legislation and case law	558
1. Recapture of French or allied vessels	
Recousse recouse of French or allied ships	559
2. Recapture of neutral vessels	561
American case law	563
The Far East	565
Belgian case law	566
Salvage claims	568
 Chapter IIIC. Prize Jurisdiction	571
Introductory Section: The origin of the function of the Admiral and of Admiralty jurisdiction	571
Section 1. The organization of prize jurisdiction	576
National Regulations	576
England	577
France	578
Spain	579
Italy	579
Germany and Austria	580
Denmark and Sweden	580
The Netherlands	581
Russia	587
Japan	588
The United States	588
Section 2. Competence of the prize courts	589
Section 3. The law to be applied by the prize courts. Reprisals	
Orders	595
Question (a) Application of municipal law or the law of nations?	596
Question (b) The legal permissibility of reprisals which run counter to the law of nations	601

Section 4. Procedure in prize cases	610
(a) The very restricted <i>jus standi in judicio</i> of enemy subjects	612
(b) The overriding duty of claimants to act <i>bona fide</i>	612
(c) Duty of the captor to bring his prize before a prize court for adjudication	612
(d) Release before adjudication	613
(e) Representation of the parties in prize proceedings	613
(f) Contents of the affidavits	613
(g) Insurance issues; commissions of appraisal, etc.	613
(h) Surety on bail	614
(i) Evidence	614
(j) Requisition of prizes	615
(k) Sale of the prize during the proceedings	616
(l) Appeal or revision	617
Section 5. Possible dicta. Legal effects of a condemnatory judgment	618
Section 6. Award of damages. Probable cause. Freight. General average	621
(A) Claims for damages	621
(B) Freight claims	629
General historical introduction	
The different types of freight claims	630
(a) Freight claims of a captor against the owners of cargoes carried on a neutral ship	631
(b) Freight claims of a neutral ship owner against the captor in case of release of a prize	634
(c) Claims of the captor of an enemy ship to the freight earned by her owner prior to the capture	636
(d) Claims of the captor of neutral goods on board an enemy ship to the freight which their neutral owner on their release still owed to the enemy ship owner	637
(e) Freight claims of the ship owner against the cargo owner	638
(f) Order of priority between different freight and other claims	638
(g) The <i>quantum</i> of the amount of freight after capture	639
(C) Apportionment of general average (<i>avarie commune</i> or <i>avarie grosse</i>)	640
Section 7. Proceeds of prizes. Droits of the Crown and droits of Admiralty. Prize Bounty	642
Introduction	642
1. Legislation on the subject	
England	645
The French system	647
The Netherlands	649

Spain	651
The United States	651
Japan	652
Russia	652
2. Case law on the subject	652
English case law	
(a) Distinction between “droits of the Crown” and “droits of Admiralty”	653
(b) The award of prize money	658
French case law	661
Section 8. Review of national prize court decrees. Arbitration and similar procedures	663
Introductory	663
A. Various degrees of internationalization of national prize court decrees	664
B. Conferment of prize law disputes upon an international body	667
Abbreviations	675
Bibliography	677
Geographical Name Index	681
Name Index	685
Prize Case Index	691
Subject Index	713
Treaty Index	725