

SOUTH AFRICAN LAW COMMISSION

PROJECT 33

REVIEW OF THE LAW OF PRIZE

REPORT

September 1987

To Mr H J Coetsee, MP, Minister of Justice.

I have the honour to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for consideration the Commission's report on the review of the law of prize.


G VILJOEN
CHAIRMAN

16 September 1987

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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HIERDIE VERSLAG IS OOK IN AFRIKAANS BESKIKBAAR

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1. INTRODUCTION

1.1 The Commission was requested by the Department of Justice during 1977 to review the law of prize and the law of admiralty. The reason was that the South African courts at that time still derived their jurisdiction concerning prize and admiralty matters from British legislation which dated from the previous century when South Africa was still under British rule. The constitutional developments which culminated in the coming into existence of the Republic of South Africa in 1961 made it necessary for the Republic to have its own legislation on the matters concerned.

1.2 The review of the law of prize and the law of admiralty were placed on the Commission's programme as two separate investigations because they relate to different aspects of international law. The Commission found it convenient to commence with the review of the law of admiralty. This investigation resulted in the enactment of the Admiralty Jurisdiction Regulation Act 105 of 1983. Since the review of the law of prize was not considered particularly urgent it stood over so that attention could be given to matters having a higher priority rating.

1.3 The investigation appears on the Commission's programme under the title: Review of the law of prize. The title might create the impression that it is the intention to review the substantive rules of the law of prize. These rules are rules of international law which are not susceptible of unilateral reform by individual states. It was not the Commission's intention either to codify the rules of the law of prize. Such a codification would have been a formidable task for which the Commission is not adequately equipped. Moreover, the Commission is of the opinion that the codification of the law of prize is not necessary.

1.4 From what has been said above it should be clear that the Commission can make recommendations pertaining to the adjustment of the law of prize only in so far as the South African legislature is competent to regulate prize matters statutorily. These matters are mainly concerned with the adjudication of prize proceedings. They affect the jurisdiction of prize courts, the law applied by these courts and the procedure for the

adjudication of prize proceedings. These are the matters which received the attention of the Commission.

1.5 It might be asked whether the law of prize today still has any relevance at all and whether there is any need for the Republic to modernise its procedure for the adjudication of prize proceedings. The law of prize is, of course, applied only in time of war. We are fortunate in that since the end of the Second World War no need has arisen for the courts to apply prize law. Although a situation where it would be necessary for the courts to apply prize law is at present not foreseen, as a sovereign state the Republic has the duty to ensure that she is at all times ready to meet her international obligations. One such obligation is to make provision for the adjudication of prize proceedings should the Republic become involved in a war. It would be better to bring this branch of our law in order whilst we are enjoying peace and in so doing avoid hasty and perhaps ill-considered decisions should a need arise unexpectedly.

2. THE LAW OF PRIZE

2.1 It is not intended to give a full exposition of the rules of the law of prize in this report. It is, however, necessary to refer to some of these rules in order to form a clear idea of the nature of the law of prize.

2.2 The law of prize forms part of international law. It deals with the conduct of war at sea, and more specifically with the capture of ships and cargo by the naval forces of a belligerent State.¹ Goods thus captured are known as prize.² Nowadays this term is also used in respect of aircraft and their cargo which are captured in accordance with the law of warfare.³

2.3 A distinction is made between prize and booty.⁴ The latter term is used in respect of goods which are captured on land by the land forces of a belligerent, whereas prize relates to goods which are captured in accordance with the law of warfare by the naval forces of a belligerent. Apart from the historical origin of the distinction between prize and booty it is still important to distinguish between these two forms of capture of enemy property. The reason is that the ownership in the prize, unlike booty, does not merely by reason of the capture, as in the case of booty, pass to a state on whose behalf capture took place. In the case of the capture of prize international law requires that the question whether the capture was made lawfully must be decided judicially. Only when a prize court rules that alleged prize is in fact lawful prize, does the ownership in the goods concerned pass to the captor of the goods.

1 See in general C John Colombos International Law of the Sea 5th ed London: Longmans, Green & Co Part 11.

2 Halsbury's Law of England 3rd ed London: Butterworth & Co Vol 30, 638.

3 Prize Act, 1939 (2 + 3 Geo 6C65).

4 Halsbury 640.

2.4 Subject to certain restrictions which apply in terms of international treaties, a belligerent is entitled to employ all the means at his disposal in order to force his enemy to surrender. He is, inter alia, entitled to capture the ships of the enemy or to destroy them, wheresoever they may be found. He is also entitled to attempt to paralyse trade with the enemy by means of a blockade and to seize contraband destined for the enemy. It is obvious that such actions at sea by a belligerent infringe the rights of neutral states to the free use of the high seas and to unimpeded trade with one another. The purpose of prize law is precisely to protect the interests of neutral states. It is, therefore, unlawful for a belligerent to capture and appropriate the goods of a neutral state unless that state is guilty of violating its neutrality or breaking a blockade.

2.5 The rules of the law of prize are to be found in customs and practices of seafaring nations which in the course of time have gained fairly general acceptance. From time to time some of the rules were recorded in codes or in treaties between states. An example of such a recording is to be found in the Consolato del Mare, a code on warfare which was in operation in the fourteenth century in the area of the Mediterranean.⁵ The rule that ships of the enemy and their cargo may be captured as prize, but that a neutral ship and its cargo must be returned to the owners thereof, is part of this code. About this time England applied the rule that enemy cargo upon neutral ships may be captured as prize and neutral cargo upon enemy ships may be captured as prize. The Netherlands and other European countries, on the other hand, applied a rule which was expressed in the maxim: "free ships, free goods". This rule implies that enemy cargo upon neutral ships may not lawfully be captured as prize.

2.6 There have been several attempts to bring about uniformity in the rules pertaining to warfare at sea. At the end of the Crimean War the Allied forces and Russia concluded a treaty known as the Declaration of Paris. The following rules were included in the treaty:

5 Colombos 526.

1. Freebooting (privateering) is illegal.
2. A neutral flag protects enemy goods, except contraband.
3. Neutral goods, excluding contraband, are not susceptible to capture as prize under the flag of the enemy.
4. A blockade is binding only in so far as it is effectively maintained by a force which is sufficient to prevent reasonable access to the coast of the enemy.

2.7 In 1907 a conference was held in The Hague at which forty-four states were represented. The conference adopted a number of conventions which later became known as the Second Hague Conventions of 1907. A number of these conventions relate to warfare at sea. Among these are the following: The position relating to merchantmen of the enemy at the outbreak of war; the conversion of merchantmen into men-of-war; the laying of underwater contact mines; the bombardment of installations on land by naval forces; limitations on the capture of certain categories of ships (hospital ships; small fishing craft, etc); and the establishment of an international prize court. (This prize court has not, however, been established.)

2.8 In 1909 ten maritime states held a conference in London with a view to agreeing on a code for rules concerning warfare at sea. The code drafted by the conference is known as the Declaration of London. It is a codification of the law of prize in nine chapters under the following headings:⁶

Chapter I	Blockade in time of War
Chapter II	Contraband of War

6 See George J Boyes "The Naval Prize Bill and the Declaration of London" 1911 SALJ 59.

Chapter III	Unneutral Service
Chapter IV	Destruction of neutral prizes
Chapter V	Transfer of a neutral flag
Chapter VI	Enemy character
Chapter VII	Convoy
Chapter VIII	Resistance to search
Chapter IX	... other general provisions.

2.9 The Declaration of London was never ratified by the participants of the conference. There were also important matters on which no agreement could be reached. One of these was whether the nationality of the owner of a ship or his domicile should be decisive in deciding the question whether a ship has a neutral or an enemy character.

3. PRIZE COURTS

3.1 Colombos¹ states that the practice of submitting the question of the lawfulness of the capture of a ship or goods as prize to a tribunal for judicial decision can be traced back to the distant past. He refers to a case decided in the Admiralty Court in England in the year 1257. Diemont outlines the historical background in connection with prize courts as follows:²

The Admiralty Court of England dates back to very early times - whether it originated in Saxon times or in the time of Henry I seems to be uncertain. In course of time the Court of the Lord High Admiral began to hear disputes in civil matters connected with the sea. Its jurisdiction appears to have been threefold; in civil matters, in criminal matters and in prize matters.

3.2 The exercise of prize jurisdiction took place by virtue of an authorisation or commission of the monarch. Colombos³ refers to the wording of such a commission which was issued in 1626 showing that the court had to apply the law and customs not only of England but also of other nations in so far as they applied to prize matters. Prize jurisdiction was also conferred by commission on courts of the British colonies. These courts were known as Vice-Admiralty Courts. Diemont refers to a decision (the Picimento) handed down by the Vice-Admiralty Court of the Cape in 1795.⁴ It was not until the year 1864 that the prize jurisdiction and the procedure of the High Court of Admiralty and the Vice-Admiralty Courts were regulated statutorily.⁵

3.3 For South Africa the following important step in the development of prize courts was the passing of the Colonial Courts of Admiralty Act,

1 753.

2 M A Diemont "South African prize courts" 1941 SALJ 122.

3 753.

4 123.

5 Naval Prize Act, 1864 (27 + 28 Vict C 25).

1890, of England.⁶ This is the Act on which the jurisdiction of the South African prize courts today still founds. Section 2(1) of this Act provides as follows:

Every Court of Law in a British possession which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and which Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty.

3.4 Apparently no court in South Africa has ever been declared a prize court in terms of the said provision. Our courts therefore derive their admiralty jurisdiction (including prize jurisdiction) from the fact that they are situated in a territory which at the time was a British possession and from the fact that they had original unlimited civil jurisdiction in that territory. The South African superior courts were, in the words of the Act, Colonial Courts of Admiralty. The Colonial Courts of Admiralty Act, 1890, remained in force in the Union when the Union of South Africa came into being in 1910.⁷ It also remained in force when the Republic of South Africa came into being in 1961.⁸ Although the provisions of the Colonial Courts of Admiralty Act, 1890, were repealed by the Prize Jurisdiction Act, 3 of 1968, in so far as they relate to prize matters, the latter Act has not been put into operation as yet with the result that the repeal of the old English provisions has not come into force.

3.5 In respect of the prize jurisdiction of Colonial Courts of Admiralty section 2(3)(b) of the Colonial Courts of Admiralty Act, 1890, provides as follows:

6 53 + 54 Vict C 27.

7 Sec 135 of the South Africa Act, 1909.

8 Sec 107 of the Republic of South Africa Constitution Act 32 of 1961 before its repeal by sec 101 of the Republic of South Africa Constitution Act 110 of 1983.

A Colonial Court of Admiralty shall have under the Naval Prize Act, 1864 ... the jurisdiction thereby conferred on a Vice-Admiralty Court and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice, but unless for the time being duly authorised, shall not by virtue of this Act exercise any jurisdiction under the Naval Prize Act, 1864, or otherwise in relation to prize.

3.6 The Naval Prize Act, 1864 does not, however, confer any particular jurisdiction on a Vice-Admiralty Court, but only recognises such a court as a prize court. Section 3 of this Act provides as follows:

The High Court of Admiralty, and every Court of Admiralty or of Vice-Admiralty, or other Court exercising Admiralty Jurisdiction in Her Majesty's Dominions, for the time being authorised to take cognizance and judicially proceed in Matters of Prize, shall be a Prize Court within the Meaning of this Act.

3.7 As regards the jurisdiction of the High Court of Admiralty, section 4 of the Act merely provides that the jurisdiction of this court shall be effective throughout the dominions of Her Majesty and that the court is competent to enforce an order of a Vice-Admiralty Court sitting as a prize court and of the Privy Council in an appeal concerning prize matters.

3.8 It is important to note that the prize jurisdiction of Colonial Courts of Admiralty is suspended and that that jurisdiction must be put into operation by a specific act of state. In this connection section 2(3)(b) of the Colonial Courts of Admiralty Act referred to above must be read with section 2 of the Prize Courts Act, 1894, which provides that:⁹

2(1) Any commission, warrant or instruction from Her Majesty the Queen or the Admiralty for the purpose of commissioning or regulating the procedure of a prize court at any place in a British possession may, notwithstanding the existence of peace, be issued at any time, with a direction that the court shall only act upon such proclamation as hereinafter mentioned being made in the possession.

2(2) Where any such commission, warrant or instructions have been issued, then, subject to instructions from Her Majesty, the Vice-Admiral of such possession may, when satisfied by information

9 57 + 58 Vict C 39.

from a Secretary of State or otherwise, that war has broken out between Her Majesty and any foreign State, proclaim that war has broken out, and thereupon the said commission, warrant, and instructions shall take effect as if the same had been issued after the breaking out of such war and such foreign State were named therein.

2(3) The said commission and warrant may authorise either a Vice-Admiralty Court or a Colonial Court of Admiralty, within the meaning of the Colonial Courts of Admiralty Act, 1890, to act as a prize court, and may establish a Vice-Admiralty Court for that purpose.

2(4) Any such commission, or warrant, or instructions may be revoked or altered from time to time.

2(5) A Court duly authorized to act as a prize court during any war shall after the conclusion of the war continue so to act in relation to, and finally dispose of, all matters and things which arose during the war, including all penalties and forfeitures incurred during the war.

3.9 The commission by which the prize jurisdiction of courts was put into operation at times also fulfilled the function of circumscribing the prize jurisdiction of those courts. An example of this is the commission by which the courts of the Cape of Good Hope and Natal were empowered in 1899 to:

... take cognizance of and judicially proceed upon all and all manner of captures, recaptures, seizures, prizes and reprisals of all ships, vessels and goods, which shall, on the outbreak of any such war, have been already seized and taken, and which are, or shall be, brought, within the limits of such court, and all other matters of prize falling within the jurisdiction of the said Court, and to hear and determine the same, and according to the course of Admiralty and the Law of Nations, and the Statutes, Rules and Regulations in that behalf for the time being in force; to adjudge and condemn all such ships, vessels and goods, as shall belong to the Foreign State named in such Proclamation, or to the subjects of such State, or to any others inhabiting within any of the Countries, Territories or Dominions of the same or which are otherwise condemnable as prize and which shall be brought before the said Supreme Court ... for adjudication and condemnation.

3.10 During the Second World War the South African courts were, on the other hand, only empowered to act as prize courts without the jurisdiction of the courts having been specified in detail.¹⁰

3.11 The Naval Prize Act, 1864, contained several provisions of a procedural nature. Section 13 made provision, inter alia, for the promulgation of "General Orders for regulating (subject to the Provisions of this Act) the Procedure and Practice of Prize Courts ..." This provision has been replaced by section 3(1) of the Naval Prize Act, 1894, which reads as follows:

Her Majesty the Queen in Council may make rules of court for regulating, subject to the provisions of the Naval Prize Act, 1894, and this Act, the procedure and practice of prize courts within the meaning of that Act, and the duties and conduct of the officers thereof, and of the practitioners therein, and for regulating the fees to be taken by the officers of the courts, and the costs, charges and expenses to be allowed to the practitioners therein.

3.12 The Prize Courts (Procedure) Act, 1914, provides that as from the date on which rules for prize courts are promulgated in terms of section 3(1) of the Naval Prize Act, 1894, the provisions of the Naval Prize Act, 1864, relating to procedure are repealed. Such rules were promulgated by Order in Council during 1914. Those rules of course also applied to Colonial Courts of Admiralty and therefore also to the South African prize courts. In 1939 on the commencement of the Second World War the rules were replaced by new rules promulgated by Order-in-Council. By that time the Union of South Africa already enjoyed sovereignty. The 1939 rules for prize courts which were promulgated in England, therefore did not apply in South Africa. The rules were, however, made applicable to South African prize courts by the Governor-General in terms of the powers conferred on him by the War Measures Act, 13 of 1940.¹¹ These rules applied only for the duration of the war measures. The current position is therefore that

10 Proclamation 239 of 1939.

11 Proclamation 224 of 1941.

the procedure of the South African prize courts is still regulated by the British prize court rules of 1914.

3.13 The matters in respect of which a prize court has jurisdiction are nowhere clearly defined. The expression which usually occurs in this connection and which probably derives from the commissions which have long conferred jurisdiction on prize courts reads: "to take cognizance of and judicially proceed in matters of prize". This expression also appears in the example of the commission quoted above. However, "Matters of prize" are not defined. Colombos¹² says that it is the primary function of a prize court to decide whether a capture constitutes lawful prize or not. He quotes Story as having said:

Prize extends to all captures made on the sea jure belli; to all captures in foreign ports and harbours; to all captures made on land by naval forces and upon surrenders to naval forces either solely or by joint operations with land forces; and thus, whether the property so captured be goods or mere choses in action; to captures of the captor's own country; to money received as ransom or commutation on a capitulation to naval forces, alone or jointly with land forces.

3.14 Colombos comes to the conclusion that the jurisdiction of a prize court applies in any case of a capture under the law of maritime warfare and that a court will also adjudicate upon incidental matters. Under incidental matters Colombos mentions claims in connection with freight, demurrage, salvage and, in general, claims having a connection with the capture of a ship or its cargo. To this may be added the right of a belligerent to requisition for its war effort goods in the custody of a prize court, not yet adjudicated,¹³ or to take over neutral ships and goods against compensation (the right of pre-emption).

3.15 The question as to which law the South Africa prize courts apply, or should apply, must be determined against the background of the historical development of these courts. As indicated above, the

12 757.

13 Halsbury 643.

Vice-Admiralty Courts of the Cape Colony and Natal were merely extensions of the High Court of Admiralty of England. These courts, as well as the High Court of Admiralty, derived their prize jurisdiction from a commission of the British monarch. The formula of this commission, which was followed from early times and which, throughout, remained more or less the same, was to adjudicate prize matters "in accordance with the course of admiralty and the law of nations, and the statutes, rules and regulations for the time being in force in that behalf".¹⁴ Colombos¹⁵ points out that the English courts emphasise time and again that they are not applying English law but international law. Diemont¹⁶ qualifies this formulation by describing the law applied by our prize courts as "international law as conceived by the High Court of Admiralty in England". Booyesen¹⁷ holds more or less the same view when he says that the mere fact that there is such a thing as the English law of prize suggests that the courts do not apply pure international law but international law as understood and interpreted by the English prize court. It is, however, true that the English law of prize has international law as its foundation.

3.16 Booyesen¹⁸ sums up the position regarding the law which our prize courts apply as follows: In the first place a South African prize court will be bound by legislation of parliament. Secondly, our prize courts have up to now applied English prize law. In so far as it can be said that the English law of prize is in accordance with international law it can be said that our courts apply international law. Further, our courts will be bound by the decisions of our Appellate Division even if those decisions are not in accordance with international law. Further, our courts are free to consult the sources of international law if there is no binding precedent and may in the light of such authority establish a rule of law.

14 See H Booyesen "Kommentaar op die Wet op Prysregsbevoegdheid 3 van 1968" 1979 THRHR 41, 61.

15 762.

16 1941 SALJ 126.

17 1979 THRHR 63.

18 1979 THRHR 67.

4. THE PRIZE JURISDICTION ACT 3 OF 1968 AND THE NEED FOR REFORM

4.1 As has been indicated above, the Prize Jurisdiction Act 3 of 1968 is aimed at regulating the prize jurisdiction of the South African courts. In section 2 of the Act each provincial or local division of the Supreme Court of South Africa is given jurisdiction in all prize proceedings instituted in such a division, whether or not the capture or alleged capture occurred within or outside the Republic or within or outside the area of jurisdiction of the division concerned.

4.2 Prize is defined as:

- (a) a ship or aircraft captured as prize jure belli; and
- (b) anything so captured while in or upon a ship or aircraft, whether or not the ship or aircraft is so captured.

4.3 The expression prize proceedings is defined as any proceedings relating to prize or alleged prize.

4.4 The Act, for the rest, provides that prize proceedings shall be adjudicated upon as if they were civil proceedings (section 3); that condemned prize shall belong to the State (section 4); and that the power to make rules under the Supreme Court Act 59 of 1959 includes the power to make rules for the adjudication of prize proceedings. Section 7 of the Act provides for the repeal of the English Acts mentioned above on which the jurisdiction of the South African prize courts was founded up to now.

4.5 As has been mentioned, Act 3 of 1968 has not as yet been put into operation. The reasons for this have been mentioned in paragraph 1.

4.6 Mention has already been made of Booyesen's article in the Journal of Contemporary Roman-Dutch law¹ in which he comments on Act 3 of 1968.

1 1979 THRHR 43.

With reference to certain objections mentioned by him in the article he puts the question, by way of introduction, whether the Act can be put into operation in its present form. It is, therefore, necessary to examine aspects of the Act which Booyesen regards as shortcomings.

4.7 It has been pointed out above that the jurisdiction of prize courts has traditionally been put into operation by commission of the head of state. Although it was not necessary after the commencement of the Naval Prize Act, 1864, in respect of the High Court of Admiralty but only in respect of Vice-Admiralty Courts and later Colonial Courts of Admiralty, the practice was, nevertheless, continued in respect of the High Court of Admiralty and a commission was issued to that court in the First World War as well as in the Second World War. Act 3 of 1968 is silent on the commencement of the jurisdiction of prize courts. Booyesen sees this as a shortcoming. He gives the following reasons: The power to declare war vests in the executive. For the vesting of the jurisdiction of a prize court a state of war is a prerequisite. When a war is not declared formally, it can be difficult for a court to determine whether goods were in fact captured jure belli. By issuing a commission the executive consents to the adjudication by a prize court of its capture, which would otherwise not be justiciable

4.8 Booyesen next deals with the question whether a mere searching of a vessel on the high seas in time of war, without the ship or goods being captured, may be adjudicated by a prize court. He refers to authority² from which he infers that the prize court has jurisdiction only if the goods were actually captured as prize, in other words, physically taken out of the possession of the former owners. He also infers this intention from the definition of prize in section 1 of the Act and the fact that section 2 refers to capture or alleged capture. Booyesen agrees with this "limitation" on the jurisdiction of a prize court. Colombos,³ on the other hand, shows that the British courts have since the eighteenth century exercised jurisdiction in respect of unlawful conduct in the exercise of the right of search. It is

2 1979 THRHR 48.

3 Chapter XX and particularly 733.

suggested that the proper protection of the rights of neutrals demands that the jurisdiction should not be restricted.

4.9 Another aspect of the Act at which Booyesen levels an objection is that the Act does not, in his view, clearly demarcate the jurisdiction of prize courts vis-à-vis that of the ordinary courts. He thinks that the wording of section 2 of the Act can be interpreted as an extension of the traditional jurisdiction of prize courts which may in certain instances result in overlapping with the jurisdiction of the ordinary courts. He objects to the provisions of section 2 in terms of which a prize court has jurisdiction in prize proceedings whether or not the capture or alleged capture occurred within or outside the Republic or within or outside the area of jurisdiction of the court concerned.⁴

4.10 According to Booyesen section 2 of the Act gives a prize court jurisdiction also in respect of the capture of a ship in the territory of a neutral or a belligerent state, that is to say on land, for example at the place where the ship is being built. The question is whether a prize court should have jurisdiction in such a case. It is suggested that this question is of academic interest only and that it would have no practical effect on the jurisdiction of a prize court since in terms of the jus belli it would not be necessary to have such a capture adjudicated by a prize court.

4.11 Booyesen next mentions the case of a ship that is captured in the interior of the Republic. Act 3 of 1968 does not distinguish between property of the citizens of the Republic and property of aliens. According to Booyesen one is faced here with a conflict between the jurisdiction of prize courts and that of the ordinary courts. The law of prize deals with the capture of goods jure belli. It is suggested that the property of citizens of the Republic or of aliens in the Republic cannot be captured under the law of warfare. Any such capture must be effected under legislation relating to requisitioning and is not justiciable by a prize court.

4 1979 THRHR 48 et seq.

4.12 In respect of the cargo of a ship Booyesen sees a limitation on the jurisdiction of a prize court in that the prize court has jurisdiction only if the goods are in fact in or upon the ship. The court would not have jurisdiction if the cargo had been discharged but was still in the port. The jurisdiction of the prize court would depend on whether the goods which were discharged had been seized as contraband.

4.13 Booyesen⁵ also mentions that the Act does not distinguish between men-of-war and military aircraft on the one hand and merchantmen and commercial aircraft on the other hand. Traditionally the ownership of captured men-of-war automatically vests in the state responsible for the capture and no condemnation by the prize court is necessary. This would, presumably, also apply to military aircraft. The reason why the capture of men-of-war had in the past sometimes been adjudicated by the prize courts, was that the captors were entitled to a portion of the proceeds of the prize. Since prize nowadays belongs to the State there is no reason why prize proceedings should be instituted in respect of men-of-war and military aircraft.

4.14 Although Booyesen is correct, it would appear to be unnecessary to exclude jurisdiction in respect of men-of-war and military aircraft. The opportunity for the exercise of jurisdiction in respect of such ships and aircraft would seldom arise, in the first place because the State would simply not institute prize proceedings in respect thereof and, secondly, because the enemy (being the owner of such ships and aircraft) would not have any locus standi in our courts. It must, however, be borne in mind that merchantmen and commercial aircraft can be equipped for purposes of war and that there might be a dispute on the question whether or not a ship or aircraft is a man-of-war or a military aircraft.

4.15 The Act does not expressly provide which law has to be applied in prize proceedings. From the definition of "prize", viz a ship or aircraft

5 1979 THRHR 61.

captured as prize jure belli, Booyesen⁶ and Dugard infer that the legislature intended international law to be applied. Booyesen thinks that this is a departure from the existing legal position. As was indicated in the previous chapter, Booyesen is of the opinion that the law that has up to now been applied in prize proceedings is the English law of prize, or international law as perceived by the High Court of Admiralty of England. Booyesen points out that the international law of prize does not always present a uniform picture, but that in respect of certain matters there are radical differences of opinion among various states. In his opinion either the law of prize must be codified or the English law of prize must be retained as the foundation of our law of prize.

4.16 It has already been mentioned that the Commission does not intend to codify the law of prize. The Commission does, however, agree that it would be unwise to jettison the law of prize that has been built up over the centuries through case law, in favour of the vague criterion of international law.

6 1979 THRHR 68.

5. CONSULTATION

5.1 After a preliminary study of the subject the Commission came to the conclusion that adjustment of the Prize Jurisdiction Act 3 of 1968 was necessary in order to regulate the jurisdiction of the prize courts more fully; to provide which law a prize court must apply; and to provide for some incidental matters. In December 1984 the Commission published a working paper together with a Bill embodying the said adjustments.

5.2 The working paper was sent to 71 individuals and bodies who, in the opinion of the Commission, have an interest in the matter or who were in a position to submit valuable comments on the proposals. A further 40 copies were distributed on request.

5.3 Comments were received from only a few individuals and bodies. They are Dr T M Kühn, Head of the legal service of Armscor, Prof C F C van der Walt of the Potchefstroom University for Christian Higher Education; Prof D J Devine, Director of the Institute of Marine Law at the University of Cape Town; and the General Council of the Bar of South Africa.

5.4 Dr Kühn pointed out that in modern times it is no longer customary for states to declare war formally against one another. The word "war" is avoided for political and other reasons. The proposed legislation would, in his view, be of little value if the jurisdiction of a prize court were to depend upon a declared war.

5.5 Concerning the declaration of war Colombos remarks as follows:¹

The principle that war should never be commenced without a previous declaration has undergone many variations at different times. The correct procedure is that a declaration should precede the outbreak of hostilities.

1 505.

5.6 Colombos furthermore points out that Convention 111 of the Hague Conventions of 1907 provides that hostilities may not commence without a clear warning in the form of a declaration of war together with reasons or an ultimatum. Neutrals must be notified of the state of war. Colombos² nevertheless refers to various instances where the provisions of the Convention were not complied with.

5.7 Kühn also objects to the use of the word "war" in the Bill and the reference to "enemy". The fact remains, however, that the jurisdiction of a prize court depends upon the existence of a state of war, whether it is a declared war or not. It is not merely a question of an armed conflict or a skirmish. The capture of prize takes place under the jus belli – the law of warfare. In a war there is always an enemy against whom war is waged. It is for the very reason that there might be uncertainty as to whether the Executive regards a particular armed conflict as a war and whether it wishes its captures to be adjudicated upon by a prize court that provision is made for the bringing into operation of the jurisdiction of prize courts by a commission.

5.8 In his comments Prof Van der Walt posed the question whether the jurisdiction of prize courts should not include the capture of land vehicles. As has been mentioned above prize law was traditionally concerned only with the capture of ships and ships' cargo, and aircraft and their cargo were included at a later stage. The reason is that ships and aircraft make use of international trade routes and that those routes must, for the sake of free trade, be left as unimpeded as possible, even in times of war. The same considerations do not apply to land traffic. It is in any case not the intention to extend the jurisdiction of the prize court to matters which up to now have fallen outside the jurisdiction of those courts. Such a step would moreover not be in accordance with international law.

2 506.

6. RECOMMENDATIONS

6.1 The Commission is of the opinion that Act 3 of 1968 should be amended as proposed in the accompanying Bill. The amendments embodied in the accompanying Bill are explained below.

6.2 The definition of prize differs somewhat from that in Act 3 of 1968, although it contains the same elements. The definition contained in the existing Act so far as it relates to ships' cargo and aircraft cargo might perhaps be interpreted narrowly because of the phrase: "while in or upon a ship or aircraft". Anything that is discharged or unshipped after a ship or aircraft has been escorted and which is captured as enemy property or contraband must also be capable of being included in the definition of prize. Furthermore an attempt has been made to translate the Latin expression "jure belli" into English.

6.3 The existing definition of prize proceedings as being any proceedings relating to prize or alleged prize is vague. In the opinion of the Commission it is desirable to define prize proceedings more closely with reference to the nature of such proceedings, particularly because these are proceedings in respect of which jurisdiction is conferred upon the courts specially and for a particular purpose. The definition of the Commission embraces proceedings which have traditionally been adjudicated upon by the prize courts.

6.4 In clause 2(2) of the Bill recommended by the Commission, provision is made for the suspension of the prize jurisdiction of the courts and for the putting into operation of that jurisdiction by the State President by proclamation. As was mentioned earlier in this report, there are good reasons for this procedure, which has been followed from the earliest times.

6.5 The Commission considers it necessary for the sake of good order to make it clear in which court prize proceedings must be instituted. A capture usually takes place outside the jurisdiction of any court. Under the existing law the prize must, if possible, be brought within the area of jurisdiction of a prize court and the proceedings must be instituted in that court. The Commission considered it desirable to provide

that proceedings be instituted in one specific court only (Cape of Good Hope Provincial Division of the Supreme Court of South Africa) in a case where the prize cannot be brought within the area of jurisdiction of a court.

6.6 In the Commission's view it is necessary to stipulate which law must be applied by the courts in prize matters. Usually it is merely stated that the law of prize forms part of international law. As has been mentioned above, however, various nations interpret certain rules of the law of prize differently and one is in fact dealing with English prize law, German prize law or French prize law rather than with a uniform international law of prize. To date our courts have applied English prize law. It is suggested that this law and the case law that has developed over a long period should not be jettisoned in favour of a rule that international law has to be applied because such a rule would only lead to uncertainty. The Commission's recommendations in this regard are embodied in clause 5 of the Bill.

6.7 Prize proceedings are normally decided on ships' documents and affidavits by the ships' crew and the captors. In exceptional cases it is necessary to hear oral evidence. It might sometimes be necessary in view of the unavailability of witnesses, to relax the rules relating to the admissibility of hearsay evidence. Provision is made for this in clause 6 of the Bill.

6.8 The Commission deems it necessary that provision be made for appeal against the judgment or order of a court in prize proceedings. See clause 7 of the Bill.

6.9 The procedure applied in prize proceedings has up to now been regulated extensively by rules of court promulgated in England for the High Court of Admiralty. The Prize Court Rules of 1939, for instance, contain about 37 rules with numerous sub-rules and about 66 prescribed forms. The reason why separate rules of court for prize proceedings have come into being is perhaps that those proceedings were in the past adjudicated upon by separate and distinctive courts. If one strips the rules of the prize courts of their formalism and their distinctive terminology and one looks at the nature of the proceedings regulated by them it appears that

those proceedings could just as well be regulated by the ordinary rules for superior courts. Should it be found in the adjudication of prize proceedings that the existing uniform rules do not meet the requirements for the proper adjudication of such proceedings, they could easily be adapted. The Commission therefore does not, at this stage, find it necessary for separate rules for prize proceedings to be made.

ANNEXURE A: DRAFT LEGISLATION

BILL

To regulate the prize jurisdiction of courts and to provide for matters incidental thereto.

To be introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Definitions.

1. In this Act, unless the context otherwise indicates -

"court" means any court of a provincial or local division of the Supreme Court of South Africa;

"prize" means a ship or aircraft or anything in or upon a ship or aircraft which is captured as prize in accordance with the international law relating to warfare;

"prize proceedings" -

- (a) means proceedings for the condemnation as prize of anything captured or destroyed as prize by the armed forces of the Republic in a war in which the Republic is involved;
- (b) means proceedings for the return of anything allegedly captured and held unlawfully as prize or for damages in respect of such alleged capture or holding of goods;
- (c) means proceedings for the requisitioning of anything which has been captured as prize and is in the custody of a court pending a decision as to the capture thereof as prize;
- (d) means proceedings for salvage in respect of the recapture of prize from the hands of an enemy of the Republic; and
- (e) means any other proceedings relating to prize.

Prize juris=
diction of
courts.

2. (1) Every court shall be competent to adjudicate upon prize proceedings instituted in that court, whether or not the capture or alleged capture occurred within or outside the Republic or within or outside the area of jurisdiction of that court.

(2) No court shall exercise the jurisdiction conferred by this Act unless that jurisdiction is put into operation by proclamation issued by the State President on the ground of the existence of a state of war between the Republic and an enemy specified in that proclamation.

Institution
of prize proceedings.

3. (1) Prize proceedings shall be instituted in the court within whose area of jurisdiction the prize has been brought for adjudication or is being held: Provided that if the prize has been destroyed or if it is impossible or impracticable to bring it within the area of jurisdiction of any court, proceedings in respect thereof may be instituted in the Cape of Good Hope Provincial Division of the Supreme Court of South Africa.

(2) If proceedings for the condemnation of prize are not instituted within a reasonable time a claim for the return of the goods concerned or for damages in respect thereof may be instituted in any court.

Adjudication
of prize proceedings.

4. Prize proceedings shall be adjudicated upon mutatis mutandis as if they were civil proceedings, and a court adjudicating upon such

proceedings shall, in addition to the powers it possesses by virtue of its ordinary civil jurisdiction, also have the power to make any appropriate order it may deem fit.

Law to be applied.

5. Subject to any act or any treaty which is binding upon the Republic, a court adjudicating upon prize proceedings shall apply the law that would immediately before the commencement of this Act have been applied by the High Court of Admiralty of the United Kingdom in respect of such matter: Provided that -

(a) such first-mentioned court shall not be bound by any statutory or procedural rule that applies in the United Kingdom;

(b) in any case where the law to be applied is obscure or uncertain the following sources may be consulted in order to reach a just decision:

(i) international treaties;

(ii) international custom in so far as it is indicative of general practice accepted as international law;

(iii) the general principles of law recognised by civilized nations;

(iv) decisions of international tribunals and the doctrines of the most highly qualified jurists, as additional sources of the law.

Rules of evidence.

6. (1) A court may in the adjudication of prize proceedings, subject to such directions and conditions as it may deem fit, admit statements and other evidentiary matter which are in the nature of hearsay and which would otherwise on the ground thereof be inadmissible.

(2) The weight to be attached to such evidence shall be in the discretion of the court.

Appeals.

7. A judgment or order of a court given in the exercise of its prize jurisdiction shall be subject to appeal as if it were a judgment or order of a court given in ordinary civil proceedings.

Condemned prize.

8. Condemned prize shall belong to the State.

Rules of Court.

9. (1) The uniform rules for superior courts made under section 43(2)(a) of the Supreme Court Act, 1959 (Act No. 59 of 1959), or section

6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), shall, in so far as they are applicable, apply to prize proceedings.

(2) The power to make rules under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1957), shall include the power to make such rules for the adjudication of prize proceedings.

Repeal of laws.

10. The laws mentioned in the Schedule are hereby repealed to the extent indicated in the third column, in so far as they apply in the Republic.

Short title.

11. This Act shall be called the Prize Jurisdiction Act, 198 .

SCHEDULE
LAWS REPEALED

Number and year of law	Title	Extent of repeal
27 & 28 Victoria, Ch 25	"The Naval Prize Act, 1864"	In so far as it relates to prize matters.
53 & 54 Victoria, Ch 27	"The Colonial Courts of Admiralty Act, 1890"	In so far as it relates to prize matters.
57 & 58 Victoria, Ch 39	"The Prize Courts Act, 1894"	In so far as it relates to prize matters.
4 & 5 George 5, Ch 13	"The Prize Courts (Procedure) Act, 1914"	In so far as it relates to prize matters.
5 & 6 George 5, Ch 57	"The Prize Courts Act, 1915"	In so far as it relates to prize matters.
6 & 7 George 5, Ch 2	"The Naval Prize (Procedure) Act, 1916"	In so far as it relates to prize matters.
Act No. 3 of 1968	The Prize Jurisdiction Act, 1968	The whole.

