

# Britain and the Neutrals in the French Revolutionary Wars: The Debate over Reprisals and Third Parties

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## Introduction

In the waging of economic warfare during period of the French Revolutionary Wars of 1792–1814, the contending states were faced with a fundamental choice between two strategies. These may be termed the blockade strategy, and the mercantilist strategy. The basic differences between the two may be explained very simply. The goal of the blockade approach – employing the term in a rather broad, generic sense – was to restrict trade between the enemy and the outside world. Its purest and most extreme form consisted of a blockade in the narrow and technical sense of the term: the investment of an enemy port or area by means of a sort of fence of ships on the seaward side. This was basically a maritime counterpart of the besieging of a city on land. The mercantilist strategy was importantly different, in that here, the goal was to force the enemy into suffering an unfavourable balance of trade – i.e., to put him in the position of importing more goods than he exported, thereby causing a drain of specie or precious metals from his treasury for the payment of the difference. In this sense, the mercantilist strategy was, so to speak, one-half of a blockade – it sought to halt exports from the enemy, but not imports to it. In fact, a mercantilist strategy would ideally even entail an *increase* of imports into the enemy's territory, so as to worsen his trade balance to the maximum possible extent. If the blockade strategy may be likened (as just noted) to a military siege, then the mercantilist strategy could be compared to a sort of chess game, in which the enemy was manoeuvred into an unfavourable financial position.

These two alternative strategies both had important implications for the position of neutrals – but, as will be seen, in very different ways. From the standpoint of international law, blockade was the more clearly established of the two alternatives. By the eighteenth century, it was a well-recognised belligerent right – i.e., a right

possessed by belligerent parties during warfare, exercisable purely at will, with no need for justification in terms of any extraneous principle. It is important to appreciate, however, that this belligerent right of blockade was tightly circumscribed, and for good reason. On its face, it was a flagrantly interference with the normal right of neutrals to trade freely with belligerent states during wartime in any goods that are not directly war-related (i.e., in any goods that are non-contraband). This interference was justified by regarding blockades as military operations analogous to sieges – it being universally accepted that neutrals were not permitted to intrude into ongoing military operations, e.g., by bringing supplies into besieged towns. For this analogy to be persuasive, however, it was necessary that the blockade actually be comparable to a systematic siege-like operation – i.e., that it not consist of the mere sporadic capture of isolated neutral vessels. Stated in legal terms, the requirement was that a blockade must be effectively maintained. In concrete terms, this key requirement meant that neutral ships could be lawfully captured and condemned *only* if a blockade was being systematically maintained and enforced by a squadron of vessels, and if the neutral ship was apprehended in the act of penetrating this cordon of ships.<sup>1</sup>

The mercantilist strategy also affected neutral parties, though in a rather different way. Here, the basic strategy was to choke off the enemy's exports – and, if possible, even to increase his imports. One step in this direction, of course, was for the mercantilist belligerent *itself* to refuse to import goods from its enemy. But for the infliction of maximum harm, it would be necessary, in practical terms, somehow to induce neutral countries to participate in the effort as well. The legal problem facing the belligerent powers was that there was no clear legal pathway or mechanism for forcing neutrals to participate in a mercantilist programme, as there was for compelling neutrals to respect blockades.

The British attempt to weaken France during the French Revolutionary Wars of 1793–1815 by means of a mercantile strategy therefore necessarily involved some innovations – or at least attempted innovations – in the traditional law of neutrality. But France was no merely passive participant in this process. It too proved itself prepared to innovate, in the interest of defeating the British strategy. Moreover, the innovations of both sides needed to be justified legally on the basis of existing and accepted principles of international law. That is to say, that the innovations needed to be presented, with as much credibility as possible, as being merely novel *applications*, in new circumstances, of longstanding and accepted fundamental principles of law. In their justifications of their respective policies, the two sides appealed to quite different fundamental principles. France's strategy was justified on the general principle of state sovereignty: the right of each state (whether belligerent or neutral) to determine its own trading policy for itself, without interference by other states. At the heart of the British strategy, in contrast, was

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<sup>1</sup> On the background to the law of blockade generally, and the requirement of effectiveness, in the period up to the eighteenth century, see Stephen C. Neff, *The Rights and Duties of Neutrals: A General History* (Manchester: Manchester University Press, 2000), pp. 34–35, 57–60.

the right of reprisal: the right of states (in this case, of belligerent states) to take countermeasures, in the modern terminology, against violations of law committed by their foes.

There was no doubt that both of these justifications were indeed basic rights of states under the law of nations – at least in principle. The difficulty lay in their application in practice, in the particular circumstances of the period. It was true, as France maintained, that it had a sovereign right to formulate and execute its own economic policies – but if the policy involved (as the French one did) the utilisation of neutrals in furtherance of its war effort, then it could be argued that there was a violation of law on the part of the neutrals who participated in the scheme – and, arguably, by France itself for participating in that violation. Similarly, it was true, as Britain maintained, that a belligerent has the legal right to take countermeasures against its enemy for violations of law – but if the countermeasures were directed (as the British ones were) against neutrals rather than directly against the enemy, then it was (to put it mildly) open to question whether the measures really qualified as reprisals in the eyes of the law of nations.

On a more general level, it may be said that the British and French experiences during the French Revolutionary Wars provide a striking indication of the difficulty of applying rules of international law, which frequently are rather general in character, to the circumstances of particular crises and disputes. In lay persons' terminology, the problem is sometimes put in terms of tension between the letter and the spirit of the law. This is a perpetual dilemma that is still very much present today, as are the specific issues that were at stake in the British-French contest of 1793–1815.

This discussion will analyse the legal issues that arose in the application of these two basic strategies in the French Revolutionary Wars, particularly in the later phase of 1803–14, following the brief interlude of peace provided by the Treaty of Amiens of 1802.<sup>2</sup> The first section will discuss the basic legal problems associated with the two strategies and, more particularly, the legal factors behind the British shift, in 1807, from a blockade to a mercantilist policy. The second section will discuss the central legal issue involved in the waging of the mercantilist form of economic warfare, the law of reprisal – and, specifically, the contention that arose over the application of acts of reprisal against neutral parties rather than against opposing belligerents. The third section will discuss the manner in which modern international law has dealt with this important issue.

## The Rival Strategies

During the course of the French Revolutionary Wars, the two sides both resorted to both of the major economic-warfare strategies, although in different sequences. France initially adopted the mercantilist approach, under the grand-sounding label

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<sup>2</sup> For a brief account, see also Neff, *Rights and Duties*, pp. 76–85.

of the “Continental System”.<sup>3</sup> This is sometimes thought of as being some kind of blockade of Britain by France, but in fact it was nothing of the sort. It involved no serious attempt to halt neutrals from trading with Britain. Rather, it was a boycott of British-made goods, a refusal to *import* goods of British origin into France itself or to other areas controlled by or allied to France. In 1806, however, the French supplemented this mercantilist approach with a blockade strategy – involving, as will be seen, not the mounting of blockades in the technical sense, but instead taking action against neutrals for trading with Britain *after* the fact.

The British approach to economic warfare changed rather more fundamentally than the French one did, in that it consisted first of a blockade strategy, which was then altogether replaced by a mercantilist programme. The blockade strategy was justified legally as an exercise of the inherent rights of belligerents. This took two forms: first, the mounting of blockades, in the strict sense of the term, of French-dominated areas of Europe; and second, the invocation of a controversial legal doctrine with the slightly mysterious label of “the Rule of 1756”. Then, in 1807, Britain abruptly changed tack to a mercantilist strategy, which involved positively encouraging neutrals to trade with France – subject, however, to the crucial proviso that, in doing so, neutral traders must be channelled through British ports, where they would be subject to a *de facto* “tax” to the British government, thereby bolstering the British war effort.

### ***The British blockade strategy and the Rule of 1756***

It has been observed that a blockade, in order to be lawful under international law, must be effectively maintained. There was considerable debate over the precise meaning of this key requirement, but the details of it need not detain us here.<sup>4</sup> It is only necessary to emphasise that the essence of the requirement was that a fleet of ships be continuously “on guard” off the coast of the invested area, without a break, and in such force as actually to effectuate the systematic – as distinct from merely sporadic or random – capturing of any ships which attempt to enter. Such an effective blockade was fully enforceable against neutrals, with the result that neutral ships apprehended in the act of penetrating the blockade could be brought before a prize court and condemned (i.e., confiscated), together with their entire cargoes.

In the early period of the conflict, Britain sought to supplement the policy of mounting blockades in the strict sense of the term by invoking an alternate justification for the capture of neutral ships for trading with the enemy – a justification that,

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3 For a thorough account of the French system, and the disputes to which it gave rise, see generally Eli F. Heckscher, *The Continental System: An Economic Interpretation* (Oxford: Clarendon Press, 1922). See also in this volume the chapter by Isaac Nakhimovsky, for rival justifications both in terms of political economy and on moral grounds of the British and French outlooks on the future of the interstate system.

4 On this dispute, see Carl J. Kulsrud, *Maritime Neutrality to 1780: A History of the Main Principles Governing Neutrality and Belligerency to 1780* (Boston: Little, Brown, 1936), pp. 238–42.

significantly, did not entail the burdensome requirement of effectiveness. This was the so-called “Rule of 1756.” In its full form, it was “the Rule of the War of 1756,” providing a direct indication of its historical provenance, as a product of British prize courts devised during the Seven Years War of 1756–1763 (i.e., the War of 1756 by its contemporary labelling). The Rule stated, in brief, that neutrals are not allowed to engage in a trade with the enemy during wartime from which they had been excluded in time of peace. In practice, this referred to the enemy’s colonial trade, which during peace was typically a monopoly of the colonial power, from which foreigners were barred. If the colonial power were to open the trade when it was at war – as France did during the Seven Years War – then any neutral ship which took advantage of the opportunity and entered the trade became good prize.

The rationale for the Rule was the contention that neutrals who engaged in colonial trading in this manner were, in effect, becoming part of the enemy’s economic system – and, as such, they were no longer entitled to the protection from capture afforded by the shield of neutrality. The Rule was sometimes pithily summed up by saying that neutrals are permitted to trade *with* the enemy, but not *for* him.<sup>5</sup> This distinction, in turn, was based on the idea that a carrying trade was, in an important respect, not really a bona fide form of trade in goods, but instead was a provision of a service. Proponents of the Rule of 1756 maintained, accordingly, that, while it was permissible for neutrals to trade with a belligerent (i.e., to buy and sell goods between their *own* country and the belligerent state), it was not permissible for a neutral to perform services for a belligerent, if those services furthered the belligerent’s war effort. The Rule of 1756 may therefore be seen as the germ of what later (in the second half of the nineteenth century) would be articulated as the more general concept of unneutral service.<sup>6</sup>

A crucial attraction of the Rule of 1756, from the British standpoint, was that it permitted the capture of neutral vessels on an individual basis, with no need, as there was for blockades, to maintain any kind of systematic net for the capturing of *all* ships engaging in the prohibited trade. Two other important features of the Rule should be pointed out. The first is that the Rule was directed not against the enemy side (or at least not directly) but rather against the purported neutrals themselves. In other words, the primary or immediate wrong was not the opening of the trade by the enemy belligerent, but rather the taking advantage of that opening by the so-called neutrals. The other important point was that the logic of the Rule entailed particularly severe consequences for the purported neutrals, in the form of a complete forfeiture of their neutral status (or neutral character, in legal terminology). That is to say, that so-called neutrals who participated in the

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5 On the genesis and early application of the Rule of 1756, see Kulsrud, *Maritime Neutrality*, pp. 78–106; and Richard Pares, *Colonial Blockade and Neutral Rights 1739–1763* (Cambridge: Cambridge University Press, 1938), pp. 180–204. See also in this volume the chapter by Tara Helfman.

6 On the development of the law of unneutral service in the nineteenth century, see Neff, *Rights and Duties*, pp. 112–14.

normally closed trades were to be regarded as no longer neutral at all, but rather as functioning parts of the enemy's belligerent system. As such, they were subject to capture, with their entire cargoes treated as good prize.

During the French Revolutionary Wars of 1792–1814, France again relaxed its normal rules on colonial trading monopoly, allowing neutrals into the trade. Neutral traders, particularly Americans, avidly took advantage of the new-found prospects. Britain proceeded, once again, to invoke the Rule of 1756

The British experience with the use of the Rule of 1756 proved, in the event, to be an unhappy one, for two reasons. First, there was considerable contention over the validity, in principle, of the Rule.<sup>7</sup> No less a figure than James Madison, during his service as American secretary of state, penned a lengthy argument against the very existence of such a rule – the longest single piece of writing that he ever produced. His position, in essence, was that the right of neutrals to trade with belligerents (in non-contraband goods) was of so fundamental a character that it could be infringed in only one manner: by a blockade, effectively maintained. The Rule of 1756, on this argument, was nothing but a means of instituting a blockade whilst discarding the absolutely crucial requirement of effectiveness. In the common parlance, the Rule of 1756 amounted, on this thesis, to the mounting of a “paper blockade.”<sup>8</sup>

The second problem – or rather complex set of problems – with the Rule of 1756 was the extreme, and constantly growing, difficulty of applying it effectively in practice. The difficulty here arose primarily from the practice adopted by neutral (chiefly American) traders of “laundering” the trade between the West Indies and France through American ports. If it was unlawful (at least in the watchful eyes of the British) for Americans to take goods directly from the French West Indian colonies to the mainland, the voyage could be divided into two parts: first, from the colonies to an American port; and second, from the American port to France. Each of these single voyages could then be presented as being, independently of the other, a bona fide trading *with* France – something that neutrals were certainly permitted to do. British prize courts countered this tactic, however, by devising the appropriately named “continuous-voyage principle.” This was to the effect that, if French colonial goods were taken to an intermediate port for no other reason than to break the voyage into two parts, in the manner just described – i.e., if the goods were never incorporated into the “common stock” of the intermediate neutral country – then a prize court would disregard the intermediate stop, as a mere fiction, and treat the two ostensibly voyages as being, in reality, one single integrated journey from the

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7 For a vigorous presentation of the validity of the Rule of 1756, see James Stephen, *War in Disguise; or, The Frauds of the Neutral Flags* (London: C. Whittingham, 1805). Concerning Stephen and his stance, see Stephen C. Neff, “James Stephen's *War in Disguise*: The Story of a Book”, *Irish Jurist* 38 (2003), pp. 331–51.

8 James Madison, “An Examination of the British Doctrine Which Subjects to Capture a Neutral Trade Not Open in Time of Peace”, *The Writings of James Madison: 1803–1807*, vol. 7, ed. Gaillard Hunt (New York: G. Putnam's Sons, 1908), pp. 204–375. The pamphlet was published anonymously, although Madison was in fact widely known to have been the author.

French colonies to the mainland. The result, of course, would be that the venture would then be caught by the Rule of 1756.<sup>9</sup>

Far from solving the problem of circumventions of the Rule of 1756, the continuous-voyage principle led the Americans to engage in yet further imaginative devices. As British prize courts laid down criteria according to which they would distinguish a continuous voyage from a genuinely “broken” one, the American traders would rush to satisfy the letter of the law whilst continuing the trading in practice. The result was an ongoing juridical cat-and-mouse game between the British prize courts and the American traders.<sup>10</sup> By 1807, the British had wearied of the game and adopted instead a significant change of policy – from a blockading strategy to a mercantilist one.

### *The British change to a mercantilist strategy*

The new approach was devised chiefly by a British lawyer named James Stephen, who had substantial experience in legal practice in the West Indies and who accordingly had a close knowledge of the difficulties involved in the effective enforcement of the Rule of 1756. At the same time, he was strongly of the view that the neutral traders were operating to the substantial advantage of France and detriment of Britain and needed somehow to be brought to brook. His plan for doing this was to give up the attempt to *stop* the neutral trade, and to substitute in its place a policy of *exploiting* the neutral trade instead. This would be done, in essence, by rechanneling the trade of neutrals through British ports, where it would be closely monitored, supervised – and even, in effect, taxed. This rechanneled trade would then work to the advantage of the British war effort – when viewed, that is, through a mercantilist lens – by actually facilitating the importing of goods into the French areas, thereby undermining the French Continental System.

The policy was instituted by a British order-in-council of November 1807, which set out the two major components of the policy. First was a discarding of the previous reliance on blockades for the halting of neutral trade with the enemy, in favour of a sweeping general prohibition against neutral trade with the French-dominated areas. The second component was the provision for the issuing of licenses for exemptions from this general prohibition. Neutral traders would have to travel to Britain for the obtaining of these licenses, so that all trade to the enemy would be channelled through that country.<sup>11</sup> In practice, the intention was to issue these licenses on a large scale, with a view to maximising imports into the French

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9 For a discussion of such cases in the Seven Years' War, see the chapter by Helfman in this volume.

10 On the employment of the continuous-voyage principle in support of the Rule of 1756 and the many legal problems to which it gave rise, see Herbert W. Briggs, *The Doctrine of Continuous Voyage* (Baltimore: Johns Hopkins University Press, 1926), pp. 11–30; and James W. Gantenbein, *The Doctrine of Continuous Voyage Particularly as Applied to Contraband and Blockade* (Portland, Ore.: Keystone Press, 1929), pp. 14–28.

11 For the text of the order, see Heckscher, *Continental System*, pp. 393–96.

domains from the outside world – with the consequence that France’s balance-of-trade position would be worsened, with precious metals being siphoned out of the enemy regions. Bearing in mind that France itself forbade trade with Britain, any imports into France that had first passed through Britain would have to be smuggled into the Continent. The practical effect, then, was that the licenses issued by the British were, basically, authorisations to neutrals to engage in smuggling, with the effect of undermining the French Continental System – and thereby, of course, furthering the British war effort. Insofar as neutrals would be doing much of this trading, they would now be functioning as instruments of Britain’s economic-warfare programme.<sup>12</sup>

In a broad sense, this could be regarded as a sort of tit-for-tat measure on the part of the British. If the French were seeking to enlist the neutrals in their war effort by opening up their colonial trade to them, Britain would now do the same by redirecting neutral trade through British ports, licensing it and effectively taxing it for the benefit of the British treasury. The difficulty, though, from the legal standpoint was that the specific methods employed by the two belligerents in the pursuit of these larger ends were significantly different. The French policy of opening its colonial trade involved the exercise of what lawyers call sovereign-right measures – specifically, the exercise of a state’s normal sovereign right to determine its own economic policy as it chose. More specifically still, the French policy was an exercise of that country’s sovereign right to decide for itself what kinds of ships it would admit into its territory for trading purposes. The only actual controlling of trade, therefore, was the admission or non-admission of ships into French-controlled ports.

The British policy was importantly different, in that it involved the control of neutral trading outside of British territory, in that it was designed to redirect neutral traders from the high seas into British ports. This was clearly not a normal sovereign right of states. Specifically, Britain’s general prohibition against trading with the enemy was, on its face, flatly illegal, as a blatant contradiction to the fundamental principle of the freedom of the seas. Clearly, some significant, and imaginative, legal groundwork was going to be required if a coercive trade-monopoly policy of this kind was to be instituted. That justification was the law of reprisal.

## The Debate over Reprisal

The essence of reprisal – or of countermeasure, as it is termed in modern parlance – is simple enough. It is the commission of an act which is inherently unlawful, but which is justified in the particular circumstances as an emergency response to a *prior* unlawful act by another party. The typical case of reprisal involves the action being taken against the very party that had committed the prior unlawful act. In the case

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<sup>12</sup> For an informative account of the operation of the license system, see Francis Piggott, *The Declaration of Paris 1856: A Study* (London: University of London Press, 1919), pp. 102–10.

of the British economic-warfare policy of 1807–1812, however, that was not so. The measures were taken against third parties, i.e., against neutrals. It was that element of the policy which caused the greatest legal controversy, as will be explained. First, however, it is well to point out some salient features of the general law of reprisal, before turning our attention more specifically to the British licensing programme.

### *Some background on the law of reprisal*

Some very brief background on the legal concept of reprisal will prove helpful.<sup>13</sup> In its *very* narrowest sense, the word carries the literal meaning of taking back (straightforwardly from the French *reprendre*). In this sense, it refers to the right of the victim of, say, a theft to engage in self-help and to take back from a thief whatever item the thief had stolen. The result, clearly, is to restore the theft victim to the precise position that he had been in before the offence was committed. In the very narrowest sense of the term, reprisal thus amounted to a simple reversal of the original wrong.

In the course of time, reprisal came to be somewhat broadened in its scope, in two noteworthy respects. First, it came to refer to the obtaining of compensation for a past wrong in some other form than the recovery of the *very* item that had been taken. That is to say, it applied to compensation for a past loss instead of to a direct reversal of the wrong. Second, and more importantly yet, the right of reprisal was extended to allow the obtaining of the compensation from parties *other than* the original wrongdoer. Specifically, it allowed victims of past offences to recover compensation from fellow-nationals of the original wrongdoer, in the absence of the wrongdoer himself. In other words, it was the very essence of the principle of reprisal that action would be taken against someone other than the actual offender.

In medieval Europe, the taking of reprisals in this manner became highly standardised and highly regular. The typical scenario was one in which a merchant from one state was somehow plundered or injured in a foreign country, *and* in which the foreign government culpably failed to provide an adequate remedy (e.g., by sheltering the original wrongdoers and contumaciously refusing to bring them to justice). In that case, culpable non-activity of the government – which came to be known legally as denial of justice – would be regarded as itself a wrongful act. In order to obtain compensation for that denial of justice by the foreign government, the aggrieved merchant would approach his *own* sovereign with a request for what came to be called as a letter of reprisal. In his request, the merchant would set out the facts of the case, with whatever evidence he was able to offer, and state the monetary value of the loss that he claimed to have suffered. If the merchant was successful in his application, the letter of reprisal would be granted. This letter was, in effect, a license to the merchant to seize property, in his *own* country, from nationals of the wrongdoing sovereign, up to the stated amount of the merchant's

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<sup>13</sup> For a brief account of the evolution of the law of reprisal during the Middle Ages, see Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), pp. 76–82.

loss. In practice, this meant that property would be taken from merchants of the foreign state who happened to be resident in the victim's home state at the time of the granting of the letter. The process was designed, of course, to ensure that the merchant received due compensation – but no more than that – for the loss that he had suffered from the denial of justice in the foreign state.

It might seem both arbitrary and harsh that the brunt of the loss was borne by the foreign merchants in the victim's home state, who presumably would have had no responsibility whatever for either the original injury or for the consequent denial of justice. But a couple of points may be borne in mind in this regard. One is that the reprisal action was calibrated to the original loss with the greatest precision possible, so that there would be no unjust enrichment of the victim. It should also be appreciated that the essence of the offence was not the original wrongdoing but rather the subsequent denial of justice, which was (by hypothesis) the fault of the foreign government – and, by extension, of the foreign country at large. The underlying idea was that there is a kind of collective responsibility on the part of nationals of a country for wrongs committed by that country's government. This may seem to be something of a fiction, but a further point to bear in mind is that the alternative was to leave the victim of the original wrongdoing uncompensated. In the eyes of many, it seems fairer that the loss be borne by nationals of the wrongdoing sovereign (or fellow-nationals of the original wrongdoer) rather than by a wholly innocent victim. Finally, there was the consideration that the merchants against whom the reprisals had been taken would have, in their turn, a legal action against the original wrongdoer – and, if they were in a position to exercise that right effectively, then the ultimate loss would fall, as it should, on the original miscreant. Admittedly, in practice, it was seldom, if ever, possible for the merchants actually to achieve this recovery – but it was generally agreed that at least they were in a better position to do so than the original victim was, whose initial attempts to obtain justice had been foiled.

Apart from any intrinsic interest that this historical survey might hold, four lessons should be extracted. The first is that reprisals comprised actions which were *inherently* unlawful (in the example given, the despoiling of merchants who were accused of no personal wrongdoing) – but which were justified by an exceptional circumstance, i.e., by the fact that the act was a response to, or countermeasure against, a prior unlawful act. The second important point is that reprisal was not designed to be an act of mere vengeance. It was a mechanism, governed by the rule of law, for ensuring redress to victims of violations of law. It was therefore a method of law-enforcement, of a self-help character.

The third point is that the process of reprisal entailed, by its very nature, the taking of countervailing measures against parties *other than* the original wrongdoer. Reprisals therefore could not properly be said to be criminal or punitive in character because criminal prosecutions or punitive actions are taken against actual wrongdoers, and not against innocent surrogates. Reprisals were entirely compensatory in character, with no other purpose than to restore the victim of the original wrongdoing to the position that he had previously been in.

The fourth point concerns the features of the innocent surrogates against whom the reprisals were taken. Although, as just noted, they were not themselves responsible for either the original wrongdoing or the later denial of justice, they were also not persons selected entirely at random, lacking any connection to the wrongdoers. Rather, they were associated with the wrongdoers, if only in the rather formal sense of being fellow nationals of the original miscreant, or subjects of the sovereign committing the denial of justice.

In the course of time, reprisals grew beyond this core conception just outlined, in various ways, one of which calls for particular attention. This is the alteration in what might be called the orientation, or the purpose, of reprisals. In the early stages of development, as just discussed, reprisals were wholly backward-looking, in the sense that the reprisal process was designed to compensate innocent parties for legal wrongs incurred. The idea, in other words, was to restore the *status quo ante*, to put the victim into the position that he would have been in if the wrong had not occurred. The process was designed, in short, to “cancel out” past wrongdoing. An important change that occurred in the eighteenth and nineteenth centuries – a process which, incidentally, has not as yet been the subject of close scholarly attention – was that reprisals came to be forward-looking instead of backward-looking. That is to say, they began to have the purpose of inducing a change in the *future* conduct of the party against whom they were taken.

This was particularly so in the case of what came to be termed “belligerent reprisals,” referring, as the term implies, to reprisals taken in the course of war by one belligerent against another. The important core ideas behind reprisals continued to be present – i.e., that reprisals were law-enforcement measures of a self-help character. But they were not designed to obtain compensation, as in the case of the reprisals involving despoiled merchants. If one side in an armed conflict embarked upon a deliberate policy that violated the laws of war (e.g., killing prisoners), then the other side could commit counter-violations, on a tit-for-tat basis, with a view to “persuading” the original wrongdoer to alter its ways. An important point to note here is that, in such cases of future-oriented reprisals, the permissible level of severity of the reprisal measures must be measured differently from the earlier past-oriented situations. In the traditional situation, the severity of the reprisals is calibrated strictly to the level of the original material injury. This must necessarily be the case, given that the purpose of reprisals was compensation for past losses. In the case of future-oriented actions, however, such as belligerent reprisals, the permitted level of severity is determined, at least in principle, by the level of severity that is just necessary to bring about the sought-after change in the other party’s future conduct. It is readily apparent that, for future-oriented reprisals, a significantly larger element of guess-work will be required.

With these general points about the law of reprisals in hand, we may gain some greater insight into the nature of the legal disputes that arose in connection with the British licensing policy of the French Revolutionary Wars period.

### *Reprisal in action*

It was observed above that, prior to its instituting of the licensing programme, Britain had mounted blockades of various areas of the European coast that were under French domination. These began in 1803, with the resumption of war following the respite provided by the Peace of Amiens of the previous year. These blockades were legally controversial, on two grounds. First, it was contended by some, particularly in the United States, that the blockades were not effectively maintained as required by international law.<sup>14</sup>

The second objection to the British blockades, pressed particularly by France, was that the practice of what came to be called commercial blockading was unlawful. This referred to the blockading of areas which were not defended at the time by the enemy's armed forces – i.e., to blockades whose *sole* purpose was to inflict economic injury onto the enemy rather than to bring force to bear against the enemy's arms. The debate over the lawfulness of commercial blockading extended far into the nineteenth century, with Britain consistently of the view that the practice was lawful – a position that came, in due course, to be generally accepted.<sup>15</sup> For present purposes, it will suffice to note that the debate was a live one in the early nineteenth century – and that this debate was the spark that set off the chain of reprisals and counter-reprisals that caused so much controversy.

France responded to the blockades by the issuing of the Berlin Decree of 21 November 1806. The preamble contained a long recitation of alleged violations of law on Britain's part, the most notable of which was the denunciation of commercial blockading as a "monstrous abuse of the right to blockade." The Decree then appealed to "natural justice" for the right of an aggrieved belligerent "to combat the enemy with his own arms." This meant that, just as Britain sought to wage economic war against France by preventing neutrals from trading with it, so it would proceed to do the same, at least in substance, in return. The character of the Berlin Decree as a reprisal was underlined by the statement that the policy outlined in it would be operative only so long as the alleged British violations of law continued.

The substantive policy instituted by the Berlin decree comprised three salient provisions. First was a grand declaration that "the British Islands" were now in "a state of blockade." Second, and apparently separately, the Decree announced a *general* prohibition against neutral trade with Britain – with the effect that *all* merchandise of British ownership, as well as all goods being taken to or from Britain, were, *ipso*

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<sup>14</sup> Bradford Perkins, *Prologue to War: England and the United States 1805–1812* (Berkeley: University of California Press, 1961), pp. 105–6.

<sup>15</sup> For opposition to the lawfulness of commercial blockade in later legal literature, see William Edward Hall, *The Rights and Duties of Neutrals* (London: Longmans, Green, 1874), pp. 89–92; and John Westlake, "Commercial Blockade", *The Collected Papers of John Westlake on Public International Law*, ed. L. Oppenheim (Cambridge: Cambridge University Press, 1914), pp. 312–61. For support for the lawfulness of commercial blockade see Ludwig Gessner, *Le droit des neutres sur mer* (2<sup>nd</sup> ed., Berlin: Carl Heymann, 1876), pp. 214–15; and Paul Fauchille, *Du blocus maritime: Étude de droit international et de droit comparé* (Paris: Rousseau, 1882), pp. 166–71.

*facto*, “declared lawful prize.” This general trade prohibition appeared to mean that goods taken to and from Britain would be lawful prize under all circumstances, without regard to whether or not the carriage involved the penetration of a blockade line. The third salient provision was a statement that any ships which came from a British port would be denied admission to any French-controlled port. All three of these pronouncements clearly affected neutral as well as enemy nationals.<sup>16</sup>

These three key provisions were of quite distinct legal character. The blockade of the British Isles was a perfectly lawful exercise of a recognised belligerent right – provided, however, that it was effectively maintained. In the case at hand, it was entirely obvious to all that France utterly lacked the naval resources to make such a blockade effective. The second provision, that all goods going to or from Britain or its colonies were good prize, was a clear violation of the fundamental right of neutrals to trade with belligerents (apart from the contexts of blockade violation or contraband carriage). It was justifiable, if at all, only on the ground of reprisal. It should be noted, however, that, although the policy was explicitly in response to allegedly unlawful acts by Britain (i.e., the mounting of commercial blockades), the actual measures were directed against neutral traders rather than against the British themselves. The intention, of course, was to make Britain suffer – but only indirectly and consequentially, through the loss of trading with neutrals.

The legal basis of the third measure – the exclusion from French-controlled ports of neutrals who traded with Britain – had a different legal basis yet. This policy was merely an exercise of the standard *sovereign* right of states to determine whether, and on what conditions, to admit foreign nationals into its territory. This third policy was therefore, in effect, a boycott measure against neutrals who traded with the enemy. In the parlance of the twentieth and twenty-first centuries, this would be termed an instance of “secondary boycotting,” i.e., of boycotting not only one’s *actual* enemy but also third parties who traded with that enemy.

The following year, in November 1807, France increased the penalty applied to ships which traded with Britain contrary to the general trade prohibition laid down in the Berlin Decree. The First Milan Decree provided that ships coming from British ports were now to be captured and confiscated rather than merely refused entry into French ports, as the Berlin Decree had stipulated. This measure was importantly different from the third components of the Berlin Decree just explained. Now, neutrals who traded with Britain would actually be subject to measures that were, in effect, directly punitive.

In all events, the provisions of the Berlin Decree provided the British with the legal justification for the licensing programme which they inaugurated the following year, in November 1807. That the legal basis of the programme was the law of reprisal was evident from the preamble of the order-in-council, which referred expressly to the Berlin Decree, denouncing it as “an unprecedented system of warfare” to which Britain was now responding. If France was taking the audacious

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16 For the text of the Berlin Decree, see [www.napoleonicsociety.com/english/chap28a.htm](http://www.napoleonicsociety.com/english/chap28a.htm).

step of prohibiting neutrals from trading with Britain, Britain would now proceed to do precisely the same in return. The order accordingly announced, in substantially the same terms as the Berlin Decree, that “all trade” with the enemy “shall be deemed and considered to be unlawful,” with the result that, if neutral ships were discovered to be engaging in trade with the French domains, then both the ship and its cargo would be good prize. This was the reprisal component of the British policy in the strict sense: the act of directly responding to an enemy violation of law, by committing that same violation back at him.<sup>17</sup> If France forbade neutrals from trading with Britain (as, arguably, it effectively did by its blockade proclamation of 1806, then Britain was merely doing the same by its parallel prohibition of neutral trade with France of the following year. In this case, of course, precisely as with the French policy of the Berlin Decree, the *immediate* targets of the action were neutral parties, who were to be prohibited from exercising their normal right of trading with belligerents. Only as a *consequence* of that infringement of neutral rights would the enemy suffer (by the loss of the benefits expected from trading with neutrals).

The second component of the British policy – the licensing scheme – was then presented as a concession to neutrals, as a way of softening what was admitted to be a rather harsh interference with their normal rights. Trade with the French domains would be allowed, subject to license by the British government. This programme, as explained above, was designed to prohibit neutrals from trading with France without first obtaining licenses from British authorities. With the neutral traders armed with such licenses – and with the British government correspondingly armed with the fees paid for issuing them – the traders could proceed to smuggle British goods into the French domains and thereby to undermine the boycott component of the French Continental System.

Upon learning of this British action, France responded with a further reprisal measure of its own with the promulgation, the following month, of the Second Milan Decree. The intention was basically the same as before – to inflict penalties onto neutrals who traded with Britain. It was now made clear that these penalties would be incurred for any form of cooperation with the British licensing system, even for merely stopping in Britain and acquiring a license, and even if the actual goods being carried were not of British origin. Also, the consequences were now somewhat different in character, in that neutral vessels cooperating with the British system were to be regarded as altogether forfeiting their neutral status and as thereby acquiring British character instead. As such, they would become lawful prize simply on the basis of this imputed enemy nationality. It is interesting to note that the rationale here was substantially that which underlay the Rule of 1756: that there was an important difference between, on the one hand, a neutral’s trading with a belligerent at (so to speak) arm’s length and, on the other hand, a neutral’s trading activity being actually integrated into the enemy’s war effort.

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17 For the text of the order-in-council, see Heckscher, *Continental System*, pp. 393–96.

### *The legal debate in Britain*

The British licensing policy was controversial within Britain itself, as well as with neutrals.<sup>18</sup> Lord Brougham, for example, a doughty opponent of the policy, denounced the licensing trade as a “miserable, shifting, doubtful, hateful traffic.”<sup>19</sup> No less a figure than Castlereagh candidly admitted in the House of Commons that the policy was not justifiable on “principles of commercial policy” but only on the basis that they were bona fide war measures.<sup>20</sup>

From the legal standpoint, there were basically two large questions at issue. The first was whether the French action was such as to justify the taking of reprisals by Britain. The second question was whether, *assuming* that reprisals were justified (i.e., that the French had committed a prior violation of law), the particular measures adopted by Britain fell within the category of lawful reprisal action. The chief problem here lay in the fact that the British measures were directed, at least proximately, against neutral traders and not against France itself. The first question, in other words, was whether reprisals were justified in principle. The second concerned the lawfulness of the particular form of reprisal chosen by the British – specifically the question of whether it is lawful to take reprisal measures whose impact would fall substantially onto a party that had no part in the wrongdoing which elicited the reprisals.

Both of these questions received a thorough airing in both houses of the British parliament early in 1808. There was a further debate in the House of Commons in February 1812. In the 1808 debate, Lord Henry Petty led the attack on the licensing policy. He maintained that the supposedly unlawful French policy – the paper blockade of the British Isles – had not actually injured Britain, since it led to no captures of British-bound vessels. Consequently, no wrong had actually been committed by France, so that there was no basis for a reprisal. France had committed an injurious act against Britain, to be sure – after all, the two countries were at war. But that action consisted of a refusal to allow goods of British origin into its territories. To this policy, contended Lord Petty, the appropriate reaction was a response in like kind, i.e., a counter-refusal to admit goods of French origin into British domains.<sup>21</sup>

In the House of Lords, similar objections were voiced. Lord Auckland made the point that the earlier British policy, of attempting to enforce the Rule of 1756 against neutrals, had been a lawful one, but that the licensing policy was not. He objected that the French paper blockade had not actually been implemented (i.e., that no

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18 For vigorous opposition, see Joseph Phillimore, *Reflections on the Nature and Extent of the Licence Trade* (2<sup>nd</sup> ed., London: J. Budd, 1811); and Joseph Phillimore, *A Letter Addressed to a Member of the House of Commons ... Respecting the Orders in Council and the Licence Trade* (London: J. Budd, 1812).

19 Remarks of Lord Brougham, H.C., June 12, 1812, *Cobbett's Parliamentary Debates*, vol. 23, p. 364.

20 Remarks of Castlereagh, H.C., June 16, 1812, *Cobbett's Parliamentary Debates*, vol. 23, p. 538.

21 Remarks of Lord Petty, H.C., February 5, 1808, *Cobbett's Parliamentary Debates*, vol. 10, pp. 314–20.

sporadic seizures of ships had actually been made pursuant to it), so that there was no basis for reprisal action on Britain's part.<sup>22</sup> Lord Erskine derisively commented that Bonaparte's inability to mount any kind of blockade, effective or otherwise, was so patent that the French emperor, in his words, "might as well have talked of blockading the moon."<sup>23</sup>

The most contentious point was the question of the extent to which reprisal measures could be taken against neutrals, a matter which Lord Erskine addressed at some length. He contended that the answer depended crucially on whether the neutral had in some way acquiesced in unlawful measures adopted by the enemy. More specifically, he maintained that, if the neutral submitted voluntarily to the measures, then the result would be a forfeiture of neutral status.<sup>24</sup> In that event, the true position would be that action could then be taken against the erstwhile neutral – *not*, however, under the title of reprisal, but rather under title of the general rights of war against enemies in wartime. The concrete difference here was that a reprisal action must be limited in its effects – either (as in the original concept) to the extent needed to compensate the belligerent for any injury done, or to the minimum extent necessary to induce the neutral to halt its violations of its duties as a neutral. Action against persons possessing enemy status, however, was not bounded by those constraints. Enemy nationals, and all persons assimilated to them, were fair targets *per se*.

Lord Erskine went on to contend that a neutral who acquiesced in the enemy measures out of weakness, rather than out of actual preference for the enemy's cause, would be regarded as a victim of the enemy rather than as his ally. In such a case, there would be no forfeiture of neutral status. The absence of intention on the neutral's part to take sides in the struggle would, however, be no defence to a charge of unneutral conduct. And since that unneutral conduct would be prejudicial to the British war effort, Britain would be entitled to take reprisals.<sup>25</sup> Any such reprisal measures, however, would have to be proportionate to the wrong to which they were responding. That meant (it was argued) that Britain could mimic the French policy of refusing entry into its ports of ships which had traded with France. That would be merely the exercise of the normal sovereign right of all states to control the entry of foreign nationals into its territory. But the British policy went importantly further than that, by exposing the neutrals to the far more severe penalty of capture and condemnation.

American Secretary of State James Monroe protested against the British policy along these same lines. He contended that the French ban on the importation of British-origin goods constituted no violation of neutral rights, being mere "internal

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22 Remarks of Lord Auckland, H.L., February 15, 1808, *Cobbett's Parliamentary Debates*, vol. 10, pp. 465–69.

23 Remarks of Lord Erskine, H.L., February 15, 1808, *Cobbett's Parliamentary Debates*, vol. 10, p. 473.

24 Remarks of Lord Erskine, H.L., February 26, 1808, *Cobbett's Parliamentary Debates*, vol. 10, p. 938.

25 Remarks of Lord Erskine, H.L., February 26, 1808, *Cobbett's Parliamentary Debates*, vol. 10, p. 938.

regulations” of the French state. And if the French went no further than the exercise of their ordinary sovereign rights, then Britain likewise could go no further. But the British, Monroe insisted, did go further, by resorting to what he called “external regulations,” involving enforcement outside of British territory, on the high seas.<sup>26</sup>

The most thoroughgoing defence of the lawfulness of the British policy was presented by the Lord Chancellor in the February 1808 debate in the House of Commons. For one thing, he insisted that the French blockade proclamation, in the Berlin Decree, far from being a mere nullity, was a serious attempt to lay the ground for future action. On the question of reprisal specifically, he maintained that Britain was not constrained to respond to unlawful measures by answering them in like kind. It was entitled to choose its “mode of retaliation”. On the question of injury to neutrals resulting from reprisals against the enemy, his position was that the crucial issue was whether the injury to neutrals was “only consequential on measures directed against the enemy”, or whether the measures were “originally directed against neutral powers.”

Moreover, Britain was entitled to take direct reprisal action against neutrals if the neutrals were themselves guilty of violations of their duties as neutrals – which, the Lord Chancellor maintained, was the precisely the case in the present crisis. Accepting certificates from the French – i.e., certifications that goods which they were importing were *not* of British origin – constituted, in his view, participation by the Americans in the French system of economic warfare. These certificates were characterised by Earl Bathurst in the House of Lords debate as “belligerent instruments” evidence acquiescence by neutrals in France’s economic-warfare campaign against Britain.<sup>27</sup>

Of the various speakers in defence of the British policy, the one whose views carried the most legal weight was Sir William Scott, who, in addition to being a member of the House of Commons, was – rather more memorably – a prominent judge in the High Court of Admiralty.<sup>28</sup> He was a friend of James Stephen, the mastermind behind the policy and, in his political capacity, a loyal supporter of the government. As such, he spoke briefly in favour of the policy. The right of retaliation, he insisted, was limited “only by the extent of the annoyance which called for the exercise of it.” That is to say, it did not have to be a response of like kind to the original injury. It only needed to be duly proportionate in terms of severity. The requirement of proportionality, in other words, was a question of quantity and not of quality. Even if the French policy of condemning ships for trading with Britain had not actually been exercised in practice, it nevertheless constituted an injury on France’s part, in that it amounted to “an insult to this country [...]” He added

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26 Monroe to Foster, Jan. 14, 1812, in *America: Correspondence between Viscount Castlereagh, and Messrs. Foster and Baker, March to August 1812* (London: R. G. Clarke 1813), pp. 35–37.

27 Remarks of Earl Bathurst, H.L., February 15, 1808, *Cobbett’s Parliamentary Debates*, vol. 10, p. 471.

28 For an excellent biographical and legal study of Scott’s life and career, see Henry Bourguignon, *Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty* (Cambridge: Cambridge University Press, 1987).

the hope that neutrals would duly appreciate that the real target of the retaliatory measures was the enemy and not themselves.<sup>29</sup>

It was not long before Scott had the chance to consider the lawfulness of the British policy from the more exalted vantage point of the admiralty bench. The leading case concerned a vessel called the *Fox*. In his judgment, Scott readily conceded that the British policy of controls constituted “a great and signal departure from the ordinary administration of justice in the ordinary state of the exercise of public hostility.” He even candidly stated that he would have “no hesitation” in holding that the measures “would cease to be just if they ceased to be retaliatory [...]” He then went on to rule that they *were* in fact retaliatory – justified by the “extraordinary deviation [...] in the conduct of the enemy.” The orders in council were, in short, “a counteracting reflex measure, compelled by the act of the enemy.” He held, moreover, that the British orders were in fact an exact reflection of the French action which had stimulated them. The French policy sought to prohibit neutrals from trading with Britain; and the British policy, in turn, sought to prohibit them from trading with France.<sup>30</sup>

The United States was not disposed to accept these excuses. So strong was the reaction against the British position that the United States even took the ultimate step towards the enforcement of what it saw as its neutral rights. It declared war against Britain in June 1812, largely (though not entirely) on the basis of the British licensing programme.

### *Some further light*

Long after the conclusion of the French Revolutionary Wars – and of the British-American war of 1812–1814 which was embedded modestly within them – there was some further judicial consideration of at least some of the issues that had arisen. The occasion was the conclusion of a claims-settlement agreement between France and the United States in 1831, encompassing American claims arising from the Berlin and Milan Decrees.<sup>31</sup> The settlement agreement itself contained no admission of liability on France’s part, but only a lump-sum payment in exchange for a waiver of further claims from the American side. Adjudicators within the United States, however, had occasion to consider the legal issues, in the course of their deliberations over the distribution of this payment. They held that the exclusion from French ports of ships which had previously stopped in Britain, pursuant to the Berlin Decree, was a lawful measure of domestic regulation. Confiscatory measures, however, were not lawful – i.e., the treatment of ships or cargoes as good

<sup>29</sup> Remarks of Scott, H.C., March 10, 1808, *Cobbett’s Parliamentary Debates*, vol. 10, pp. 1066–67.

<sup>30</sup> *The Fox*, *Reports of Cases Argued and Determined in the High Court of Admiralty*, ed. Thomas Edwards 113 (1811). See also the earlier cases of *The Lucy*, Edwards 122 (1809), *The Luna*, Edwards 190 (1810) and the later case of *The Snipe*, Edwards 381 (1812). On Scott’s judicial experience with the licensing policy, see Bourguignon, *Sir William Scott*, pp. 219–23, 266–72.

<sup>31</sup> France-U.S.A., “Convention Regarding Claims”, July 4, 1831, 82 *Consolidated Treaty Series* 97.

prize simply on the basis of prior trading with Britain. This was on the thesis that such confiscatory measures were functionally equivalent to blockade-enforcement measures, as opposed to mere domestic trading regulations. As such, they were unlawful, since France had failed in its duty of effectively maintaining blockades.<sup>32</sup>

There was no comparable judicial or quasi-judicial consideration given to the British licensing policy, apart from the cases discussed above in the British admiralty courts during the conflict. The Treaty of Ghent of 1814, which brought an end to the war between the Britain and the United States, did not contain any resolution of the issues. Nor did it entail any kind of payment.<sup>33</sup>

There cannot, therefore, be said to have been a satisfactory resolution of the range of issues presented by the French and British policies towards neutrals in the 1807–1815 period. Even the adjudication of the lawfulness of the French measures concerned only the measures themselves, viewed, as it were, in isolation, rather than in their broader context. That is to say, that France's immediate action, of refusing entry into its ports of ships which had previously called in Britain, was, on its face, merely an exercise of a state's sovereign right to determine the conditions of entry of foreigners into its territory. Left unresolved, however, was the question of neutral ships which traded with France *without* a British-issued license: whether they should be regarded as cooperating with the French war effort – i.e., as comprising part of France's programme of belligerence against Britain – or, alternatively, whether they should be regarded as simply exercising their normal right, as neutrals, to trade with belligerents.

## Later Developments

The issues concerning reprisals affecting neutrals were not a mere relic of the eighteenth and nineteenth centuries. They reappeared in acute form during the First World War. A detailed treatment of the legal issues is not possible in the present context. It will therefore suffice to note that, as in the French Revolutionary Wars, various measures were taken by the belligerents under the heading of reprisal – particularly by the Allied side in the furtherance of their policy of blockade of the Central powers – which had their immediate impact upon neutrals, with consequential effects (it was intended) eventually falling onto the enemy.<sup>34</sup>

As in the French Revolutionary Wars, the issue of reprisals against neutrals came to be considered by the British prize courts. The leading case, from the British prize courts, concerned a Norwegian vessel named the *Stigstad*, which

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32 John Bassett Moore, *International Adjudications Ancient and Modern: History and Documents* (New York: Oxford University Press, 1933), vol. 5, pp. 360, 406.

33 Great Britain-U.S.A., "Treaty of Ghent", Dec. 24, 1814, 63 *Consolidated Treaty Series* 421.

34 See, on this subject, Hessel Edward Yntema, "Retaliation and Neutral Rights", *Michigan Law Review* 30 (1919), pp. 564–88; A. Pearce Higgins, "Retaliation in Naval Warfare", *British Year Book of International Law* 8 (1927), pp. 129–46, and Neff, *Rights and Duties*, pp. 152–55.

was sailing from Norway to Rotterdam, in neutral Netherlands.<sup>35</sup> The particular infringement of traditional neutral rights that was involved was the diversion of the neutral vessel into a belligerent, with a view to conducting the process of visit and search in a more thoroughgoing manner than was possible at sea (though also with the automatic effect of bringing the neutral ship within reach of the normal *sovereign* rights of the belligerent state, as it would not have been if the search had been conducted wholly on the high seas, as in the traditional practice). The *Stigstad* was diverted by the British navy into a port in Scotland. In the event, neither the ship nor its cargo was confiscated; but the owners made a claim for the delay and diversion, alleging that the British policy of diverting neutral ships from the high seas into its ports was unlawful. The prize court conceded that the British policy was an innovation, not sanctioned by existing international law. It must therefore find its justification, if any, in the law of reprisal. Here, as in the earlier cases decided by Scott, the crucial issue concerned the extent to which reprisals could lawfully be taken against a party other than the original wrongdoer.

In considering this question, the prize court candidly conceded that the situation was one of conflicting rights. But it firmly rejected any contention that neutrals had an absolute right to trade with belligerents. The issue is not, therefore, whether the neutral's trade has been interfered with, but rather whether the British reprisal policy "subjects neutral to more inconvenience or prejudice than is reasonably necessary under the circumstances."<sup>36</sup> It went on to note that

Belligerency and neutrality are states so related to one another that the latter must accept some abatement of the full benefits of peace in order that the former may not be thwarted in war in the assertion and defence of what is the most precious of all the rights of nations, the right to security and independence. The categories of such cases are not closed. To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which [...] he [the belligerent] enjoys already under the heads of contraband, blockade, and unneutral service, would be to take away with one hand what has formally been conceded with the other [...] [T]o say that the retaliation is invalid against neutrals, except within the old limits of blockade, contraband, and unneutral service, is to reduce retaliation to a mere simulacrum, the title of an admitted right without practical application or effect.<sup>37</sup>

In the present case, the regulations were held to be not, in fact, unduly harsh. Hence they involved no violation of international law.

Lest it be thought that there is a consensus on this question even now, it should be pointed out that a judicial decision only a few years later was largely to the opposite effect. This was an arbitral claim by Portugal against Germany in 1930,

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<sup>35</sup> The *Stigstad*, [1919] *Appeal Cases* (L.R.), p. 279.

<sup>36</sup> The *Stigstad*, [1919] *Appeal Cases* (L.R.), pp. 285–86.

<sup>37</sup> The *Stigstad*, [1919] *Appeal Cases* (L.R.), pp. 288–89.

arising out of the sinking of a ship named the *Cysne* during the First World War.<sup>38</sup> The principal issue at stake concerned Germany's placing of pit props onto its absolute contraband list. This was contrary to the rules set out in the Declaration of London of 1909, which both parties agreed were applicable to the circumstances. Germany justified this departure from the accepted rules on the ground of reprisal. The arbitral panel rejected the German defence, on the ground that the placing of an item onto a contraband list was an act that, by its nature, was directed against neutrals (in the sense that it amounted, in practical terms, to a prohibition against neutral trade in the item with the enemy side). That is to say that, even if a reprisal measure was intended *ultimately* to counteract wrongdoing by the enemy belligerent, the fact that it was directly *proximately* against a neutral party which was not party to any wrongdoing made it unlawful.

The latest authoritative word on this matter is to be found in the Articles on State Responsibility, drafted by the International Law Commission (a United Nations body of legal experts) in 2001. The text of the Articles themselves is frustratingly vague on the question of countermeasures (i.e., non-forcible reprisals) affecting third states.<sup>39</sup> But the Commission's official commentary is somewhat more forthcoming:

Countermeasures [the commentary states] may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State.

This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties [...]. Such indirect or collateral effects cannot be entirely avoided.<sup>40</sup>

The commentary gives two examples of the kind of "indirect or collateral effects" that it has in mind. One is a situation in which a wrongdoing state is denied transit rights by the injured state because of its wrongdoing. It is possible that the delays in the movement of goods following on from this would adversely affect the trading partners of the wrongdoing state. The other example concerned trade sanctions imposed against a wrongdoing country, such as a ban on the export of raw materials to that state. Such a ban might disrupt or halt manufacturing activities in the wrongdoing state, with an adverse effect on third countries relying on prompt delivery of those goods. Notice, however, that in both of these examples, the

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38 The *Cysne* (Portugal v. Germany), June 30, 1930, *International Law Reports*, p. 487.

39 The relevant provision, Article 49, stipulated that "[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations [...]." It is not immediately clear whether 'only' is a limitation on the *purpose* for which the countermeasures may be applied, or whether it is a limitation on the type of state against which the countermeasures may be taken.

40 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002), p. 285.

*immediate* reprisal measures are envisaged as being levied against the wrongdoing state itself, with the third parties suffering only the “knock-on” effects from those. The implication would appear to be, then, that the opposite situation would not be lawful, i.e., the situation in which the countermeasures (or reprisals) are directed at first instance against innocent third parties, with the actual wrongdoers suffering only the “knock-on” effects. As yet, however, there is no firm judicial authority to this effect. And it should be remembered that the *Stigstad* decision was to the opposite effect.

The best view of the question of reprisals and third parties, it is submitted, is that suggested by the International Law Commission: that a certain degree of collateral damage to innocent parties cannot be ruled out, but that the *proximate* target of reprisals (or countermeasures) must be the wrongdoing party. It is interesting to note that this conclusion is in line with the accepted laws of war, in which collateral injury to civilians is accepted, within strict limits, as an unavoidable feature of armed conflict – but that there is nonetheless an absolute prohibition against the deliberate targeting of civilians.

It cannot be said, however, that this conclusion fully resolves the question of third parties because the fact remains that countermeasures may be directed against third parties for wrongful acts which they commit in their own right – and contentious questions can arise as to when third parties might be guilty of such action. For example, if a country is committing unlawful acts, it might be contended that *other* countries which trade with it thereby make a contribution, if only an indirect one, to that wrongful conduct – and that those third countries thereby become complicit, in their own right, in the illegal conduct. Stated more broadly, the difficulty lies, potentially at least, in distinguishing between, on the one hand, arms-length dealings between independent parties and, on the other hand, collusive or joint conduct between parties. The distinction between these can sometimes be fine in the extreme, as illustrated by the experience of the United States during its period of neutrality in 1914–1917. A century before that experience, however, during the French Revolutionary Wars, many of the key issues had received their first thorough airing, in an atmosphere of high emotion and loud controversy. It is entirely possible that at least some of these conceptual battles will be re-fought in the future. History, it would appear, has a disturbing habit of not going away.