Part 3
PRIZE LAW, JURISDICTION AND PROCEDURE

6. The substantive law of prize

Introduction

141. The Terms of Reference require the Commission to 'consider whether Australia should enact its own law of Prize and, if so, formulate recommendations for such a law'. There has always been a close historical connection between the instance and prize jurisdiction of admiralty courts,[1] and this no doubt explains why in a reference primarily on admiralty jurisdiction, the Commission was asked to consider whether any provision is necessary either dealing with the substance of prize law or giving jurisdiction over matters arising under the law of prize. If it is recommended that jurisdiction be given, the further question arises whether provision for prize procedure needs to be made, and if so, the form and content of such provision. This and succeeding chapters deal with three closely connected issues — the substantive law of prize law, prize jurisdiction, and procedure — and examine what, if any, provision is needed in Australian law.

The substantive law of prize

What is prize law?

142. Since 18th century, prize law has been part of the international law of maritime warfare, applicable to events occurring in time of war. It deals with the legality of seizure by naval forces of private property of a maritime nature belonging to an enemy national or to nationals of neutral countries. It also deals with the disposal of seized property. Condemnation by a prize court, not the fact of seizure, operates to confer on a captor a title to the seized property which is internationally recognised[2] and which is free of all liens and encumbrances.[3] In theory the rule is that the captor cannot destroy a prize until title passes by virtue of condemnation by a prize court. But exceptions exist and 'no unanimity exists in

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1 Colombos, 1967, 795.

2 See Treaty of Peace between the Allied Powers and Japan, San Francisco, 8 September 1951, art 17(a): 'Upon the request of any of the Allied Powers, the Japanese Government shall review and revise *in conformity with international law* any decision or order of the Japanese Prize Courts . . .' (emphasis added). See Treaty of Peace (Japan) Act 1952 (Cth), Schedule for text of the Treaty.

3 But British prize courts will allow pre-existing civil salvage liens to be enforced in prize proceedings in some circumstances against the *res* which has been seized in the exercise of their equitable jurisdiction: *The Prins Knud* [1942] AC 667.

theory or practice as regards those exceptions'.[4] The international law of prize has never been codified. Nor has Great Britain (or Australia) ever had an official code of prize law or law of naval warfare.[5] The Declaration of Paris of 1856 was formally a declaration of the seven parties to the Paris Conference which ended the Crimean War. But it was subsequently acceded to by some 20 other states and has since come to be regarded as a statement of customary international law on the points which it covers: the abolition of privateering, the immunity from capture of goods of neutrals or carried under a neutral flag unless the goods are contraband of war, and the definition of effective blockade.[6] The second Hague Conference, 1907, adopted several Conventions on naval warfare covering such matters as the treatment of enemy merchant ships at the outbreak of war (Convention No VI), the conversion of merchant ships into warships (Convention No VII), restrictions on belligerent rights of capture at sea of coastal and fishing vessels and of mail, the treatment of the crews of captured merchant ships (Convention No XI) and the rights and duties of neutrals (Convention No XIII). These Conventions all contained a clause providing that they were binding only on the ratifying states, and only in a war in which all the belligerents were parties.[7] They secured only limited acceptance at the time and their status has not improved since.[8] A further Convention, No XII, provided for the establishment of an international prize court to hear appeals from prize courts of belligerents, but this Convention never came into force.[9] Because of British concern owing to uncertainty of the law which such a prize court would apply, a conference was convened to attempt to set out concisely the appropriate rule of international law on a range of issues. The resulting compromise was embodied in the Declaration of London of 1909.[10] The 70 articles of the Declaration never entered into force, though some of its provisions were reflected in the contents of municipal prize codes and influenced decisions of prize courts, and it had some impact on neutral opinion in World War I.[11] Its current value as a statement of prize law is very limited.[12] In the absence of an international prize court or any conferral by state practice of prize jurisdiction on other international tribunals, 'international judicial institutions have had no opportunity of developing . . . rules on the specific

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4 Oppenheim 1952, vol 2, 487.

5 Cobbett 1937, 257 discusses the status of the various unofficial British codes which have appeared from time to time.

6 Colombos 1967, 481—2 contains an English translation of the text of the Declaration, and comment on it.

7 id, 486.

8 See Rowson 1947, 166—71 for their treatment by prize courts during World War II.

9 See Boyle 1982, 135—7 for the background.

10 See Smith 1959, 223—45 for text and comments.

11 Boyle 1982, 138.

12 Colombos 1967, 486-7.

subject of prize law'.[13] Instead, municipal prize courts, especially those of Britain, played a key role in adapting the judge-made prize law inherited from the 19th century to the changed conditions of the World Wars in the 20th century.[14]

143. *Seizure of enemy property.* In relation to seizures of enemy property three situations need to be distinguished, only one of which is dealt with by the law of prize. Where enemy warships, other public vessels, and public cargoes are captured, title to the property immediately vests in the captor by virtue of the fact of capture, and no question of prize law arises.[15] The second and third situations concern private property of enemy nationals situated on land or at sea respectively. There is a 'divergence between the rules of war on land, which prohibit capture of private enemy property, and the rules governing sea warfare which permit prize-capture'.[16] The precise dividing line between the two sets of rules is far from clear. But the types of property which may be the subject of seizure in prize are considerably wider than the subject-matter of admiralty jurisdiction, ships,[17] freight and cargoes.[18] Money, cheques, bonds, securities, and goods dispatched by parcel post have all been condemned in Prize.[19] It is not clear whether submarine cables may be seized.[20] Prize law covers at least some

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13 Schwarzenberger 1968, vol 2, 365. See Colombos 1967, 822—5 on the use of reservations by some states, including Australia, so as to ensure that the PCIJ and subsequently the ICJ could not have jurisdiction over prize matters. For the Australian reservations of 6 February 1954 to the compulsory jurisdiction of the ICJ (subsequently withdrawn) see 186 UNTS 77. See also Stone 1954, 542 n 135.

14 There are no reported decisions on prize from United States courts this century: Knauth 1946, 69; Tucker 1957, 75 n 61, 271 n 14.

15 Colombos 1967, 800. The position with respect to state-owned vessels used exclusively on commercial service is unclear: Tucker, 106, n 36; Whiteman vol 11, 86—7; O'Connell 1984, 1114. For similar uncertainty in the converse situation, privately owned vessels subject to varying degrees of state control as to cargo and destination, see Smith, 110—12.

16 *Schiffahrt-Treuhand GmbH v HM Procurator-General* [1953] AC 232, 262.

17 id, 263 holding that vessels under construction, even though incapable of floating at the time of capture, were '"maritime property in a maritime town" and are rightly to be regarded as maritime prize'. See also *The Antonia C* [1949] 1 WLR 459 in which a scuttled ship was held to have been captured as a ship and not as a piece of wreckage at the bottom of the sea. On wreck in prize law see Rowson 1947a, 175—6. On the definition of 'ship' for civil admiralty purposes see ALRC 33, para 98-108.

18 See eg *Ten Bales of Silk at Port Said* (1916) 2 B & CPC 247, 254 where an Egyptian Prize Court held that, from the moment that goods are shipped under a bill of lading they become cargo and so remain until they cease to be bound by that instrument. For the definition of cargo and freight for civil admiralty purposes see ALRC 33, para 108-10.

19 *Turkish Moneys Taken at Mudros* (1916) 2 B & CPC 336; *The Frederik VII* [1917] P 43; *The Noordam (No 2)* [1920] AC 904; *In the matter of Ten Registered Letters ex Eastbound Aircraft* (Bermuda, S Ct in prize, 1941) 16 ILR 583. See O'Connell 1984, 1124 on the controversy about interference with the mails.

20 Whiteman 1968, 88.

seizures by maritime forces on non-tidal rivers and lakes,[21] and even in some circumstances seizures on land when made by maritime rather than land forces.[22] The fact that aircraft play a key role in a seizure at sea does not prevent a seized *res* from being condemned in prize.[23] In addition

> liability to capture and confiscation of enemy civil aircraft, and of enemy goods on board, now enjoys general support, and it is not likely that this adaptation of the practice operative in warfare at sea rather than the practice governing seizure of property on land will be reversed.[24]

The Prize Act 1939 (UK) s 1 applies prize law to aircraft and goods carried therein 'notwithstanding that the aircraft is on or over land'. But the lack of specificity in this[25] and other national legislation,[26] and the complete absence of reported decisions from any jurisdiction on the application of prize law to aircraft[27] have left uncertainty over the details of how prize law is to be applied to aircraft.[28]

144. *Seizure of neutral property.* Prize law applied to the property of neutrals fulfils the same basic functions as when it is applied to enemy property, determining the legality of the seizure and providing for the transfer of title to ships, goods and other maritime property which have been legally seized. But the questions which arise are generally more complex and controversial and as a result the applicable law is less settled. In dealing with these questions courts

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21 *In the matter of Certain Craft Captured on the Victoria Nyanza* [1919] P 83; *Enemy Craft Captured on the River Tigris* (1922) 9 Ll LR 554. But note the contrary United States position: 10 USC s 7651(c).

22 *The Roumanian* [1916] 1 AC 124, 137—44 referring to decisions concerning cargo warehoused in or near a port; *The Anichab* [1922] 1 AC 235. See Whiteman, 59—60 for references suggesting that the requirement that the forces be maritime is not always adhered to.

23 Rowson 1947a, 209-10.

24 Tucker, 109. During World War II aircraft were made the objects of prize law in the British Empire, the United States, Italy and Holland, but not in France, Germany and Japan: Rowson 1947a, 212.

25 See Parry 1940, 298 for criticism of the legislation for failing to consider and resolve the many problems which are created by making aircraft an object of prize law.

26 The provision in the United States legislation (see now 10 USC 7651(b)(1)) that, for the purposes of prize, "'vessel" includes aircraft' is equally cryptic. Read with the basic grant of jurisdiction (now in 10 USC 7652) it would appear to allow prize jurisdiction over aircraft irrespective of the place of seizure.

27 Rowson 1947a, 213 n 6 refers to a single unreported case.

28 id, 212-13; Tucker 1955, 108-10; Knauth 1946, 76-7; Stone 1954, 527.

often have to refer to other rules and concepts of international law such as neutrality, belligerent rights, blockade, contraband and reprisal.[29] There is no clear dividing line between these matters and prize law.[30]

Prize bounty, prize money and prize salvage

145. *Prize bounty.* Prize bounty, prize money and prize salvage are matters which have been traditionally associated with prize courts. In England the grant of prize bounty dates back to the 17th century.[31] It was money paid as a reward for the capture of enemy ships of war. The sum was calculated 'at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement' and was paid to those members of the naval forces of the Crown actually present at the capture or destruction of the enemy warship.[32] Jurisdiction over prize bounty was transferred from the prize courts to a special tribunal in 1918.[33] It was announced in 1939 and confirmed in 1945 that prize bounty would no longer be paid and the whole system, including the prerogative right to award prize bounty, was abolished by the Prize Act 1948 (UK) s 9(2).[34] This Act did not extend to Australia and it may be that the prerogative right survives here, exercisable by the Governor-General.[35] But the system of prize bounty only becomes operative by proclamation, traditionally by proclamation with the respect to a particular conflict, and no proclamation is now in force in Australia.

146. *Prize money.* Prize money was originally paid to encourage the capture of merchant ships and has an even longer history than prize bounty.[36] It is a sum of money calculated as a percentage of the value of a merchant ship, cargo or other

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29 See generally Tucker 1955, 269—75, 344—51. An example is the right of belligerents to stop and search neutral vessels. Under English prize court practice 'compensation should in all cases be awarded where the [Prize] Court is satisfied that there has been unreasonable diversion, undue delay, or unnecssary interference with the ship's voyage': Colombos 1967, 775.

30 See eg Rowson 1947a, 200 where it is noted that British prize courts dealt with cases of detention under the Reprisal Orders 'even though the detention which they first ordered was not strictly a matter of prize'. For the way in which reprisal related to prize law during World War II see Rowson 1945, 1—4; see also Rowson 1947a, 186 where contraband and blockade are treated as a branch of prize law; cf *The Stigstad* [1919] AC 279, 288.

31 Colombos 1967, 818.

32 Naval Prize Act 1864 (Imp) s 42. For the similar system which applied in the United States until its abolition in 1899 see Knauth 1946, 70.

33 Naval Prize Act 1918 (UK) s 2. For prize court actions in respect of prize bounty for two famous pre-1918 naval engagements see *In the Matter of the Battle of the Falkland Islands* [1917] P 47; *In the Matter of the Battle of Jutland* [1920] P 408.

34 See Hansard (UK) (*H of L, 5th Series*) col 818ff (7 December 1948) for the background.

35 *Australian Commentary on Halsbury's Laws of England, Prize* para 2, n(b).

36 The history is briefly set out in Hansard (UK) (*H of L, 5th Series*) col 818—19 (7 December 1948).

private property taken and condemned in prize. All rights (droits) in prize originally belonged to the Crown, but in the course of time some were conferred upon the Lord High Admiral. By the 1830s all prize droits were back in the hands of the Crown and were surrendered to the Exchequer by William IV. But the distinction between those droits which had been granted to the Admiral and those which had always remained with the Crown was not abolished. Admiralty droits were allocated to the Treasury while, rather paradoxically, Crown droits were allocated to the Navy and provided the source of prize money. An actual grant of Crown droits in respect of a particular conflict was necessary before prize money became payable.[37] The dividing line between Crown and Admiralty droits in some respects is obscure. Traditionally a prize court in condemning in prize would determine upon which side of the line a seizure fell and hence, assuming a grant of prize money had been made for the conflict, whether prize money was payable. Broadly, the proceeds of all seizures in ports at outbreak of war and in certain other circumstances were droits of Admiralty; seizures on the high seas or of ships forced into port by the Navy were droits of the Crown.[38] In World War I the task of determining the type of droit was not given to prize courts but to a special Naval Prize Tribunal.[39] In World War II prize courts again did not decide on droits. The determination was made administratively, relying in some cases on the estimated value of prizes, that the total value of prizes should be divided one-third to Admiralty droits, and two-thirds to Crown droits and hence prize money.[40] In both World Wars prize money went into a fund for general distribution, not to individual captors. As with prize bounty, the prerogative right to grant droits to captors in future wars was abolished by the Prize Act 1948 (UK) s 9(2).[41] This Act does not apply to Australia and therefore the prerogative to grant droits may still survive here. If so, it could presumably be exercised by the Governor-General in any future conflict.

147. *Prize salvage.* Prize salvage is governed by the Naval Prize Act 1864 (Imp) s 40. Where property belonging to any of Her Majesty's subjects which has been taken as prize by the enemy is retaken by any of Her Majesty's ships of war, it may be restored by a decree of a prize court to its owner on the payment by the owner to the re-captors of prize salvage. The amount payable is normally one-eighth of the value of the property but, where the recapture is made under circumstances of special difficulty or danger the prize court may award up to one-fourth. The provision does not apply where the prize was used by the enemy

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37 See eg *The Abonema and Other Ships* [1919] P 41, 42 n (1) for the text of the proclamation of 15 August 1918 in respect of Crown droits accruing in World War I.

38 See ibid, for a review of the various criteria used.

39 Naval Prize Act 1918 (UK) s 2.

40 See Hansard (UK) (*H of L, 5th Series*) col 819 (7 December 1948) for details.

41 See Knauth 1946, 73 for the abolition of prize money in the USA in 1899.

as a ship of war. The Prize Salvage Act 1944 (UK) s 1[42] provides that claims for prize salvage shall only be commenced with the consent of the Admiralty or the Secretary of State.[43] This Act does not purport to apply to Australia (s 2) so that an unrestricted right of Australian service personnel to claim prize salvage would appear to continue to exist.[44]

The position in Australia

148. There is no Australian legislation dealing with prize. The Imperial and United Kingdom legislation on prize which is in force in Australia is discussed in chapter 7. But this body of legislation is directed to matters of jurisdiction and procedure, not the substantive law of prize. While a few of the provisions of this legislation touch on what are arguably points of substance (such as subjecting aircraft to prize law) it is generally true to say that an Australian prize court would find its prize law in customary international law. In doing so it would no doubt be strongly influenced by the way in which that law has been incorporated in and developed by decisions of British courts, in particular of the Privy Council.[45] It may be that a future Australian prize court would decline to follow British and Privy Council precedents on the basis that, in its view, they did not reflect international law, but this must remain speculative especially since there is virtually no modern practice in relation to the law of prize. There are only a few reported Australian prize decisions, mostly from World War I and none of major significance.

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42 The Prize Act 1945 (Can) s 6(1) is in similar terms.

43 See Hansard (UK) (*H of L, 5th Series*) 572—3 (1 February 1944) for the background to this Act. The reasons for introducing the restriction included: the delay in adjudging claims meant an unacceptable delay in putting the recaptured ship back into urgent war service; the recapture by forces of mixed nationality caused problems when the laws of one or more of the countries involved did not recognise a right of prize salvage; entering into treaties between allies for the return on a reciprocal basis of recaptured ships to their owners was complicated by the possibility of individual claims for prize salvage, and a desire to bring prize salvage into line with civil salvage claims by HM's ships (see Merchant Shipping Act 1894 (Imp) s 557, but cf Navigation Act 1912 (Cth) s 329C). For the subsequent inter-Allied agreements on prize salvage see Rowson 1947, 338—40.

44 See also RAN Regulations and Admiralty Instructions, art 5101 in force by virtue of the Naval Defence Act 1910 (Cth) s 34(b), which deals with some of the procedural aspects of how service personnel may claim awards of salvage under the Naval Prize Act 1864 (Imp). For general salvage claims by service personnel see now Defence Act 1903 (Cth) Part IXB (inserted 1988).

45 Kunz 1942, 205; Stone 1954, 542—3.

The need and scope for reform

Difficulty in ascertaining prize law

149. It is obviously difficult to estimate how satisfactory a body of law that has remained virtually unused in conflicts since World War II[46] will be in a future conflict without knowing the nature of, and Australia's role in, that conflict. In World War II only three prize cases appear to have come before Australian courts.[47] While knowledge of prize law is understandably very limited, there would appear to be sufficient textbooks and copies of the specialised prize reports available in Australia to serve any likely need. Prize cases are almost never matters of urgency[48] due to the widespread and internationally acceptable practice of allowing the sale or requisition of the *res pendente lite* with litigation later taking place against the proceeds in the hands of the court.[49] There would therefore seem to be little need to codify the law of prize in order to make it more accessible. Neither is there any indication that in the very limited circumstances in which it was applied the law of prize proved unsatisfactory to Australian interests in World War II. From this point of view there seems to be no need for reform.

Possible changes in prize law since 1945

150. *Has prize law changed?* The discussion so far has assumed that the international law of prize remains as it was at the end of World War II. There are several reasons for suggesting that this may not be the case. To the extent that it is

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46 The only reported cases that appear to have occurred in subsequent conflicts are *Government of Pakistan v RSN Co Ltd* (Dacca, High Court, 1965) 40 ILR 472 arising out of the India-Pakistan war of 1965, and the more than 400 cases between 1948 and 1960 arising out of the Egypt-Israel conflict which were heard in Egyptian prize courts. For reports of some of the latter see 16 ILR 587—602; 17 ILR 440—9; 24 ILR 992—4; 28 ILR 656—64; 31 ILR 509—20. For discussion see Trappe 1960; Brown 1966. The use by both Pakistan and Egypt of prize law was limited in that it related almost exclusively to ships and cargoes found within their internal or territorial waters: see RR Baxter, 'The Law of War' in Bos 1973, 107, 120. During the Algerian independence conflict French courts declined to exercise prize court jurisdiction over seized ships on the basis that no state of war existed: Norton 1976, 306 n 272.

47 *The Remo* (1940) LJ PC (2nd series) 52 (WA S Ct); *The Astoria*, id, 53 (NSW S Ct). The Angelo Maersk was seized in Fremantle but there is no report of any prize decision. For the purposes of comparison the prize court in London in the period 1939—1947 heard 466 cases involving ships, 328 cases involving ships and cargoes, and 743 cases involving cargoes or parts of cargoes: Hansard (UK) (*H of C, 5th Series*) (written answers) col 354 (17 December 1947).

48 Statistics relating to the work of the prize court in London in World War II reveal an average delay in uncontested cases between the issue of writ and final condemnation of 9.8 months in cases involving ships and 18.6 months in cases of cargo or parts of cargo: Hansard (UK) (*H of C, 5th Series*) (written answers) col 354 (17 December 1947).

49 Some 524 ships were requisitioned in the context of British prize proceedings during World War II: id, col 355. See generally Fitzmaurice 1945, 75—82.

not, Australian courts may have a greater need for legislative guidance. However any changes that have occurred would make the task of accurately codifying international law more difficult.[50]

151. *Difficulties in identifying directions for reform.* Prize law is not an area of law of special or even significant interest to Australia. Because of this, it is far from clear what policy Australia should adopt in any legislation. Because of the absence of international discussion of prize law in the last 35 years, it is impossible to assess the views of states as to what the present law of prize is or should be. Even if Australia had a particular interest which it wished to promote there is no means if assessing what international support would be forthcoming. Some indication of the difficulties can be seen by briefly examining some of the reasons why prize law may not have remained as it was in 1945. One is the impact of technology. Just as the development of submarines, mines, long range coastal defences and the like eroded the pre-1914 laws of naval warfare during the two World Wars, so there is a feeling, admittedly imprecise, that technological changes since 1945 will require further changes in the laws of naval warfare, even if they have not rendered substantial parts of that body of law simply obsolete.[51] A second reason for doubting the continued viability of prize law is that it can be argued that the distinction basic to prize between capture at sea, with which it deals, and capture on land, with which it does not, lacks any clear rationale.[52] As Stone observes, 'there is no reason in principle why prize jurisdiction should be limited to maritime prize'.[53] Conversely there may be no reason to apply maritime law to the seizure of maritime property.[54] The United States as a matter of policy avoided resort to prize law in both World Wars without disadvantaging itself in dealing with captured or interned merchant shipping.[55] In the 1950s the possibility that the United States would resort to prize proceedings in the future was described as an 'unlikely contingency'.[56] British practice has remained within the framework of prize law but has sharply reduced the importance of its core

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50 See also *The Zamora* [1916] 2 AC 77, 93.

51 See generally O'Connell 1970 for the view that, while adjustments are clearly needed in the 1945 law, much more survives intact than might have been expected. For a much more pessimistic view see Baxter 1973, 119—20. But while there may be good grounds for taking an optimistic view, even O'Connell 1984, 1154 acknowledges that 'the practice during the two World Wars has left the law of blockade devoid of most of its traditional characteristics, so that its present applicability and content are questionable'.

52 See O'Connell 1984, 1112.

53 Stone 1954, 526.

54 Knauth 1946, 86.

55 Knauth 1946, 85—6, 91. One of the reasons for not resorting to prize law was the United States' long tradition of neutrality during which it opposed the way that, in practice, prize law was used by belligerents to interfere with what the United States regarded as the rights of neutrals: id, 82—6; Jessup 1942, 454; Howard 1979, 45—7. But, as Knauth's account shows, it is not clear what advantage was gained by avoiding recourse to prize law in World War I.

56 Tucker 1955, 75, n 62.

features, the determination of the legality of seizure and condemnation so as to pass title in the *res*, by devices such as requisition *pendente lite* and the treating of seized goods ordered to be released by a prize court as imported into the country and therefore subject to all ordinary wartime restrictions on re-export and use of materials within the country.[57] In addition, whatever the theoretical relationship between prize law and the doctrine of reprisal,[58] it is clear that reliance by Britain and other maritime powers on reprisals has been a major force in outflanking the practical utility of prize law in its narrower, pre-World War I form.[59]

152. *Impact of United Nations Charter.* A third reason for questioning the continued existence of 1945 prize law is more profound. It is arguable that, as there must be a declaration of war to permit the use of prize law and as there can be no permissible declaration of war under the United Nations Charter, therefore there is no longer any scope for the operations of prize law.[60] This argument has been criticised on two levels. It can be questioned whether prize law is only brought into effect by a legal declaration of war,[61] or whether a legal declaration of war is completely impossible under the law of the United Nations Charter.[62] But the main weight of criticism is on a different level, relying on the observed fact that armed conflict (sometimes accompanied by declarations of war) continues to exist despite the Charter.

> [I]f general war should occur, contrary to the Charter, these rules [of maritime warfare] would undoubtedly be resuscitated, since the alternative would be a totally unregulated conflict and belligerents would be deprived of the advantages of useful devices of economic warfare: for this reason, defence planners need to take into account the whole range of traditional rules of maritime warfare.[63]

A similar argument can be made with respect to more limited armed conflict. But even if the law of prize has not been deprived of scope by the Charter, it is generally recognised that many concepts linked to prize, such as neutrality, blockade, contraband and reprisal require systematic re-evaluation in the light of the Charter.[64] Such a re-evaluation will have to take into account the fact that,

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57 Fitzmaurice 1945, 75—82.

58 See para 144.

59 Baxter 1973, 119.

60 Lauterpacht 1968, 62 *Proc ASIL* 58.

61 See Rowson 1947a, 171—4 who canvasses the somewhat inconsistent state practice in World War II but concludes 'it is probable that, because of its far-reaching consequences, the right of prize derives from the existence of war in the formal sense and cannot be deduced from a state of armed conflict with a foreign Power falling short of war'.

62 See eg Stone 1974, 429—30.

63 O'Connell 1984, 1094. See similarly Stone 1974, 429—31; Blix 1976, 125, 136.

64 See eg Norton 1976, 307—11; F Deak, 'Neutrality Revisted' in Friedmann et al 1972, 137, 153; Baxter 1968; Guttinger 1975, 80; O'Connell 1984, 1094.

with the two limited exceptions already noted,[65] there has been no resort to prize law in any of what O'Connell estimates to 'have been roughly one hundred situations since 1945 in which naval power has been exerted in a coercive role, involving about 50 different navies.[66]

153. *Impact of other developments in international law and practice.* A fourth reason for not assuming that prize law has remained as it was in 1945 is that, quite apart from the Charter, other international developments, both in law and practice, since 1945 are likely to have had substantial effects on prize law. Most significant is the expansion which has taken place in the humanitarian laws of war since 1945. The four Geneva Conventions of 1949 together with the 2 additional Protocols of 1977,[67] have some direct and many more indirect points of contact with prize law, yet they were drafted without any systematic attempt to resolve conflicts between humanitarian and prize law.[68] Another factor in international practice is the changing modes of commerce. The increase of state trading[69] and the tremendous growth of flag of convenience shipping[70] are both significant in this respect. A prize court may have no difficulty going behind the flag to discover enemy character[71] but whether, if a flag of convenience state was involved in armed conflict of the appropriate kind, all 'its' shipping should or would be treated as enemy shipping is less clear.

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65 See para 149.

66 O'Connell 1984, 1095. Lauterpacht 1968, 60 treats the absence of resort to prize law as having strong implications for the continued existence of prize law and explains the Egyptian and Pakistan cases where prize law was invoked on the basis that the judges had no power under their own municipal law to question the legality or otherwise of the armed conflicts out of which the cases arose (id, 61). Other writers explain the absence of cases by looking to the facts of the armed conflicts which have occurred and do not draw the same implications: see eg Stone 1974, 430.

67 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; Protocols I and II, Geneva, 12 December 1977 (1977) 16 ILM 1391. See for the 1949 texts the schedules to the Geneva Conventions Act 1957 (Cth). Australia is a party to the four 1949 Conventions, but has not yet ratified the 1977 Protocols.

68 Johnson 1983, 12. See also O'Connell 1984, 1101, 1117.

69 See Johnson 1983, 7 on whether the distinction in the law of neutrality between the rights of neutral states and those of neutral subjects to trade with belligerents remains valid and the consequences for prize law if it does not.

70 O'Connell 1984, 1113.

71 ibid; Schwarzenberger 1968, 365.

Conclusion

154. All these factors reinforce the view that the Commonwealth should not attempt to legislate on the substantive law of prize.[72] This law is international law and there could be real difficulties were Australia to attempt to state in legislation either what this law is or what it should be. It is not a subject upon which Australian interests are readily identifiable, certainly not in a sufficiently precise way to afford guidance in reforming the law. Neither is there sufficient international state practice or writings of commentators to provide adequate guidance on what is likely to be internationally acceptable either at present or, *a fortiori*, in the future. It may be that if, in some future conflict, the law of prize is to be applied, Australian courts would require some legislative guidance. But this could be given in the form of regulation where necessary,[73] after appropriate consultation with any allies involved in the conflict. Whether framework prize legislation is necessary in Australia is discussed in chapter 7: whatever view is taken on that question, no specific legislative provision for substantive prize law is necessary.[74] The only exception to this conclusion relates to the three areas of prize money, prize bounty and prize salvage:[75] these are clearly obsolete and should be abolished.

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72 See Beattie report, para 8 for a similar recommendation.

73 Compare, for example, the way in which it was found that British prize courts needed legislative direction in World War I on aspects of contraband, and an Order in Council was made: O'Connell 1984, 1145.

74 Provision dealing with limited substantive issues may however be desirable if legislation is ever enacted: see para 173, 178.

75 See para 145—7.