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Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals

I. INTRODUCTION

In September 1980, Iraqi armed forces attacked and overran Iranian border positions, launching an offensive calculated to force the quick collapse of the Khomeini regime and to satisfy Iraqi territorial ambitions at a stroke.1 After more than three years of huge losses to both nations,2 and with attrition working to Iran's advantage,3 Iraq began to seek ways to force an end to the war.4 In February 1984, Iraq declared a fifty nautical mile exclusion zone around the Iranian oil depot at Kharg Island, in the northern Persian Gulf, warning that any ships entering this zone would be subject to attack.5

Since declaring this "exclusion zone," Iraq has carried out a series of air attacks against commercial shipping in the vicinity of Kharg Island, both within the declared zone and beyond its limits.6 Similarly, after warning that continued

1. See Cottam, The Iran-Iraq War, CURRENT HIST., Jan. 1984, at 9. A detailed treatment of the complex historical and political pressures leading to the Gulf War is beyond the scope of this Comment. A short but thorough factual account may be found in Cottam, supra this note, at 9-10. See also Wright, Implications of the Iraq-Iran War, 59 FOREIGN AFF. 275 (1981).

2. Cottam, supra note 1, at 12. According to various news media sources, as many as 130,000 lives had been lost by February 1984. See, e.g., TIME, Feb. 27, 1984, at 63; MACLEAN'S MAG., May 14, 1984, at 50.

3. Cottam, supra note 1, at 12. Iraq's loss of oil revenue and resulting fear of any possible domestic instability weighed heavily in the Iraqi decision to widen its war effort. See generally id. This fear may also explain Iraq's eagerness to accept various initiatives by the United Nations to end the hostilities. For example, on September 28, 1980, the Security Council unanimously called for a cessation of hostilities. S. Res. 479 (1980), S/14244, Res. & Doc. of the Security Council 1980, at 23. Iraq asserted its willingness to abide by Resolution 479, but Iran refused to observe any cease-fire as long as Iraqi forces remained on Iranian territory. W. LANDSKRON, ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 1980, at 85, 87. On July 12, 1982, the Security Council passed unanimous Resolution 514, calling again for an immediate cease-fire. S. Res. 514 (1982), 19 U.N. CHRONICLE, (No. 8) 21-22 (1982). Iraq quickly stated its continued desire to honor the Security Council's Resolutions. W. LANDSKRON, ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 1982, at 98. Iran, however, rejected Resolution 514 and "dissociated" itself from any further Security Council action until the Council expressly branded Iraq as the aggressor. Id.

4. For example, by threatening the flow of oil from the Persian Gulf, Iraq hoped to force both the oil exporting nations of the Persian Gulf and Western oil purchasers to pressure Iran into accepting some settlement. TIME, June 4, 1984, at 30.


6. For a representative description of the attacks, see TIME, May 28, 1984, at 50. Some vessels have been attacked as far as seventy miles from Kharg Island. TIME, Apr. 9, 1984, at 38. Accounts vary regarding the number of ships attacked. At the end of May 1984, Iraq claimed that it had "destroyed"
Iraqi attacks on shipping would draw reprisals against neutral vessels, on May 14, 1984, Iran carried out air attacks on neutral ships in the southern half of the Persian Gulf. These attacks, by both belligerents, have recurred in a continuing pattern of Iraqi attacks followed by Iranian reprisal, often after a respite of some days or weeks.

This Comment examines the legality, under international law, of the attacks by the Persian Gulf belligerents against neutral commercial vessels. The Comment first discusses the continued viability of rights of neutrality under both the Paris Pact of 1928 and the collective security arrangements of the U.N. Charter.11

27 ships since February 27, 1984. Time, June 4, 1984, at 32. Lloyd's of London, the principal insurer of the world's commercial shipping, listed 70 vessels "attacked" in the area over a somewhat longer period. Boston Globe, Sept. 13, 1984, at 5, col. 4. On October 22, 1984, a representative of Lloyd's Shipping Intelligence Department stated that 99 vessels had been "attacked" since the war began in September 1980. Telephone interview with Mr. R. Hooke, Shipping Information Services, Lloyd's of London (Oct. 22, 1984). Yet another source quoted Lloyd's as stating that 57 vessels had been raided by Iraq and Iran since January 1984. N.Y. Times, Dec. 4, 1984, at A12, col. 3. Reliable data remain difficult to obtain. Iraq has also mined the waters around Kharg Island. See Newsweek, June 4, 1984, at 18. The use of mines in warfare at sea is a controversial issue in international law, the treatment of which is beyond the scope of this Comment. For a brief discussion on mine warfare in international law, see 2 L. Oppenheim, International Law: Disputes, War and Neutrality 471-73 (H. Lauterpacht 7th ed. 1952) [hereinafter cited as Oppenheim-Lauterpacht].

7. See Time, Oct. 24, 1983, at 34-35. When Iraq, in October 1983, received from France Super Etendard fighter-bombers, configured to carry Exocet anti-ship missiles, Iran warned that if its oil facilities were attacked, it would close the Persian Gulf. Id. This warning was transmitted both by Iranian State Radio and by the Speaker of the Iranian Parliament. Id. See also Maclean's Mag., May 14, 1984, at 49.


11. The collective security system created under the United Nations replaces and improves upon the previous system of the League of Nations. See generally Tucker, supra note 10, at 174-75. Article 2, paragraph 4 of the U.N. Charter prohibits the "use of force against the territorial integrity or political independence of any state." U.N. Charter art. 2, para. 4. Article 39 of the Charter establishes the Security Council as the body vested with authority to determine the existence of threats to the peace, breaches of the peace, and other acts of aggression, and to make recommendations or take remedial measures in such cases as provided by Articles 41 and 42 of the Charter. U.N. Charter art. 59. Article 51 recognizes the right of an individual state to use force in self-defense, pending action by the Security Council. U.N. Charter art. 51. See also P. Jessup, A Modern Law of Nations 157-69 (1948).
Next, the Comment analyzes the merits of possible Iraqi arguments seeking to legitimize the air attacks as justifiable either under a concept of "exclusion" or "war" zones, or under the more traditional doctrine of maritime blockade. Finally, the possible legitimacy of Iranian reprisals against neutral vessels, premised on alleged violations of international law by Iraq's armed forces, is examined. The author concludes that neither Iraq nor Iran has valid justification under international law to conduct air attacks on neutral commercial shipping in the Persian Gulf.

II. RIGHTS OF NEUTRALS

A. Traditional Law

Under traditional customary international law, non-belligerents, or neutral states, possessed a general right to continue commerce with belligerents, provided such commerce did not favor or jeopardize the position of any particular belligerent. Any state which fulfilled the duty of abstention and impartiality could claim the attendant rights of neutrality. Failure to remain neutral, either

12. "Exclusion zones," characterized also as "war zones" or "security zones," have been declared by belligerents in order to justify the complete closure of specified areas to all maritime traffic, both enemy and neutral, and to justify a belligerent claim of right to attack any vessel entering such a zone. See infra notes 90-193 and accompanying text. Belligerents initially characterized these zones as "reprisals," see infra note 14, in order to provide a legal basis for their imposition. See infra notes 115-16 and accompanying text.

13. The doctrine of maritime blockade is a long recognized method of economic warfare, in which a belligerent may legally bar access to an enemy's coast and seize and condemn any vessel in breach of such a blockade. See infra notes 194-274 and accompanying text.

14. Reprisals are sometimes recognized under international law as legitimate responses, by a belligerent in its conduct of warfare, to a co-belligerent's violation of international law. See infra notes 275-347 and accompanying text.

15. See infra notes 193, 320-21 and accompanying text.


(1) A neutral State must abstain from taking sides in the war and assisting either belligerent and, in matters of discretion, deal impartially with all belligerents.

(2) A neutral State must prevent its territory from being used as base of hostile operations by any belligerent.

(3) A State not participating in a war is entitled to respect by belligerents of its rights as a neutral power. It must, however, acquiesce in restrictions which, under the laws of war and neutrality, belligerents are entitled to impose on the relations between their enemies and neutral nationals.

(4) A neutral State, as distinct from a neutralized State, may change its status to one of belligerency. Otherwise, the state of neutrality is co-extensive with that of war.

(5) Any violation of the legal duties owed by belligerents and neutral States to one another is a breach of international law and entails the consequences of an international tort. (citations omitted)

Id. See also, Tucker, supra note 10, at 165.

17. SCHWARZENBERGER, supra note 16, at 549.

18. See Tucker, supra note 10, at 202. Abstention and impartiality are, in a sense, conditions precedent to a claim of neutral status and its attendant rights. Id. at 204 n.17.
through commission of "un-neutral" acts, or by acquiescence in belligerent acts which compromised the character of a state's neutral status, legally allowed the offended belligerent to disregard the offending state's claim to neutral trading rights.

The doctrines that evolved from the recognition of neutrality in traditional law had as a necessary presupposition that the belligerent parties held equal status legally, at least with regard to the war itself. This equality was based on international law's acceptance, prior to World War I, of a sovereign state's resort to war as a simple fact, neither legal nor illegal. Thus, a third state's decision to participate in the belligerency or to refrain and claim neutral status was essentially a political, as opposed to a legal, question which turned on each state's estimate of its own best interests.

21. When a neutral state violates or abandons its duties of neutrality, it can be considered either to have surrendered its right to demand suitable respect from belligerents for its neutral rights or to have ceased its claim to neutral status. Tucker, supra note 10, at 258-59. Even under the former, less consequential analysis, the neutral state forfeits its neutral protective rights. Id.


23. Id. See also Schwarzenberger, supra note 16, at 37-38.

24. A state's choice to participate in an existing belligerency was as unfettered as the resort to war of the original belligerents. Schwarzenberger, supra note 16, at 573. Even after a period of neutrality, the neutral state was free to change its status to belligerency at any time. Id.

25. Although customary law did not require neutral states to issue formal declarations of neutrality, as their non-participation or abstention and impartiality entailed a presumption of neutral status, it was customary practice to make such declarations. Tucker, supra note 10, at 200-01.

26. Id. at 165.

27. In general wars, neutrality rights seldom have been respected for long. During the Napoleonic Wars of the nineteenth century, for example, Great Britain instituted a blockade of all neutral ships bound for French ports. Oppenheim-Lauterpacht, supra note 6, at 630-31. Though Russia and other neutrals formed a pact of "Armed Neutrality" to protect their rights, Britain successfully persisted in its blockade. Id. In World War I, the belligerent powers argued that neutrality was far less important than the outcome of a struggle waged on issues transcending merely national interests. Id. at 634. World War II only emphasized this trend toward a voluntary and almost universal abandonment of neutrality. Id. at
The law of neutrality, however, provided no absolute right to neutral commerce. The same pragmatism which gave rise to neutrality rights recognized that a belligerent was unlikely to refrain from interference with its enemy's trade when great interests, perhaps including national survival, were at stake. Thus, the doctrines of blockade and contraband were vital exceptions to neutrality rights, yielding a balance between neutral and belligerent interests. These doctrines secured to belligerents the legal means to police neutral actions and ensured for neutral states the safety and preservation of legitimate trade.

B. The Paris Pact and the U.N. Charter

Beginning in World War I and culminating in the United Nations Charter, a fundamental change took place in the international law of war, with consequential effect on the traditional rights of neutrality. The Versailles Treaty, terminating the war, provided that in time of peace, neutral ships should not be stopped or searched except as provided in the articles of the treaty. The Hague Conventions, which also dealt with neutral rights, were instrumental in the development of modern international law. The Hague Conventions, however, did not provide for neutral protection in time of war, and the Versailles Treaty did not explicitly provide for such protection.

637. When issues of great import are at stake, maintenance of international economic order becomes secondary to collective efforts taken in support of the rule of law itself. Id. See also Tucker, supra note 10, at 193.

28. See generally Oppenheim-Lauterpacht, supra note 6, at 624-29. See also Schwarzenberger, supra note 16, at 592.

29. See supra note 27. The tension between the belligerent's need to conduct effective warfare and the neutral's desire to continue a profitable trade has always been at the heart of neutrality disputes. Thus, when Great Britain believed it vital to blockade Napoleon's France, it did so in the face of armed resistance by neutrals, claiming that the "exceptional character" of the war justified its action. Oppenheim-Lauterpacht, supra note 6, at 630.

30. See infra notes 31-32 for a description of the operation of the blockade and contraband doctrines. The attempt to strike a balance between the opposing interests of neutrals and belligerents is especially evident in the formation of the Armed Neutrality of 1780. Oppenheim-Lauterpacht, supra note 6, at 629. Russia, speaking for the neutral states, claimed the right to continue neutral trade with belligerents, subject to limitation only by legitimate blockade and previously agreed upon strictures on trade in contraband. Id.

31. Blockade doctrine allowed a belligerent with sufficient naval force to halt entirely neutral commerce to an enemy's ports or coasts. For a more detailed discussion of blockade, see infra notes 194-230 and accompanying text. A full discussion of the doctrine of contraband is outside the scope of this Comment. Briefly, customary law regarded trading in items or goods denominated contraband of war as outside the protections afforded legitimate neutral trade, though not necessarily an un-neutral act. Schwarzenberger, supra note 16, at 618-19. In conjunction with a belligerent's right to visit and search neutral vessels on the high seas, id. at 595-97, contraband doctrine recognized as legitimate the belligerent seizure of items related to the conduct of warfare, if such items were destined for enemy use. Id. at 616. For a full discourse on contraband, see Oppenheim-Lauterpacht, supra note 6, at 799-830.

32. For example, the notification required of a legal blockade, see infra note 206 and accompanying text, warned the neutral state that passage to the blockaded destination was prohibited. Furthermore, although blockade running, or breach, made the neutral vessel and cargo liable to condemnation by a Prize Court, the court proceedings theoretically gave the neutral a forum for redress. See infra notes 225-28 and accompanying text. Commerce to open ports was subject to the contraband limitation, see supra note 31, though a cargo containing contraband and non-contraband items might be subject to seizure. See Schwarzenberger, supra note 16, at 617. Like all "rules" of warfare, the blockade and contraband doctrines sought to provide a regulated means for belligerents to wage warfare, in this case economic warfare, while remaining within the rule of law. Id. at 9-10.

33. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, 225 Parry's T.S. 189.
ing World War I, labeled Germany the initial aggressor in that conflict and accordingly punished Germany for its illicit recourse to war, assessing damages in the form of reparations. The Treaty also included an attempt to establish a collective security system, the League of Nations, to deter future resort to war. A more affirmative renunciation of the right to war was embodied in the Paris Pact of 1928. This general treaty bound its signatories to renounce war as an instrument of national policy. Only war waged in self-defense or as a measure of collective security in defense of another nation remained, at least in theory, legal.

The goals of the Versailles Treaty and the Paris Pact were not realized. The progressive failure of the collective security measures promised by the League, coupled with the ineffectiveness of the Paris Pact in preventing war, culminated at the conclusion of World War II in a more determined effort through the U.N. Charter to eliminate warfare as an acceptable extension of national policy. Article 2, paragraph 4 of the Charter explicitly forbids the use of force against the "territorial integrity or political independence" of a state, leaving Articles

34. Schwarzenberger, supra note 16, at 760.
35. Id.
36. Id.
37. Id. See also The Covenant of The League of Nations, 225 Parry's T.S. 195, 195-205.
41. It is generally agreed that the Paris Pact stands for the principle that war is illegal unless waged in self-defense or under the authority of some collective security system. Brownlie, supra note 38, at 89.
42. Under the Paris Pact alone, each state is its own judge of whether an action was taken in self-defense against "impending attack," at least until an international jurisdiction, e.g., the Nuremberg Tribunal, see infra note 174, is established with cognizance of the question. Schwarzenberger, supra note 16, at 29. See also Tucker, supra note 10, at 170 n.11. Pursuant to Article 39 of the U.N. Charter, the Security Council can render such a determination. See infra note 54 and accompanying text. See also infra note 61. In the context of the Persian Gulf War, a claim by Iraq that its invasion of Iran was justified under the doctrine of anticipatory self-defense would be possible, provided a strong showing could be made that Iran itself planned an invasion. See Brownlie, supra note 38, at 257-64, 275-78.
43. See supra note 41. See also Schwarzenberger, supra note 16, at 46-47.
44. See, e.g., Brownlie, supra note 38, at 216-19.
45. Id. at 114. Though the Paris Pact did not prevent Axis aggression in World War II, a majority of states adhered to the Pact by taking discriminatory action against the aggressor states. Id. For this and other reasons, particularly the embodiment of the Pact's gist in Article 2, paragraph 4 of the U.N. Charter, the desuetude of the Paris Pact has not been raised. Id. at 113-15.
46. Schwarzenberger, supra note 16, at 50.
47. U.N. Charter art. 2, para. 4.
39, 41, and 42 to vest the Security Council with broad powers to enforce this prohibition. As did the Paris Pact, Article 51 of the Charter explicitly recognizes the legitimacy of self-defense. Under modern international law, therefore, resort to war has become presumptively illegal, absent justification as self-defense or as a legitimate measure undertaken through a system of collective security.

C. Modern Neutrality

Given the profound change wrought by the Paris Pact and the U.N. Charter in the legal status of war, the continuing viability of the neutrality doctrines, based as they were in the traditional view that war was a political right of every sovereign nation, must be seriously questioned.

Article 39 of the U.N. Charter charges the Security Council with the duty to determine the existence of threats to, or breaches of, the peace or acts of aggression. The Security Council is therefore competent to assess the legality of each state's action in the initiation of a belligerency, that is, which state, if any, is the aggressor. Once the Security Council has determined the origin and nature of the aggression, it may direct members of the United Nations to apply sanctions under Article 41, or may resort to the use of military force as outlined in Articles 42 through 47 in order to restore the peace. Whether through economic sanction or force, the measures directed by the Security Council for execution by member states would be, under traditional international law, neutral acts. Member states ignoring the Security Council's action by continu-
ing trade with an aggressor, whether called upon to take specific measures or not, would be in violation of their general obligation to give the United Nations "every assistance" in actions taken. Thus, the legitimacy of a member state's claim to neutrality rights when the Security Council has declared an aggressor is, at best, problematic. Merely the fact that Security Council action may grant a right to a non-participant to discriminate against an aggressor-belligerent vitiated the first principle of neutrality, abstention and impartiality. Under an international legal regime based on an effective system of collective security and renunciation of war, therefore, neutrality rights are obsolete.

In fact, collective security under the U.N. Charter and the direction of the Security Council often has proved ineffective. The Paris Pact and the U.N. Charter both require that a competent international body make a determination that an illicit resort to warfare has occurred. Without such a determination, the belligerency has no legal status. This absence of legal status was precisely the situation prior to World War I which gave the concept of neutrality rights its foundation. From its inception, the weaknesses of the Security Council system have been delay and difficulty in making a factual finding of aggression and the often paralyzing effect of the veto power of the permanent Members. The subsequent political polarization of the Security Council has all but eliminated the possibility, at least for the present, of taking active and effective measures.

60. U.N. Charter art. 2, para. 5. "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." Id. (emphasis added). See also Tucker, supra note 10, at 175 n.18.

61. See generally Tucker, supra note 10, at 174-75. If the Security Council directs no specific measures against an aggressor, its determination of the aggressive and therefore illegal nature of a belligerent's action would still be authoritative under Article 39 of the Charter and should, consistent with the spirit of the Charter and the Paris Pact, oblige member states to refrain from aiding the aggressor. See supra note 60. See generally Tucker, supra note 10, at 174-75.

62. See Brownlie, supra note 38, at 402-04.

63. See supra note 18.

64. Jessup, supra note 11, at 53; Oppenheim-Lauterpacht, supra note 6, at 642.


67. Id. at 170, 177, 179.

68. See supra note 23 and accompanying text.

69. See supra note 22 and accompanying text.

70. Jessup, supra note 11, at 194.


72. See Aron, supra note 65, at 716. Though allies in World War II, the United States and the Soviet Union have since paralyzed the U.N. Security Council with liberal use of the veto power to support conflicting interests. Id. For an account of the extraordinary difficulty encountered by the United Nations in attempting to define "aggression," see Brownlie, supra note 38, at 353-57.
against an aggressor. As noted above, absent such action by the Security Council, the provisions of the Paris Pact and the U.N. Charter remain inoperative. In such situations, the pragmatic need to minimize economic disruption, which was the very reason for creating neutrality rights, would justify the continued viability of such rights.

D. Neutrality in the Persian Gulf War

Though the Security Council has called upon both belligerents in the Persian Gulf War to cease hostilities and to respect freedom of navigation in the Gulf, it has not attempted to name an aggressor or to recommend measures to restore the peace. Both Iraq and Iran may assert a claim of right in the initiation and conduct of the war. Until and unless the Security Council declares an aggressor, the provisions of the Paris Pact and the U.N. Charter remain inoperative.

73. The Security Council has been able to issue resolutions calling generally for cease fires or the use of peaceful means to resolve conflict, as in the present case of the Persian Gulf War. See supra note 3.
74. Tucker, supra note 10, at 171, 177.
75. See supra note 28.
76. Schwarzenberger describes the modern law of neutrality under the United Nations as "potentially applicable alternative patterns of legal behavior" involving a choice, through the veto power of the permanent members of the Security Council, between traditional neutrality and the law of collective security. SCHWARZENBERGER, supra note 16, at 665-66.
79. See supra note 3; the Iranians rejected Resolution 514 and any further Security Council action absent a declaration recognizing Iraq's aggression. Id.
80. See Wright, Implications of the Iraq-Iran War, 59 FOREIGN AFF. 275 (1981). Iraq bases its claim on the extortion of the Algiers Pact of 1975 which set the Iran-Iraq border at the thalweg, or main channel, of the Shatt-al-Arab river, a favorable decision for the then Shah of Iran. Id. at 277-78. The Pact settled a long-standing boundary dispute in Iran's favor in return for an Iranian withdrawal of support for the Kurdish insurgency which had threatened the existence of the Iraqi government. Id. The new Khomeini regime proved no less threatening, refusing to return territory forcibly acquired by the Shah and fomenting Shi'ite dissent throughout the Arabian Islamic nations of the Gulf. Id. at 278-79. Border clashes escalated in intensity, leading to the September 1980 Iraqi decision to use force. Id. at 279. Iran's claim of right would certainly be self-defense, as Iraq struck first, crossing the border into Iran. See Evans & Campany, Iran-Iraq: Bloody Tomorrows, Proc. U.S. NAV. INST., Jan. 1985, at 33.
81. Under Article 39 of the U.N. Charter, the Security Council is charged, inter alia, with the responsibility of determining the existence of aggression. U.N. CHARTER art. 39. See also supra note 55. The question of the General Assembly's competence to label aggression is not settled. The case would seem weak, however, as there are many explicit provisions in the Charter with regard to the Security Council's competence and only a vague Charter reference to a residency General Assembly power. See BROWNLIE, supra note 38, at 333-34. In its recent decision in the case of Nicaragua v. United States, the International Court of Justice unanimously held itself competent to adjudicate the merits of the alleged U.S. aggression, explaining that the Security Council's authority in this area is "primary," not "exclusive." See Case Concerning Military and Paramilitary Activities In and Against Nicaragua, (Nic. v. U.S.) 1984 I.C.J. 70, at paras. 89-98 (Judgment of November 26, 1984). See also N.Y. Times, Nov. 27, 1984, at A1, col. 6; Comment, Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or
sor, the Persian Gulf War has no legal status.\textsuperscript{83} This situation is the functional equivalent of the international order prior to World War I.\textsuperscript{84} Non-participant nations that fulfill the duty of abstention and impartiality\textsuperscript{85} should therefore enjoy the protections and incur the duties owed to a neutral under customary international law.\textsuperscript{86} Thus, the neutral nations whose ships have suffered attacks in the Persian Gulf may have a right to moral or material reparation, or to take retaliatory steps, if it can be shown that the attacks were without justification under international law.\textsuperscript{87}

Iraq might seek such justification by characterizing its attacks on commercial shipping in the Persian Gulf as a lawful consequence of neutral intrusion into a valid exclusion zone.\textsuperscript{88} Alternatively, Iraq might argue that neutral ships approaching Kharg Island were in breach of a maritime blockade and therefore legitimately subject to attack.\textsuperscript{89} Iran, on the other hand, must seek to justify its attacks as valid retaliatory acts under the doctrine of reprisal.\textsuperscript{90} The merits of each of these contentions will be discussed in the following sections.

III. Exclusion Zones

A. Origins

Belligerents first employed exclusion zones\textsuperscript{91} in the major wars of the twentieth century to meet the perceived need to control the flow of neutral trade to an enemy, without the commitment of the large naval forces otherwise necessary to

\textit{Just Compulsion?}, 8 B.C. INT'L & COMP. L. REV. (1985). Whether an eventual finding of aggression would entail the same consequences as such an action by the Security Council is unknown.

82. See supra note 67.
83. See supra notes 65-76 and accompanying text.
84. See supra note 18.
85. BROWNLIE, supra note 58, at 404. See also JESSUP, supra note 11, at 193; Tucker, supra note 10, at 179. The United States has declared itself neutral in the Persian Gulf War. W. LANDSKRON, YEARBOOK OF THE UNITED NATIONS 1980, at 314.
86. Tucker, supra note 10, at 259-62. In the case of the Robin Moor, a U.S. ship sunk by a German submarine prior to U.S. entry into World War II, the United States demanded from Germany almost three million dollars in actual damages. U.S. NAVAL WAR COLLEGE, INT'L. L. DOC. 1941, at 45 (1943). Germany subsequently refused to answer the U.S. diplomatic note which had made the demand. Id. at 46. As late as December 1984, the U.S. State Department had received no requests for espousal of claims against either belligerent in the Persian Gulf War, and was unaware of any claims being pressed by other nations. Telephone interview with Asst. Legal Advisor, Near-Eastern Affairs, U.S. Dept. of State (Dec. 3, 1984).
87. See infra notes 182-93 and accompanying text.
88. See infra notes 254-74 and accompanying text.
89. See infra notes 311-47 and accompanying text.
90. Exclusion zones have acquired a variety of names, e.g., war zones, operational zones, total exclusion zones, defensive areas. See, e.g., Tucker, supra note 10, at 296 n.34. For the purposes of this Comment, exclusion zone will refer to any large ocean area which a belligerent declares closed to enemy and neutral shipping in order to prevent access to the enemy's coast. Id. See also SCHWARZENBERGER, supra note 16, at 432.
institute an effective legal blockade or contraband patrol. These zones trace their origin to two similar belligerent practices recognized by customary international law: defensive zones and operational zones. Defensive zones may be established by a belligerent in its territorial waters or waters immediately adjacent in order to provide close and effective control of its sea approaches for purposes of defense. Operational zones are declared by belligerents to warn neutral shipping of immediate danger due to current or imminent hostilities in the delimited area. Neutrals may be deemed to enter such a zone at their own risk and may be subject to belligerent control to prevent the neutrals from unwittingly interfering with combat operations. Both of these zones are characterized as limited in area and purpose, either defensive in a narrow sense or protective of neutral shipping, and, in the case of operational zones, of limited duration.

Exclusion zones are similar to operational and defensive zones in that they involve interference with neutral shipping, but differ sharply in execution and purpose. Exclusion zones are declared around enemy territory and can cover vast expanses of ocean, and are therefore unrelated to the narrow objectives of

91. Tucker, supra note 10, at 296, 301. See also Oppenheim-Lauterpacht, supra note 6, at 792.
92. Contraband doctrine was based on the belligerent's right to visit and search vessels on the high seas in order to intercept cargo deemed contraband of war. See, e.g., Oppenheim-Lauterpacht, supra note 6, at 799-801. Contraband was broadly defined as goods that allow the enemy to carry on its war effort with "greater vigour." Id. See also supra note 31.
93. Tucker, supra note 10, at 299-300.
94. Id. at 300-01.
95. Id. at 300.
96. Tucker, supra note 10, at 300.
97. Id. at 301.
98. Id. at 300. Defensive zones generally include a nation's territorial waters and a "very limited" area beyond. Id. For example, during the Vietnam War, South Vietnam declared a defensive zone within the three nautical mile limit of its territorial waters. Decree No. 81/N.G. of 27 April 1965, 4 INT'L LEGAL Mat'l 461 (1965). Operational zones are limited to the area of actual naval engagement. Tucker, supra note 10, at 301.
99. As opposed to the most expansive definition of "defense," which could rationalize any act related to national security, defensive zones exist solely to enhance the immediate physical security of the declaring nation's coastal regions. Id. at 300.
100. Id.
101. Id. at 300-01.
102. For example, the German exclusion zone in World War I, characterized as a "war zone," extended to the "waters surrounding Great Britain and Ireland, including the whole English Channel." Proclamation of the Imperial German Government of February 4, 1915. For the text of the Proclamation, see The Lusitania, 251 F. 715, 719 (S.D.N.Y. 1918).
103. See Tucker, supra note 10, at 305-06. The British Order in Council of March 11, 1915, merely stated that no vessels would be allowed to proceed to or from Germany; hence the entire eastern Atlantic was encompassed by the zone. Id. The German operational zone declared on February 1, 1917 extended to the waters around Great Britain, France, Italy, and the entire eastern Mediterranean. Mallison, Studies in the Law of Naval Warfare: Submarines in General and Limited Wars, U.S. NAVAL WAR COLLEGE, INT'L L. STUD. 1966, at 65 (1968).
defensive zones. The purpose of an exclusion zone is, in fact, to eliminate commerce rather than to prevent accidental damage to neutral vessels incident to inter-belligerent hostilities, which is the basis for a legitimate operational zone. Finally, exclusion zones are frequently enforced by indiscriminate destruction of intruding ships, an unjustified result under the rationale of the legally recognized zones described above. Clearly, an exclusion zone per se must be distinguished from operational or defensive zones, and its legal merit must be separately evaluated.

Two general types of exclusion zones have developed in international practice: the quasi-blockade and the war zone. British and German practice in the two World Wars, the former comporting generally to quasi-blockade and the latter to war zones, comprises the bulk of belligerent activity in this area.

104. See supra note 99. Clearly, defensive zones cannot be legitimately premised on the declaring state's concern for coastal defense if the zone is placed around the enemy's coast.

105. The declared intent of the British exclusion zone of World War I was to prevent goods of any kind from reaching or leaving Germany. Tucker, supra note 10, at 305-06.

106. For example, from February 1, 1917 until the conclusion of World War I, and substantially throughout World War II, the German zones were enforced by unrestricted submarine warfare, entailing virtually indiscriminate destruction. See Mallison, supra note 103, at 62-86 (description of German tactics).

107. German enforcement actions pursuant to the declared zones of February 1, 1917 and World War II made no attempt to distinguish neutral from enemy vessels, placing all at risk. Id. at 65, 76.

108. Defensive zones allow the control of shipping, not its destruction. See supra note 95 and accompanying text. Operational zones may permit the capture of intruding neutral vessels and may relieve the belligerents of liability for damage done to neutral vessels incident to inter-belligerent battle. See COLOMBOs, THE INTERNATIONAL LAW OF THE SEA 528-29 (6th rev. ed. 1967); Tucker, supra note 10, at 299-301.

109. See supra note 90.

110. "Quasi-blockade" will be used in this Comment to describe the British type of exclusion zone, which is characterized by control and regulation of neutral shipping. See infra notes 114-23, 135-41 and accompanying text.

111. "War zone" will be used in this Comment to describe the German exclusion zones, which were characterized by destruction of neutral shipping. See infra notes 146-61 and accompanying text.

112. The famous "quarantine" of Cuba instituted in October 1962 by the United States is distinguished from exclusion zones at issue in this Comment by several factors, foremost of which is the non-belligerent status of the participants. The quarantine was, in practice, closely related to contraband doctrine, involving visit and search of vessels on the high seas to prevent Soviet nuclear armed missiles from reaching Cuba. For a thorough account of the crisis and the international legal implications of U.S. actions, see A. CHAYES, THE CUBAN MISSILE CRISIS (1974).

113. The use of unrestricted submarine warfare by the United States in its 1941-45 war against Japan has been described as an exclusion zone. See, e.g., SCHWARZENBERGER, supra note 16, at 433. This zone, however, was directed solely at Japanese shipping, involved no neutrals, and is therefore of no direct concern to this Comment. See Mallison, supra note 103, at 89. Prior to the Kharg Island exclusion zone, the most recent declaration of a zone was made by the British in 1982, in the Falkland Islands (Islas Malvinas) War. Effective from April 12, 1982, the British barred all Argentine vessels from a circular zone of 200 nautical miles radius centered on the Falklands. THE SUNDAY TIMES OF LONDON, WAR IN THE FALKLANDS 164-65 (1982). Again, as in the case of the U.S. zone in the Pacific, there was no neutral involvement. See M. HASTINGS & S. JENKINS, THE BATTLE FOR THE FALKLANDS 105, 341, 381 (1983) (including a list of Argentine vessels sunk within the zone).
B. British Exclusion Zones

In World War I, the British adopted what has been called a "long-distance blockade,"114 in reprisal115 for the declaration by Germany of the waters around the British Isles as a "war zone."116 In essence, the British prohibited passage by vessels whose destination or origin was Germany.117 Ships intercepted, whether bound for German or neutral territory, were subject to compulsory deviation to Allied ports, where cargo was discharged, contraband118 condemned,119 and enemy goods120 seized. Discharged cargo, other than contraband, was not confiscated and no penalty attached to vessels carrying non-contraband.121 A later British Order-in-Council122 modified this system to provide a legal presumption of enemy character for ships and goods intercepted, thus allowing condemnation by the British Prize Courts.123

The United States, the principal neutral power at the time,124 strongly objected to the British reprisal blockade, giving three major grounds.125 First, the law of blockade did not recognize interference with trade to neutral ports,126 such as the

114. OPPENHEIM-LAUTERPACHT, supra note 6, at 792.
115. Id. See also COLOMBOs, supra note 108, at 740.
116. Tucker, supra note 10, at 305-06.
117. Id.
118. See supra note 92. The expansive nature of the contraband list was a notable development of World War I; the vast increase in the number of items which were considered contraband made the British system a target of serious neutral protest. COLOMBOs, supra note 108, at 682-83.
119. Condemnation is defined in admiralty law as the judgment of a court, i.e., a Prize Court, by which, inter alia, a vessel lawfully seized for an alleged violation of neutrality may be forfeit to the seizing government. BLACK's LAW DICTIONARY 264 (5th ed. 1979). The title to goods or vessels lawfully condemned by a Prize Court passes to the captor state with no compensation due the former owner. SCHWARZENBERGER, supra note 16, at 304.
120. "Enemy goods" are goods of enemy origin, ownership, or destination. Tucker, supra note 10, at 306.
121. Id.
122. Order in Council of February 16, 1917, reprisal for the German declaration of a war zone for unrestricted submarine warfare. Id. See supra notes 103, 106, 107.
123. Black's Law Dictionary defines Prize Courts as:

Courts having jurisdiction to adjudicate upon captures made at sea in time of war, and to condemn the captured property as prize . . . . In England, the admiralty courts have jurisdiction as prize courts, distinct from the jurisdiction on the instance side. A special commission issues in time of war to the judge of the admiralty court, to enable him to hold such court. In the United States, the federal district courts have jurisdiction in cases of prize. 28 U.S.C.A. § 1333.

BLACK's LAW DICTIONARY 1080 (5th ed. 1979)

124. U.S. neutrality was declared at the commencement of both World Wars. OPPENHEIM-LAUTERPACHT, supra note 6, at 637-38. See also COLOMBOs, supra note 108, at 665-70. The United States adopted a position of neutrality as early as 1818. OPPENHEIM-LAUTERPACHT, supra note 6, at 631-32, 668.
125. OPPENHEIM-LAUTERPACHT, supra note 6, at 792-93; Tucker, supra note 10, at 308-09. Though the British were not consistent in their use of the term "blockade," no other legal doctrine, save reprisal, was advanced; moreover, the United States chose to rely on blockade doctrine for the basis of its protest. Id.
126. The United States based its first objection on traditional blockade doctrine and Article 18 of the
ports of Northern Europe, as legitimate.127 Second, the British system did not affect trade between the Scandinavian countries and Germany,128 and thereby violated the impartiality, or universality, required of a legal blockade.129 Third, continued German trade with Scandinavia vitiated the effectiveness of the blockade.130 The British response was both general and specific, stating that the "long-distance" blockade was a reasonable adaptation of traditional law to modern circumstances,131 and thus remained in substantial conformity with the spirit of blockade.132 In further support of the British case were genuine British efforts to honor legitimate neutral rights133 and the actual high order of effectiveness of the blockade.134

Early in World War II,135 the British reinstated the same basic "long-distance blockade" on Atlantic commerce. In the summer of 1940,136 however, the British initiated a new series of measures to restrict neutral trade and isolate Germany, the "Navicert" system.137 This system was essentially one of control, requiring ships engaged in neutral trade to obtain prior British certification and approval of cargo and routes.138 Warship interception on the high seas provided enforcement for the system;139 failure to comply with the British procedure140 entailed Declaration of London, which prohibited a blockade that prevented access to neutral ports. See infra notes 207-08.

127. Tucker, supra note 10, at 308. The British "cordon" was placed so distant from the German coast that neutral ships bound for neutral ports in Scandinavia were forced to pass through the blockade. Id.

128. Id. at 308. The United States also noted that Great Britain exported large quantities of goods to Norway, Sweden, Denmark, and Holland, neutral nations within the confines of the British blockade. Id. at 309-10 n.66. Since, by virtue of the blockade's action, this trade was exclusive, it appeared that Great Britain was illegitimately profiting from its blockade. Id.

129. Id. at 308. See infra note 209.

130. Tucker, supra note 10, at 308. A legal blockade must be "effective." See infra notes 210-24 and accompanying text. The United States contended that British failure to halt German trade across the Baltic rendered the British blockade ineffective in its entirety. Tucker, supra note 10, at 308.

131. OPPENHEIM-LAUTERPACHT, supra note 6, at 793 n.1.

132. Id.; Tucker, supra note 10, at 308.

133. OPPENHEIM-LAUTERPACHT, supra note 6, at 793 n.1. The British made every effort to discriminate between bona fide neutral trade and trade destined for Germany, while the British restrictions which were imposed entailed less drastic penalties for breach than did traditional law. Id.

134. Tucker, supra note 10, at 310.

135. On November 27, 1939, an Order in Council instituted largely the same system as had been used by Great Britain in World War I. OPPENHEIM-LAUTERPACHT, supra note 6, at 795.

136. On July 31, 1940, Statutory Rules and Orders, 1940, No. 1436 instituted the Navicert system. Id. at 795-96.

137. Tucker, supra note 10, at 313. A good description by a German Prize Court of the Navicert System may be found in Judgment of Dec. 18, 1942, The Ole Wegger, Supreme Prize Tribunal, Germany, 12 ANN. DIG. PUB. INT'L L. 532 (1949).

138. Tucker, supra note 10, at 314. The system required, inter alia, any ship bound for or departing from an enemy port or a port through which goods might reach an enemy, to obtain both a ship Navicert and, for any cargo, a separate cargo Navicert. Id.

139. Id. at 312.
seizure and a legal presumption of enemy character, making condemnation by the Prize Court of cargo, vessel, or both highly likely.\textsuperscript{141}

Both the original British "blockade" of 1939 and the later Navicert system were again justified as acts of reprisal,\textsuperscript{142} premised on alleged violations of international law by Germany in its unrestricted use of submarines and sea mines.\textsuperscript{143} Though there was some neutral protest over the British system, the generally sympathetic conduct of the United States lessened the impact of such protests.\textsuperscript{144}

C. German Exclusion Zones

On February 4, 1915, prior to Great Britain's declaration\textsuperscript{145} of its long-distance blockade in World War I, Germany declared the waters around the British Isles a war zone.\textsuperscript{146} All enemy vessels found therein were liable to destruction on sight.\textsuperscript{147} Germany provided neutral ships with "safe zones," but warned that entry into the war zone entailed peril for which the German government could not be held responsible.\textsuperscript{148} Though not explicitly stated, the method of enforcement was to be the submarine.\textsuperscript{149} The German war zone did result in the destruction of many vessels, most notably the \textit{Lusitania}.\textsuperscript{150} Outrage and pressure

\textsuperscript{140} Such failure to comply could have been either failing to carry a ship Navicert, or transporting goods partly or completely without cargo Navicert authorization. \textit{Id.} at 314.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Oppenheim-Lauterpacht, supra note 6, at 792, 795; Colombos, supra note 108, at 740-41, 747-48.}

\textsuperscript{143} The British retaliatory Orders in Council of World War I were premised on the alleged illegality of the German war zones, see \textit{supra} notes 103, 106, 107, 122, while German unrestricted submarine warfare and indiscriminate mine-laying provided the legal basis for the British reprisals of World War II. \textit{Colombos, supra note 108, at 740, 746.}

\textsuperscript{144} Although the United States reserved the right to claim compensation for damages which might accrue, \textit{Oppenheim-Lauterpacht, supra note 6, at 795 n.4}, from the war's beginning and increasingly until U.S. direct involvement in hostilities in 1941, the neutrality practiced by the United States was tilted toward aiding the Allies. \textit{Id.} at 637-41.

\textsuperscript{145} Germany's war zone was, in fact, the occasion prompting the British reprisal. See \textit{supra} notes 114-15 and accompanying text. On November 3, 1914, Britain had declared the entire North Sea a "military area," thereby creating a theoretical basis for a German reprisal. Mallison, \textit{supra note 103, at 67. Although Britain did lay mines throughout the North Sea, it provided safe routes to neutral ports and accepted responsibility for neutral safety, actions sharply in contrast with the German retaliation. Tucker, \textit{supra note 10, at 297 n.35; Oppenheim-Lauterpacht, supra note 6, at 681-82. Thus, a contention that Germany's war zone was a legitimate reprisal for the British mine barrage in the North Sea should be dismissed as invalid due to the disproportionality of the German retaliation. See infra note 278 and accompanying text. Contra Mallison, supra note 103, at 67. Mallison does not detail the reasoning in support of his conclusion that the German war zone was a legitimate reprisal action. On this issue, and throughout the cited work, Mallison's position on the legality of war zones and German reprisals remains, as far as the present author can determine, unique.}

\textsuperscript{146} See, e.g., \textit{Oppenheim-Lauterpacht, supra note 6, at 678.}

\textsuperscript{147} Tucker, \textit{supra note 10, at 297 n.36.}

\textsuperscript{148} \textit{Id. See also supra note 102.}

\textsuperscript{149} See Mallison, \textit{supra note 103, at 62-63.}

\textsuperscript{150} See, e.g., \textit{Oppenheim-Lauterpacht, supra note 6, at 489. The case of the \textit{Lusitania} is discussed in depth in a subsequent admiralty decision in U.S. court. The \textit{Lusitania}, 251 F. 715 (S.D.N.Y. 1918).}
from the world's neutrals, especially the protests issued by the United States, induced Germany to grant guarantees of safety for passengers and crews of vessels attacked in the war zone. 151 This change of policy effectively suspended German operations in the war zone until 1917. 152 On February 1, 1917, Germany gave notification that, as reprisal for Britain's continuing illegal blockade of Germany, 153 a war zone for unrestricted submarine operations had been established around the British Isles and France. 154 All ships, enemy or neutral, would be destroyed on sight. 155 Moreover, because of the British use of "Q-ships," armed anti-submarine vessels disguised as merchant ships, German submarines would attack without warning. 156 This was the first of the absolute war zones.

In World War II, Germany again declared an "operational" zone around Great Britain and France, 157 warning neutrals 158 that passage through these waters was not safe. 159 Though initially German submarines gave the intercepted vessels' crews time to abandon ship, British anti-submarine efforts soon forced discontinuance of this practice and attack without warning became standard. 160 The Germans also employed aircraft and undisclosed mine fields to enforce the war zone. 161

D. Legality of Exclusion Zones

The British version of the exclusion zone, the "long-distance" or quasi-blockade, 162 can be rationalized as essentially a fusion and extension of tradi-

151. See Mallison, supra note 103, at 63-64.
152. Id.
153. For the legal objections to Britain's blockade, see supra notes 124-30 and accompanying text.
154. Mallison, supra note 103, at 64-65.
155. Id.
156. Id. at 67.
157. Id. at 75. The operational zone's limits were approximately those of the "combat zone" declared by the United States in its Neutrality Act of 1939. The Neutrality Act of 1939, 54 Stat. 4 (1939), 22 U.S.C. § 441 et seq. (1940). Among restrictions on sales of goods to the belligerent powers, prohibition of credit extension to belligerents and carriage of passengers to the belligerent nations, the Act barred U.S. vessels or citizens from entering the declared Combat Zone. Id. See also Oppenheim-Lauterpacht, supra note 6, at 635 n.4. The Act was substantially repealed in November 1941. Act of November 17, 1941, 55 Stat. 764 (1941).
158. Mallison notes the German contention that "neutral" trade did not exist with Great Britain after 1939. Mallison, supra note 103, at 78. Although their nations professed neutrality, ships engaged in commerce with Great Britain complied with the British Navicert system and carried goods which were, by British definition, contraband. Id. There was no reason, therefore, to give preference to such "neutral" trade. Id. This does not, however, dispose of the basic illegality of destroying any merchant ships, enemy or neutral, without prior warning and provision for crew safety. See infra note 179.
159. Mallison, supra note 103, at 75-76; see Tucker, supra note 10, at 298 n.36. On August 17, 1940, Germany issued another warning note, informing neutrals that entry into the war zone entailed the possibility of destruction. Id.
160. See Oppenheim-Lauterpacht, supra note 6, at 491-92; Tucker, supra note 10, at 64 n.41.
161. Tucker, supra note 10, at 298 n.36.
162. See supra note 110.
tional doctrines of blockade and contraband. In both wars, the British sought to impose over neutral trade the degree of control allowed under international law but impossible to implement practically under conditions of modern warfare. Whether so radical an extension of doctrine can be considered legitimized through subsequent international acceptance is problematic, due to the invocation of reprisal by the British to justify their actions. For example, publicists have regarded the British “blockades” as legal reprisals, while addressing their legality as blockade per se with far less assurance. British Prize Courts have also hinged their support of the long-distance blockade on its characterization as reprisal. Thus, exclusion zones when used in the British quasi-blockade fashion may be legal, if only as a form of reprisal.

No such approval attends the German war zone. Characterized in their ultimate form as incorporating indiscriminate destruction by any means in of all vessels encountered in the expanse of the prohibited area, German war zones

163. See generally Tucker, supra note 10, at 311-12. As the contraband list came to include all or substantially all items of trade and the Navicert system provided an expanded mechanism for regulation and control, the concept of blockade per se merged with contraband enforcement and lost its separate identity. Presumably the utility of formal rules of blockade was also lost. Id.

164. See Tucker, supra note 10, at 296 n.34. Substantially all trade with the enemy could be defined as contraband under international law. Schwarzenberger, supra note 16, at 649. This, combined with an effective traditional blockade, could halt virtually all trade with an enemy. The British system accomplished this end, not inherently illegal, through use of its quasi-blockade or exclusion zone. Tucker, supra note 10, at 296 n.34.

165. Though customary international law may not have accepted broad changes in blockade doctrine, an extension of the doctrine of ultimate destination, see infra note 225, to include cargo, as well as the vessel itself, may have resulted from belligerent practice in the two World Wars. Schwarzenberger, supra note 16, at 649; Tucker, supra note 10, at 309 n.65, 311 n.70, 316-17.

166. Tucker, supra note 10, at 301-02. Although the “rather perfunctory” invocation of the reprisal justification for war zones may undercut, to some extent, the legal relevance of belligerent practice in so describing the zones, it should not be entirely dismissed. Id. at 305; see infra notes 167-69 and accompanying text.

167. International law has accepted the British exclusion zones as reprisals, which are permissible breaches of international law taken in retaliation for an enemy’s illicit conduct. See infra notes 275-84 and accompanying text.


169. See, e.g., Colombos, supra note 108, at 741-42. British Prize Courts held themselves competent to judge only whether the reprisal taken, i.e., the quasi-blockade, was a reasonable inconvenience to impose on affected neutrals, not the merit of the executive’s decision to take the reprisal. Id. This is in contrast to other European Prize Court practice, specifically that of the German Prize Courts, which held that all measures relating to the Executive’s conduct of war were outside judicial competence. Id. at 743. See also Tucker, supra note 10, at 307 n.60. For representative British Prize Court cases, see The Stigstad, [1919] A.C. 279; The Leonora, [1919] A.C. 974.

170. Tucker, supra note 10, at 307. The legality of exclusion zones as reprisals is a separate issue, dependant on reprisal doctrine. See infra notes 290-95 and accompanying text.

171. See, e.g., Oppenheim-Lauterpacht, supra note 6, at 683 n.1.

172. Submarines, contact mines, and aircraft were employed. Id.; see supra note 157.
have enjoyed little, if any, recognition as legitimate. The Nuremberg Tribunal, specifically addressing submarine attacks by Germany within its operational zone, gave no weight to the German rationale that unrestricted submarine warfare was justified legally, based solely on the declaration of a war zone. Recognition of such a claim would entail the abandonment of all legal limitation on the conduct of war, as presumably within a legally recognized war zone, belligerents would have carte blanche to operate as they perceive necessary. Clearly, there is no merit in a proposed rule of law that functions to sanction lawlessness. In the international law of war, new weapons or changed circumstances do not automatically create new law. Similarly, mere notification of an intent to commit an illicit act at a certain place will not suffice to make the act legal.

E. The Iraqi Exclusion Zone

Iraq's declaration of a fifty mile exclusion zone around the Iranian oil facility at Kharg Island may be readily distinguished from the recognized operational and defensive zones. The clear and stated purpose of the Iraqi exclusion zone


175. The Tribunal made its comments in the context of the trial of Admiral Doenitz, charged with, inter alia, waging unrestricted submarine warfare. Mallison, supra note 103, at 77.

176. Id. at 79; Tucker, supra note 10, at 302 n.45. The Tribunal did not sentence the accused, Admiral Doenitz, for the charge of unrestricted submarine warfare, citing what it described as similar practice by the Allied powers, i.e., U.S. unrestricted submarine warfare against the Japanese in the Pacific and Great Britain's order to sink on sight all ships in the Skaggerak. Id. As noted, the U.S. zone did not affect neutral shipping. See supra note 113. The British zone in the Skaggerak was imposed during the German invasion of Norway and closely resembled an operational zone and was therefore distinguishable from the German zones. See Oppenheim-Lauterpacht, supra note 6, at 493 n.1.

177. In the German zones, for example, neutral merchant shipping could expect to be treated as enemy warships, i.e., destroyed on sight by any available means. See Tucker, supra note 10, at 56. Acceptance of such an exclusion zone would entail a virtual abandonment of claims to neutrality rights, see id., at 301, and approval of essentially lawless warfare. See Colombos, supra note 108, at 745-47; Schwarzenberger, supra note 16, at 432-33.

178. See Schwarzenberger, supra note 16, at 650-51. Thus, when a Japanese court considered the legality of new weapons, specifically the atomic bomb, it held that such weapons must be "subjected to the examination of positive international law." Judgment of Dec. 7, 1963, District Court of Tokyo, 32 Ann. Dig. Pub. Int'l L. 627, 628-29 (1966). In this case, the Japanese court found the use of atomic bombs against the cities of Hiroshima and Nagasaki to have been an "illegal act of hostilities" under international law. Id. at 627.

179. The destruction of unarmed merchant vessels, without sufficient warning and provision for crew safety, is an illicit act under the international laws of war. See, e.g., Colombos, supra note 108, at 786-88. The prohibition is even more stringent as regards neutral merchant vessels. Id. at 791.

180. That is, the attacks could be made within a declared zone virtually coextensive with the area of the ocean, see supra note 103, or essentially any time a vessel is at sea.

181. See Tucker, supra note 10, at 304.

182. See supra note 5 and accompanying text.

183. See supra notes 93-101 and accompanying text.
is to halt Iranian oil exports from Kharg Island. No serious allegation could be advanced by Iraq that the zone is defensive of Iraqi sea approaches or protective of neutral shipping, which are the legitimate motivating purposes of the recognized zones. The Iraqi zone may be treated, therefore, as one of the two types of exclusion zones created by international practice in this century: either quasi-blockade or war zone.

Iraqi enforcement of the zone, characterized by indiscriminate attack without warning and with virtually no provision for crew safety, precludes its consideration as a quasi-blockade. In fact, the Iraqi exclusion zone closely resembles the type of unrestricted warfare Germany conducted in its declared "operational zone" around the British Isles and in the Atlantic Ocean during World War II. Thus, just as German war zones failed to justify acts contrary to the law, so too must the Iraqi zone fail. Moreover, though Germany retained the possibility of arguing that its war zones were legal reprisals for British violations of international law, Iraq has neither raised such a claim, nor does it appear such a claim exists. If Iraq is to support legally its attacks on neutral shipping in the Persian Gulf, it must seek to do so under the more traditional doctrine of maritime blockade.

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184. See, e.g., TIME, Apr. 9, 1984, at 38.
185. See infra Appendix I for a map of the region. Iraqi territory on the Persian Gulf is limited to a forty mile corridor of land, bordered by the disputed Shaat-al-Arab to the north. Kharg Island is more than 100 nautical miles to the southeast of the Iraqi littoral. The exclusion zone, the radius of which is fifty nautical miles around Kharg Island, neither reaches nor protects Iraqi soil.
186. See supra notes 99-100.
187. See supra notes 110-11.
188. The great majority of attacks on merchant ships have been made by jet aircraft-launched cruise missiles - the French export Exocet. See, e.g., N.Y. Times, Dec. 4, 1984, at A12, col. 1. Such missiles are usually launched at 25 to 35 nautical miles from the target, using the aircraft's radar to make initial contact. See THE SUNDAY TIMES OF LONDON, WAR IN THE FALKLANDS 167-75 (1982) for a description of Exocet tactics. Clearly, no warning is provided and no time given for crew evacuation. The indiscriminate nature of the attacks is borne out by a statement of the Iraqi Information Minister, "How can we know which ship our rockets hit?" TIME, June 11, 1984, at 36.
189. The hallmark of a quasi-blockade, control of neutral trade, see supra notes 163-64 and accompanying text, is conspicuously missing from the Iraqi exclusion zone. Another fact is also pertinent: the British reprisal of quasi-blockade did not entail the loss of neutral life. See COLOMBO, supra note 108, at 530. The Iraqi attacks, on the other hand, have frequently entailed death and injury to the crews of neutral vessels. See, e.g., Boston Globe, Dec. 16, 1984, at 2, col. 6.
190. See supra notes 157-61 and accompanying text.
191. See supra notes 173-81 and accompanying text.
192. See supra notes 145, 153.
193. In fact, the only allegation of illegal acts of warfare has been levied against Iraq for use of chemical weapons, an action prohibited by international law. See J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 556 (2nd ed. 1959). Iraq has allegedly employed these illicit weapons against Iranian infantry. See TIME, Mar. 19, 1984, at 28; Evans & Campany, supra note 80, at 38.
IV. THE DOCTRINE OF BLOCKADE

A. Origin and Development of Blockade

The traditional doctrine of maritime blockade was a recognition under customary international law of a belligerent’s great interest in interrupting its opponent’s trade with neutrals,194 thereby weakening the enemy’s war effort.195 The right of belligerent blockade, in conjunction with contraband doctrine,196 was an integral feature of neutrality rights,197 providing necessary means for balancing belligerent and neutral rights198 and for maintaining the international economic order.199 The rules of blockade under customary law, for the most part formulated in the nineteenth century,200 were largely codified201 in the Declaration of Paris of 1856202 and in the later and unratified203 1909 Declaration of London.204

194. See, e.g., Tucker, supra note 10, at 283-84. The traditional distinction between strategic and commercial blockades, the former involving simultaneous and coordinated land and sea operations and the latter applying to sea operations only directed at an enemy’s commerce, Colombos, supra note 108, at 716-17, has lost much of its importance, given general acceptance of both forms of blockade under international law. See Oppenheim-Lauterpacht, supra note 6, at 770.
196. See supra note 31.
197. See, e.g., Oppenheim-Lauterpacht, supra note 6, at 768-69.
198. See supra notes 29-30.
199. Id. For example, the desire to preserve world trade led the United States to oppose the institution of blockade, until forced to impose its own blockade against the Confederate States in the Civil War. See Colombos, supra note 108, at 716.
200. See Oppenheim-Lauterpacht, supra note 6, at 768-69; Colombos, supra note 108, at 716. Though blockades were instituted by the Dutch as early as 1584, it was in the period of the Napoleonic Wars and after that usage created the customary law of blockade. Id. See also C.H. Stockton, Outlines of International Law 57-59 (1914)(historical survey of the traditional law).
202. 115 Parry’s T.S. 2 The four points which constitute the substance of the Declaration of Paris are as follows:
   (1) La course est et demeure abolie;
   (2) La pavillon neutre couvre la marchandise ennemie, à l’exception de la contrabande de guerre;
   (3) La marchandise neutre, à l’exception de la contrabande de guerre, n’est pas saisissable sous pavillon ennemi;
   (4) Les blocus, pour être obligatoires, doivent être effectifs, c’est-à-dire, maintenus par une force suffisante pour interdire réellement l’accès du littoral de l’ennemi. ((1) Privateering is and remains abolished; (2) The neutral flag covers enemy goods, with the exception of contraband of war; (3) Neutral goods, with the exception of contraband of war, are not subject to seizure under an enemy flag; (4) Blockades, in order to be obligatory, must be effective, that is to say, maintained by a force sufficient really to interdict access to an enemy’s coast.)
Id. at 2-3. The Declaration was essentially a codification of recognized principles. Myers, supra note 201, at 571.
203. At the outbreak of World War I, the Declaration of London, as yet unratified, was adopted in part by the Allies, only to be abandoned by 1916. Oppenheim-Lauterpacht, supra note 6, at 769. The Allies found themselves hard pressed to apply the formal rules of the Declaration, especially those relating to the standardized contraband list. See Tucker, supra note 10, at 187-88. In many of the provisions regarding blockades, however, the Declaration was representative of customary international law and therefore, though unratified, retains validity. See Myers, supra note 201, at 573-81.
204. 208 Parry’s T.S. 338. See Stockton, supra note 200, at 550-97 for committee commentary on
The modern law of belligerent blockade\textsuperscript{205} is comprised of four major elements. First, the belligerent instituting the blockade must give non-participating states notification of its existence, duration, and bounds.\textsuperscript{206} Second, a blockade may only be directed against an enemy's ports or coasts, or those occupied by the enemy;\textsuperscript{207} blockading forces cannot bar access to neutral ports or coasts.\textsuperscript{208} Third, a blockade must be enforced impartially, against all vessels.\textsuperscript{209} Finally, a blockade must be effective to be legal.\textsuperscript{210}

This last and perhaps most important\textsuperscript{211} element of effectiveness is difficult to define closely, as it is essentially a question of fact\textsuperscript{212} and therefore highly dependent on evolving technology and changing circumstance.\textsuperscript{213} The formulation of the standard in Article 2 of the Declaration of London, based on the Declaration of Paris\textsuperscript{214} and similar to the U.S. Supreme Court's interpretation of the requirement,\textsuperscript{215} defines "effective" as meaning "maintained by a force sufficient actually to interdict access to the enemy's coast."\textsuperscript{216} Publicists, describing the effectiveness requirement as distinguishing a legal blockade from a so-called "paper blockade"\textsuperscript{217} or privateering,\textsuperscript{218} have refined the formulation of the Declaration. Admiral Stockton was the U.S. representative to the London Naval Conference which reported the Declaration.

\textsuperscript{205} Belligerent blockades may be distinguished from so-called "pacific" blockades, which are generally considered measures short of war. See COLOMBOS, supra note 108, at 465-69; JESSUP, supra note 11, at 176-77.

\textsuperscript{206} See, e.g., COLOMBOS, supra note 108, at 722; Declaration of London, Arts. 8 and 9, 208 Parry's T.S. 338, at 345.

\textsuperscript{207} SCHWARZENBERGER, supra note 16, at 629.

\textsuperscript{208} Id.; Declaration of London, Art. 18, 208 Parry's T.S. 338, at 344.

\textsuperscript{209} SCHWARZENBERGER, supra note 16, at 629; Declaration of London, Art. 5, 208 Parry's T.S. 338, at 343.

\textsuperscript{210} OPPENHEIM-LAUTERPACHT, supra note 6, at 778; Declaration of London, Art. 2, 208 Parry's T.S. 338, at 343. See also Declaration of Paris, supra note 202, § 4.

\textsuperscript{211} It is effectiveness which distinguishes legal blockades from "paper" blockades. See infra note 217. Paper blockades may be directed against the enemy, impartially applied, and properly declared, but nonetheless be invalid through lack of effectiveness. See generally COLOMBOS, supra note 108, at 717-18.

\textsuperscript{212} See, e.g., Tucker, supra note 10, at 288-89 n.10. Professor Tucker points out that a blockade's effectiveness is not merely a question of fact, but includes some matters of law. Id. See infra notes 266-68 and accompanying text.


\textsuperscript{214} Tucker, supra note 10, at 288 n.10.

\textsuperscript{215} The Supreme Court cites the instructions of the Secretary of the Navy, General Order No. 492: "A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous." The Olinde Rodrigues, 174 U.S. at 515. The Court then adds, that the danger must be "real and apparent." Id. The "danger" to which the Court refers is clearly danger of capture. Id. at 516. See also infra note 224.

\textsuperscript{216} In its original French text, the Declaration of London defines an effective blockade as "maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi." Declaration of London, Art. 2, 208 Parry's T.S. 338, at 343.

\textsuperscript{217} "Paper" blockades were an archaic belligerent practice of declaring an enemy coast or port
still further. Under this refined standard, an effective blockade must pose a real danger of probable capture to ships attempting to enter or leave the blockaded area.\textsuperscript{219} Thus, the effectiveness of a blockade may be evaluated generally\textsuperscript{220} as a question of fact,\textsuperscript{221} and will depend on such information as the composition and capabilities of the blockading force,\textsuperscript{222} the size and configuration of the area blockaded,\textsuperscript{223} and whether all these circumstances actually render entry and exit dangerous to the point of probable capture.\textsuperscript{224}

A vessel in breach\textsuperscript{225} of a legal blockade, no matter what its cargo or origin,\textsuperscript{226} is subject to seizure by the blockading forces and condemnation\textsuperscript{227} through proceedings in a national Prize Court.\textsuperscript{228} Destruction of a seized vessel is only permissible under conditions of strict necessity\textsuperscript{229} and only after a sufficient guarantee of crew safety.\textsuperscript{230}

subject to blockade without the commitment of sufficient naval force to enforce the declaration. See, e.g., Tucker, \textit{supra} note 10, at 288.

218. Private ships were issued letters of marque, authorizing them to seize enemy vessels on the high seas. Schwarzenberger, \textit{supra} note 16, at 374-75. The Declaration of Paris abolished the practice. \textit{Id}. 219. See Colombo, \textit{supra} note 108, at 718. Professor Colombos cites the “most probable” standard with approval. \textit{Id}. Lauterpacht notes that an effective blockade will make a vessel’s capture “probable.” Oppenheim-Lauterpacht, \textit{supra} note 6, at 782.

220. In a situation where a belligerent seeks to enforce a blockade through means violative of firmly established rules of war, e.g., unrestricted submarine warfare, a blockade may be ineffective as a matter of law. See Tucker, \textit{supra} note 10, at 289; see infra notes 266-68 and accompanying text.

221. See \textit{supra} note 212; The Olindo Rodrigues, 174 U.S. at 513.

222. See Colombo, \textit{supra} note 108, at 718-19. For example, the addition of aircraft to a blockading force would provide for greatly increased surveillance capability. \textit{Id}. at 719.

223. For example, Professor Colombos notes that, in the Crimean War, the Latvian port of Riga was effectively blockaded by a single warship stationed in the three mile wide channel which gave access to the port. \textit{Id}. at 718.

224. Oppenheim-Lauterpacht, \textit{supra} note 6, at 782. Publicists assume that “danger” means danger of capture; throughout the literature there is no recognition of destruction as the risk run by vessels in breach of a blockade. See, e.g., Tucker, \textit{supra} note 10, at 289.

225. “Breach” of a blockade is unpermitted passage to or from an effectively blockaded port. Oppenheim-Lauterpacht, \textit{supra} note 6, at 782. The doctrine of continuous voyage, or ultimate destination, carried the possibility of breaching a blockade to its logical extreme; a vessel might be held to be in attempted breach of a blockade when bound for a blockaded port, even if an unblockaded port were the intermediate destination. See \textit{id}. at 785-86 for a review of the U.S. cases which gave rise to the doctrine. Though initially resisted by some writers and explicitly rejected by Articles 17 and 19 of the unratified Declaration of London, belligerent practice has been consistent in its acceptance of the doctrine. \textit{Id}. at 786 n.5.

226. A vessel in breach of a legal blockade, regardless of neutral standing or the non-contraband character of its cargo, was subject to seizure simply by virtue of its status as a blockade runner. See generally Colombos, \textit{supra} note 108, at 729.

227. See \textit{supra} note 119.

228. See, e.g., Oppenheim-Lauterpacht, \textit{supra} note 6, at 790. See \textit{supra} note 123 for a definition of Prize Courts.

229. Oppenheim-Lauterpacht, \textit{supra} note 6, at 487. Though practice differed as to whether the necessity of destruction was strict, according to the British rules, or merely militarily convenient, as under the Confederate commerce raiders’ practice, it was generally established that destruction of prizes must be the exception, rather than the rule. \textit{Id}. The Declaration of London, Articles 48 and 49, codifies this rule. Declaration of London, arts 48 and 49, 208 Parry’s T.S. 338, at 350.

230. Oppenheim-Lauterpacht, \textit{supra} note 6, at 488-89; Tucker, \textit{supra} note 10, at 350. There is
B. Modern Application of Blockade Doctrine

The international practice of the belligerent parties in the two World Wars had a significant conceptual impact on the law of blockade. The technological changes of modern warfare, including new weapons such as submarines, aircraft, and mines, rapidly made the institution of the classic, close blockade obsolete through impossibility. At the same time, the previously unknown pressures of general and total war rendered the aggregate belligerent interest in economic disruption of the enemy far greater than residual concern for neutral commerce. Thus, under the guise of reprisal, belligerents in both wars greatly expanded their measures of blockade through the use of exclusion zones, abandoning traditional law or simply ignoring it as inapplicable, thereby waging far more effective economic warfare.

In the wake of the World Wars, the viability of the rules of blockade under customary law is unclear. Legally, the effect of international practice in the two wars cannot be said decisively to overturn existing blockade doctrine; all the belligerent actions leading to expansive maritime blockades were taken as reprisals, and not as modifications of blockade doctrine per se. Thus, the rules of consensus on the requirement that the captor of a prize must provide for the safety of the crew and retain the ship's papers, the latter to facilitate subsequent adjudication. Id. See also Declaration of London, art. 50, 208 Parry's T.S. 338, at 350.

231. Belligerent practice may not have had significant legal impact on blockade doctrine. See infra notes 239-41 and accompanying text. Some writers, notably Lauterpacht, doubt the applicability of blockade principles after the extremes of belligerent practice in the two Wars. See OPPENHEIM-LAUTERPACHT, supra note 6, at 795-97.

232. See, e.g., COLOMBO, supra note 108, at 734-35.

233. See OPPENHEIM-LAUTERPACHT, supra note 6, at 796 n.1.

234. See supra notes 146-43, 153-56, 166-67 and accompanying text.

235. See supra notes 90-113 and accompanying text.

236. For example, traditional law was abandoned in the case of the Declaration of London, which was never formally ratified; the Allied Powers officially withdrew their previous partial application of the Declaration on July 7, 1916. See Tucker, supra note 10, at 188 n.13.

237. For example, in response to neutral protests that the "long-distance" blockade instituted by Great Britain in 1915 violated the rules of blockade, the British claimed that the "peculiar circumstances" in which the blockade of Germany was necessarily conducted made the traditional rules inapplicable. See OPPENHEIM-LAUTERPACHT, supra note 6, at 793 n.1.

238. See id. at 794-95. The economic isolation of the Central Powers was very effective, given the comprehensive nature of the British reprisal controls over commerce to Europe. Id. With the entry of the United States into the war in 1917, the Central Powers were completely cut-off from neutral commerce. Id. at 795.

239. Neutrality rights in general may be anachronistic. See supra notes 51-64 and accompanying text. Moreover, given the modern technology of warfare, blockade rules may no longer be practical. See supra note 232 and accompanying text.

240. See supra notes 115, 142 and accompanying text. The legality of these blockades was judged in accordance with their legitimacy as reprisals. See supra notes 145, 168-70.

241. See Tucker, supra note 10, at 316. Though, as noted supra note 165, belligerent practice may have established the doctrine of ultimate destination as applicable to both cargo and vessel.
blockade may be regarded as remaining unchanged by treaty or practice since the conclusion of the unratified Declaration of London in 1909.242 In the practical application of the international law of war, however, the World Wars leave little doubt that in subsequent general wars, belligerent interests would outweigh concern for neutral trade and make formal blockades strategically undesirable,243 and technological changes in warfare would make formal blockades tactically impossible.244

Some utility for blockade doctrine, as with customary rights of neutrality in general,245 may nonetheless be found in limited conflicts and special situations. Where the interests and power of neutrals far outweigh those of the localized belligerents, observance of the formalities and limitations of blockade doctrine may be expected of or forced upon belligerents by the international community.246 In such circumstances, the only international law available would be the customary rules of blockade.247

The Persian Gulf War may be such a situation. The belligerents, Iran and Iraq, are fighting a localized war over local issues.248 Virtually the entire international community has chosen to remain neutral.249 The primary concern raised by the war, at least for the non-participants and especially nations of the industrialized West, is the maintenance of an uninterrupted flow of oil from the Persian Gulf.250 The United States has declared publicly that it will suffer no disruption of this commerce251 and may be willing to use military force to ensure

242. This may overstate an argument largely technical in its merit. Lauterpacht contends that, though technically inapplicable to blockade doctrine, belligerent practice in the wars must be regarded as "development of the latent principle of blockade," presumably along the lines of the British Navicert blockade. See OPPENHEIM-LAUTERPACHT, supra note 6, at 796.


244. See supra note 232. See also J. SPAIGHT, AIRPOWER AND WAR RIGHTS 479-97 (3d ed. 1947). Spaight gives a descriptive account of the effectiveness of air attack on merchant ships through the two World Wars. The technical evolution of aircraft and guided missiles has vastly increased the potency of such attacks.

245. See supra notes 65-76 and accompanying text.

246. For example, in the Spanish Civil War, both Great Britain and Germany forced the Spanish Republican government to respect the legalities of neutral rights. See STONE, supra note 193, at 572 n.8; COLOMBOs, supra note 108, at 456-57.

247. Thus, after the 1949 conflict between Egypt and Israel, the Egyptian Prize Courts applied general rules of international law and specifically the Declarations of Paris and London. See 16 ANN. DIG. PUB. INT'L L. 587, 591 (1955).

248. See supra notes 1, 80.

249. Even the six nations bordering the Persian Gulf — Saudi Arabia, Kuwait, Bahrain, The United Arab Emirates, Qatar, and Oman — have officially declared themselves neutral. Nonetheless, they may be quietly supplying money to the Iraqis. N.Y. Times, Nov. 30, 1984, at A9, col. 1. The United States has also professed neutrality. See supra note 85.

250. See, e.g., TIME, Oct. 24, 1983, at 35. Approximately 40 percent of Western European oil, 13 percent of U.S. oil, and 60 percent of Japanese oil comes from Gulf exporters. Id. These percentages may have been reduced significantly in the last year. See Evans & Campany, supra note 80, at 41.

251. The Reagan Administration has repeatedly asserted that the United States would not "stand by and see the strait [of Hormuz] or the Persian Gulf closed to international traffic." TIME, June 4, 1984, at
its continuation.\textsuperscript{252} It may be useful, therefore, to evaluate the Iraqi exclusion zone\textsuperscript{253} under the customary law of blockade.

**C. The Legality of the Iraqi Exclusion Zone as Blockade**

The Iraqi exclusion zone as declared is a circle with a fifty nautical mile radius around Kharg Island.\textsuperscript{254} While this zone blocks passage to the island itself and to some additional ports in Iran,\textsuperscript{255} it does not necessarily interfere with access to neutral ports and coasts, and is therefore within the geographic limitations of a legal blockade's scope.\textsuperscript{256} Notification of the existence of the exclusion zone was made public and widely disseminated by the news media.\textsuperscript{257} The existence of the zone was also recognized by the U.N. Security Council shortly thereafter.\textsuperscript{258} Because the formal requirements for notification contained within the Declaration of London were never ratified,\textsuperscript{259} and because they were merely based on the diplomatic practice of the major European states at the time,\textsuperscript{260} a reasonable means of notification based on modern international practice should suffice.\textsuperscript{261} Iraq's declaration of the exclusion zone and the subsequent international debate and notoriety on the matter are clear evidence of adequate notice.\textsuperscript{262} The impar-
tiality of the Iraqi enforcement of the zone presumably has been demonstrated by the long list of nations whose ships have suffered attacks. 263

It is the element of effectiveness which Iraq’s exclusion zone cannot meet. As stated above, effectiveness is normally a question of fact which would require, at a minimum, a lengthy discussion of Iraqi tactics264 and the number of ships stopped as against the number which proceeded unmolested. 265 This evaluation need not be made, however, if the blockade’s method of enforcement is itself illicit. 266 In that circumstance, the blockade may be deemed ineffective as a matter of law. 267 The Iraqi attacks do not, in any way, purport to subject vessels intercepted in breach of the “blockade” to danger of capture and condemnation, only to the danger of destruction. 268 Iraq’s method of enforcement has been, in nearly every case, 269 attack by aircraft 270 armed with long-range guided missles. 261 Attacks without warning on merchant vessels and with no provision for crew safety are violations of international law. 272 Clearly, the Iraqi air attacks, illegal and unable by their nature to effect capture - the only available sanction for breach273 cannot be considered in the factual question of the putative blockade’s

263. See, e.g., N.Y. Times, Dec. 4, 1984, at A12, col. 1 (Cypriot supertanker attacked by Iraqis); Boston Globe, Dec. 16, 1984, at 2, col. 6 (Greek supertanker hit by Iraqi missile); Boston Globe, Jan. 8, 1985, at 4, col. 2 (Panamanian freighter struck by Iraqi missile). Exocet tactics and the use of radar make identification of ships attacked, and therefore discrimination among ships of different nations, unlikely. See supra note 188 and infra note 271.

264. Id. If every vessel entering the exclusion zone were attacked by Iraqi warplanes, the blockade would still be ineffective; by not subjecting the ships to the only legal blockade penalty, capture, the attacks are not even relevant to the question of blockade effectiveness. See Tucker, supra note 10, at 289.

265. See supra note 267.

266. See supra note 267. See supra note 264.

267. In some instances, Iraqi mines have damaged or sunk merchant ships. See Newsweek, June 4, 1984, at 18. For a brief discussion on mine warfare in international law, see Oppenheim-Lauterpacht, supra note 6, at 471-73.

268. See supra note 267. See also supra note 184.

269. Generally, the attacking aircraft have been French export Super Etendards. See N.Y. Times, Dec. 4, 1984, at A12, col. 1. Aircraft are not necessarily illegal in blockade enforcement; they must, however, conform to the same rules applicable to warships. See, e.g., Colombos, supra note 108, at 737. Practically speaking, it is difficult to conceive of a legal blockade enforced solely by aircraft; it would be necessary to have at least one warship to carry out visit, search, and capture. Tucker, supra note 10, at 289 n.13. During the Spanish Civil War, the neutral powers extended the limitations placed on the use of submarines against neutral shipping to aircraft. See Oppenheim-Lauterpacht, supra note 6, at 532.

270. Exocet missles have a maximum range of about 60 kilometers or a little more than 30 nautical miles, Combat Fleets of the World 1980-81 at 101 (J. Couhat, ed. 1980), though they are frequently launched at less than that distance. See supra note 188. These missles are independently guided after launch and cannot be fired as warning shots or aborted once fired; once having acquired a target, the missile’s radar should guide it to a direct hit. See Combat Fleets, supra this note at 101-02.

271. See supra note 179.

272. See supra notes 225-28 and accompanying text.
effectiveness. The lack of effective enforcement renders a blockade a legal nullity. Thus, Iraq cannot successfully invoke the doctrine of blockade to legitimize its attacks on neutral shipping in the Persian Gulf.

V. REPRISAL

A. Doctrine of Reprisal

Reprisal doctrine recognizes a belligerent's right to take actions or employ means not normally admissible under international law in order to compel from its enemy the cessation of illegal acts and compliance with international law in its conduct of warfare. Reprisals are regarded as a last resort, justifiable only when the enemy's illegality is serious and no other realistic method of redress is available. Proportionality applies and requires that a reprisal's scope or gravity not exceed that of the offense to be deterred. Some writers include a requirement that the reprisal action be directly related in nature to the original violation, though this is not generally held to be necessary. Finally, there is consensus that belligerent reprisals based on violations of international law must be directed at the offending belligerent. Difficulties in legal analysis arise when belligerent reprisals are directed seemingly at neutrals or affect neutral rights.

Reprisals that adversely affect neutral rights have been recognized as legal. The British quasi-blockades of World Wars I and II were considered legal

274. See, e.g., Schwarzenberger, supra note 16, at 628.
275. The discussion of reprisal in this Comment is limited to belligerent reprisals as distinguished from acts of retortion. Under customary law, acts of retortion are permissible measures of retaliation for another state's cruel, unfair, or otherwise objectionable, though technically legal, acts. See Colombo, supra note 108, at 738; Oppenheimer-Lauterpacht, supra note 6, at 134-35.
276. Tucker, supra note 10, at 151 n.5.
277. Id. at 152; Colombos, supra note 108, at 739.
278. Oppenheimer-Lauterpacht, supra note 6, at 141. Compare Tucker, supra note 10, at 153 n.9.
279. E.g., Colombos, supra note 108, at 739.
280. Id.
281. See Tucker, supra note 10, at 152, 153 n.9; Schwarzenberger, supra note 16, at 453.
282. See, e.g., Oppenheimer-Lauterpacht, supra note 6, at 139. It is necessary to distinguish the case of a belligerent entering neutral jurisdiction to prevent an illicit use of the neutral territory by its enemy. In the celebrated case of the Altmark, a German auxiliary vessel laden with British prisoners of war entered Norwegian waters to evade a pursuing British force. Id. at 695. After requesting and being refused the assistance of the Norwegian authorities, the British destroyer H.M.S. Cossack crossed into neutral waters and freed the British prisoners. Id. at 694. This was considered a case of "self-help," id. at 695, rather than a reprisal against a neutral. See Tucker, supra note 10, at 256.
283. Often, the stated object of a belligerent reprisal may be the enemy, but neutral ships become the actual targets. See supra notes 150, 155 and accompanying text.
284. Though Great Britain's quasi-blockades were arguably more clearly directed at its enemies than at neutrals, since neutral ships were not sunk. Nonetheless, because neutral ships were precluded from sailing to Germany, neutral rights to commerce without undue hindrance certainly were affected. See Tucker, supra note 10, at 305-06.
285. See supra notes 114-44 and accompanying text.
reprisals by British Prize Courts\textsuperscript{286} and by most writers.\textsuperscript{287} British assumption of an unprecedented degree of control over neutral shipping was held to be a proportionate response to Germany's illegal use of unrestricted submarine and mine warfare, and hence a legal reprisal,\textsuperscript{288} even though otherwise unjustifiable restrictions were placed on neutral rights of commerce.\textsuperscript{289} Germany's counter-reprisal,\textsuperscript{289} establishment of a war zone in which all vessels encountered were subject to immediate destruction,\textsuperscript{291} was not given legal sanction, however.\textsuperscript{292} The enormity of the German counter-reprisal's violation of international law\textsuperscript{293} far exceeded the gravity of the original violative act, the British quasi-blockade's interference with neutral trade.\textsuperscript{294} Thus, the German illegality remained unrelied by the palliative of reprisal.\textsuperscript{295}

A more basic flaw exists in both the German and British acts of reprisal and may be characteristic of any reprisal affecting neutrals.\textsuperscript{296} When the violation of international law upon which a belligerent reprisal is putatively based was originally directed against neutral trade, the right of reprisal must be deemed to accrue to the belligerent that is receiving the trade's benefit. Similarly, since a legitimate reprisal may only be directed at a belligerent,\textsuperscript{297} reprisal actions taken against neutral trade must be legally construed as actions against the offending belligerent. Legal acceptance of the British reprisals in the World Wars would seem to indicate that these legal constructions are valid.\textsuperscript{298} This may be troublesome, as doctrinal application of such a principle could allow belligerents to institute virtually any restrictive measure against neutrals under the easy cloak of reprisal.\textsuperscript{299}

\textsuperscript{286} See Colombos, supra note 108, at 741-42.
\textsuperscript{287} Id. at 750; Tucker, supra note 10, at 315; Stone, supra note 193, at 500, 503. Jessup has suggested a system similar to the British Navicert reprisal as a replacement for traditional doctrine should the need arise for rules governing blockades under the new, United Nations created, international order. See Jessup, supra note 11, at 219-20.
\textsuperscript{288} See, e.g., Colombos, supra note 108, at 741.
\textsuperscript{289} Id. at 742. The British Prize Courts held that Great Britain's reprisal was legitimate in that the degree of inconvenience suffered by neutrals as a result of the quasi-blockade was "reasonable," taking into account all the circumstances. Id. See also The Leonora, [1919] A.C. 974.
\textsuperscript{290} See supra notes 145-61 and accompanying text.
\textsuperscript{291} See supra note 160 and accompanying text.
\textsuperscript{292} See supra notes 173, 177 and accompanying text.
\textsuperscript{293} See supra note 179; Colombos, supra note 108, at 745-46.
\textsuperscript{294} Great Britain took pains to quiet neutral grumbling over the quasi-blockades, including diligent efforts to mitigate the inconvenience to legitimate commerce. See Stone, supra note 193, at 506-07. Moreover, the British blockade cost no non-combatant or neutral lives, Colombos, supra note 108, at 530, in great contrast with the German supposed counter-reprisal. Id. at 743.
\textsuperscript{295} See, e.g., Tucker, supra note 10, at 302 n.45.
\textsuperscript{296} See supra notes 283-84 (describing ways in which supposedly inter-belligerent reprisals may affect neutrals).
\textsuperscript{297} See supra note 282 and accompanying text.
\textsuperscript{298} See supra notes 286-87 and accompanying text.
\textsuperscript{299} See Tucker, supra note 10, at 258.
An alternative explanation for acceptance of the reprisal claims of the World Wars has been offered. Professor Robert W. Tucker, noting the legal insufficiency of equating the belligerent's interest in the affected neutral trade with a legal right to such commerce in order to provide a basis for an act of reprisal, suggests that "reprisal" practice in the World Wars is more accurately interpreted as a new limitation of the belligerent's obligation to respect neutral rights. Thus, in addition to the already recognized premise that a neutral's acquiescence in any belligerent's illegal acts absolves the opposing belligerent from the duty to honor that neutral's rights to greater degree, a belligerent may also base its conduct toward a neutral's shipping on the effectiveness of that neutral's efforts to police its rights. While this may not be a desirable rule, nor an accepted one, it does resolve the legal ambiguity of supposedly inter-belligerent reprisals which operate through restrictions on neutral rights.

Though the position of the law on reprisals which affect neutrals is not settled, it may be safe to assume that proportionate belligerent reprisals, premised on an enemy's violation of neutral rights and not themselves grossly violative of the basic rules of warfare, may be legally acceptable. On the other hand, characterization of flagrant violations of the rules of war in a disproportionate retaliation to an enemy's action as a legitimate reprisal will not suffice.

B. Iranian Reprisals in the Persian Gulf

Beginning in May 1984, Iran put into effect its oft asserted threat of retaliation for continued Iraqi attacks on commercial shipping in the exclusion

300. Id. at 257 n.28.
301. Id. at 255.
302. Id. at 254; Oppenheim-Lauterpacht, supra note 6, at 678.
304. If the effectiveness of each state's "policing" efforts is to be a limit on that state's neutral rights, neutral states may tend to rely on the use of force to protect their interests, thereby potentially widening conflicts. Thus, Saudi Arabia's destruction of two Iranians warplanes over the Persian Gulf, see Time, June 18, 1984, at 44, may be seen as a demonstration of the Saudis' resolve to preserve their rights.
305. Tucker, supra note 10, at 256 n.27. Tucker himself notes that his position is "far from being shared by many writers." Id.
306. The law on belligerent reprisals which affect neutrals ranges from Mallison's seemingly unconditional acceptance, see Mallison, supra note 103, at 66-67, to flat rejection as illicit. See, e.g., Tucker, supra note 10, at 255 n.24.
308. For example, the British quasi-blockades were widely considered legally acceptable reprisals. See supra notes 286-87 and accompanying text.
309. Destruction of merchant ships without provision for crew safety is a violation of the rules of war. See supra 179, 290 and 270.
310. See Tucker, supra note 10, at 302 n.45. The rejection of German war zones as legitimate reprisals clearly indicates that such extreme measures of retaliation, which primarily affect neutrals, are invalid under international law. See supra notes 171-81 and accompanying text.
311. See Maclean's Mag., May 28, 1984, at 30. The Iranians launched air attacks on a Kuwaiti tanker and a Saudi supertanker, heavily damaging the latter. Id.
312. See, e.g., Time, Feb. 27, 1984, at 83.
zone declared around the Iranian oil facility at Kharg Island. In the seven-month period following its first retaliatory action, Iran has committed several additional strikes. The ships fired upon were all neutral vessels, for the most part of nations outside the Persian Gulf region, engaged in the transport of Saudi or Kuwaiti oil far to the south of the Iraqi exclusion zone. Iran has called these attacks retaliatory in nature, taken in reprisal for Iraqi attacks on shipping bound for or departing from Iran. A determination must be made as to whether these attacks can be justified as legal reprisals under international law.

The basis for the putative reprisals is Iraqi enforcement of its exclusion zone through the employment of air-launched cruise missile attacks on intruding vessels. Assuming these attacks are illegal and therefore sufficient basis for a reprisal, the Iranians must claim the reprisal right accrues to them. While it is clear that the Iraqi attacks violate the rights of the neutrals whose ships have been attacked, there is no such clarity that Iranian rights, as distinguished from interests, have been violated, as there is no recognized belligerent right to neutral commerce. The legal acceptance of the British reprisals during the World Wars, however, provides some basis for an Iranian claim to reprisal

313. See supra note 5 and accompanying text. See also note 185.
314. In addition to the two vessels identified supra note 311, the following ships have been attacked in circumstances indicating Iran as the culprit (i.e., far outside the exclusion zone and with no subsequent Iraqi communique claiming credit for the attack): The Chemical Venture, a Liberian supertanker, Time, June 4, 1984, at 30; the Jag Pari, an Indian oil tanker, Boston Globe, Oct. 13, 1984, at 5, col. 1; the Gas Fountain, a Greek gas tanker, Boston Globe, Oct. 14, 1984, at 1, col. 2; a Kuwaiti supply boat, Boston Globe, Dec. 26, 1984, at 9, col. 1 (attack took place on Dec. 8); the Anga Cosmic, a Greek freighter, Boston Globe, Dec. 18, 1984, at 3, col. 1; the Kanchenjunga, an Indian supertanker, Boston Globe, Dec. 27, 1984, at 1, col. 5; the Serifos, a Greek tanker (missile apparently fired from an Iranian warship), Boston Globe, Jan. 28, 1985, at 3, col. 1. This list may not be complete, as no single, definitive source of information on the attacks is currently available.
315. The ships attacked include Greek, Liberian, Indian, Spanish, Kuwaiti, and Saudi vessels. See supra note 314.
316. After the first two attacks on ships registered to Persian Gulf nations, see supra note 311, only a single attack on a small Kuwaiti supply vessel has been reported. See supra note 314.
317. Generally, the attacks have taken place near the Saudi coast or in the central Gulf. See, e.g., Boston Globe, Oct. 14, 1984, at 1, col. 2.
319. No other explanation of the attacks' legitimacy has been offered by Iran, id., and any possible justification under traditional blockade doctrine is precluded by, inter alia, the illicit scope of attacks on ships bound to or from neutral ports. See supra notes 207-08 and accompanying text.
320. See supra note 188.
321. The position taken in this Comment is that the Iraqi attacks are illegal. See supra notes 188-93, 264-74 and accompanying text.
322. Reprisal rights accrue only to the injured state. See, e.g., Oppenheim-Lauterpacht, supra note 6, at 136; Tucker, supra note 10, at 257 n.28.
323. See supra note 16. Neutrals have a general right to continue commerce, subject only to the recognized restrictions of blockade and contraband. See supra notes 29-30 and accompanying text.
324. See Tucker, supra note 10, at 257 n.28.
325. Iran's interest, however vital, in maintaining its trade in oil cannot be equated with a right in international law, at least not for purposes of reprisal. Id.
326. See generally Tucker, supra note 10, at 257 n.28. In fact, the right involved is the neutral state's, under the scheme of neutrality rights. Id.; see supra note 16.
rights, despite the seeming logical incongruity. In addition, Iranian vessels have, on occasion, been attacked in the exclusion zone, providing on those occasions an independent basis for Iran’s assertion of such rights. The validity of Iran’s claim against Iraq’s exclusion zone attacks cannot be summarily dismissed.

Once one accepts the right of Iran to some reprisal, the important legal considerations become the target and manner of the reprisal actions. That is, a determination must be made of the reasonableness of Iranian attacks on neutral ships using methods similar to those which initiated the reprisal. The same theoretical questions regarding the belligerent’s right to take reprisal action for violation of neutrals’ rights also arise in connection with the valid target of a reprisal. If Iran does in fact have the right to retaliate for Iraq’s attacks, the only legitimate target for the retaliatory attacks would be Iraq. Here, any similarity to the British reprisals breaks down. The British system of quasi-blockade, instituted in reprisal for German submarine warfare, restricted the rights of neutral trade by cutting off commerce with Germany, which was certainly the target of the reprisals. Iran, in contrast, has attacked neutral ships trading with neutral nations; presumably such attacks are intended to bring neutral pressure upon Iraq to end the exclusion zone around Kharg Island. While possibly good political strategy, this reasoning cannot meet even the indirect linkage between the original perpetrator of an international illegality and the eventual object of the reprisal required by customary law. Thus, while the Iranian reprisals are arguably proportionate and clearly directed at obtaining a cessation of the Iraqi illegality, they are not directed at Iraq, the only

327. See supra notes 285-87, 298 and accompanying text.
328. See, e.g., Time, May 28, 1984, at 51 (Iraqis attack Iranian owned ship, the Tabriz).
329. See supra notes 278, 282 and accompanying text.
330. See supra note 289.
331. Nearly all the Iranian reprisal attacks have been made by aircraft firing rockets. See, e.g., Boston Globe, Oct. 14, 1984, at 1, col. 2; see also supra note 314.
332. See supra note 283, note 297 and accompanying text.
333. See supra note 282 and accompanying text. Either Iraq’s own ships, or at the very least, trade with Iraq, might be considered proper targets of a valid reprisal, given the acceptance of the British reprisals which affected neutrals. See supra notes 297-98 and accompanying text. Since Iraq’s oil facilities on the Persian Gulf were destroyed early in the war, however, no Iraqi oil and no Iraqi ships have passed through the Gulf. See Evans & Campany, supra note 80, at 37.
334. See supra note 105. See also supra notes 116-20 and accompanying text.
335. See supra note 315.
337. The “indirect linkage” between the actual object of a reprisal and the legal object, i.e., the original wrongdoer, may have been accepted in the case of the British quasi-blockades’ interference with neutral commerce to Germany. See supra notes 283-87 and accompanying text. Thus, though only neutrals were affected, the object of the reprisal was still Germany. See supra notes 296-98 and accompanying text.
338. The Iranian attacks employ essentially the same methods, see supra note 332 and accompanying text, though against far fewer ships. Iran has attacked about 10 vessels in retaliation for as many as 80 Iraqi attacks. See supra notes 6 and 314; N.Y. Times, Feb. 5, 1985, at A5, col. 3.
339. See supra note 336. The pattern of Iranian attacks bears out this contention. The Iranians have
valid target, and cannot constitute legitimate reprisals.340

The Iranian reprisals are also illegitimate under Professor Tucker's analysis.341 A possible Iranian contention that the ineffectiveness of neutral efforts to police their rights allows Iran to behave similarly toward neutrals would go far beyond the functional context of the Tucker analysis.342 When limited to neutrality rights per se,343 the inability of neutrals to enforce their rights against Iraq, witnessed by the continuation of Iraqi efforts to enforce the Kharg Island exclusion zone, may provide some legal basis, according to Professor Tucker's argument, for a like Iranian disregard of neutrality rights.344 But an attack without warning and without provision for crew safety against an unarmed merchant ship is a violation of the law of war,345 independent of neutrality rights, and is as illicit when directed at an enemy vessel as at a neutral.346

Hence, the Iranian retaliatory attacks on neutral shipping in the Persian Gulf are not justifiable as reprisals. Such attacks, therefore, represent an illicit use of force against neutral states.347

VI. Conclusion

Given the acceptance under international law of the Paris Pact and U.N. Charter principles which make aggressive resort to war illegal, the customary law of neutrality, based on the presupposition that warring states have an equal claim of right in the belligerency, should be obsolete. The failure of collective security, however, through the U.N. Security Council's inability to take measures to declare the guilt of an aggressor or to restore the peace, requires the retention of

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340. Whether attacks against commercial vessels trading with Iraq, were there any, see supra note 333, would be legal reprisals is outside the scope of this Comment. Such a hypothetical situation, however, would be similar to the German unrestricted submarine warfare reprisals whose legality has been roundly rejected. See supra notes 290-95 and accompanying text.

341. See supra notes 300-05 and accompanying text.

342. Professor Tucker's analysis, see supra notes 300-05 and accompanying text, though general in its terms, refers exclusively to the British reprisals in the World Wars and appears to exclude the German "reprisals," if only by operation of legal reasoning, as the text accompanying infra notes 344-47 will illustrate. See Tucker, supra note 10, at 254-58.

343. The neutrality right to which the Tucker analysis applies is the right of neutral states to continue trade with belligerents subject only to the accepted limitations of blockade and contraband. See supra note 16.

344. See supra notes 302-03 and accompanying text. Permissible actions under the Tucker analysis might be similar to the British quasi-blockade: greatly expanded control over neutral commerce with the offending belligerent. See supra notes 114-25, 135-41 and accompanying text.

345. See supra notes 179, 230, 270.

346. See supra note 179.

347. Thus, the Iranian use of force presumably would be a violation of article 2, paragraph 4 of the U.N. Charter. See supra note 47 and accompanying text. Saudi Arabia and the other nations of the Persian Gulf did bring the matter of Iranian reprisals to the Security Council in June, 1984. See Newsweek, June 4, 1984, at 19. These nations introduced a resolution to condemn Iran for "aggression," which is ironic in light of Iraqi commencement of both the war and the attacks on shipping. See Time, June 4, 1984, at 30. See 21 U.N. Chronicle (No.5) 5-10 (1984) for an account of the Security Council debate.
customary neutrality rights in the modern era.

Iraq's declaration of the Kharg Island exclusion zone and subsequent attacks on neutral shipping therein are illegal under international law. Justification of these attacks, which are themselves violative of the law of war, cannot be made under the concept of an exclusion zone, as the concept has no validity under international law. Nor can such attacks be associated with the enforcement of an effective blockade under customary doctrine. Because of the illegality of the method of enforcement, the blockade must be deemed ineffective as a matter of law.

Iranian reprisals against neutral shipping in the Persian Gulf, justified as retaliation for Iraqi attacks and very similar thereto, are themselves illegal. Legitimate reprisals cannot be taken against neutrals; they must be directed at the opposing belligerent.

Thus, both belligerents' attacks on neutral vessels in the Persian Gulf are illicit. Neutral nations whose ships have suffered attacks may have therefore a right to moral or material reparation.

Maxwell Jenkins

APPENDIX ONE

Map courtesy of U.S. Naval Institute Proceedings (C. Ragland)