NEUTRALITY IN MODERN ARMED CONFLICTS

A Thesis

Presented To

The Judge Advocate General's School

The opinions and conclusions expressed here are those of the individual student author and do not necessarily represent the views of either the Judge Advocate General's School or any other governmental agency. References to this study should include the foregoing statement.

by

Major Clifford E. Roberson, U.S. Marine Corps

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SCOPE

Considerations of the growth of traditional neutrality and its application to situations of modern armed conflicts, and proposals for the development of new laws of neutrality.

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CHAPTER I

INTRODUCTION

The term neutrality is derived from the latin word neuter, meaning siding with no one. Neutrality is a status in the legal sense and has its basis in international law.[1] It is not an absolute condition, but an attitude towards conflicts. The classic definition of neutrality is a status of absolute impartiality deliberately taken up by a state and acquiesced in by the belligerents.[2] For lack of a better term this status is referred to as traditional neutrality. The majority view among international law writers is that neutrality is limited to a status between belligerents and third states and cannot exist before the outbreak of the state of war becomes known to both the belligerents

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1. Neutrality: Its History, Economics and Law (4 vols. 1935-36), Vol. IV P. Jessup, "Today and Tomorrow" 3 [hereinafter cited as IV Jessup].

2. II Oppenheim, International Law 653 (7th ed. M. Lauterpacht 1952) [hereinafter cited as II Oppenheim]. The duty to observe a strict impartiality toward belligerents does not require that the neutral be "indifferent" to the outcome of a war. However, during the nineteenth century when neutrality had its greatest influence on international affairs, the attitude of indifference was commonplace. R. Tucker, International Law Studies, The Law of War and Neutrality at Sea 191 n. 20 (Naval War College Series, 1955) [hereinafter cited as ILS, 1955].

and the neutral.[3] To accept the limitation that neutrality can only exist during a state of war is to take an unnecessary limited view of neutrality and to ignore the problems arising during periods of "cold wars" and of factors which later develop into armed conflicts. The concept of neutrality applies not only to relationships during the armed conflicts but to pre and post conflicts relationships between the belligerents and third states.

The subject of neutrality is one of almost unlimited dimensions. It is further complicated by the technological developments and the political instability of the twentieth century. The historical development of neutrality is a series of compromises between irreconcilable interests of belligerents and neutrals. It being to the interest of the belligerent to bring about the greatest harm possible to his adversary and to the interest of the neutral state to continue commercial trade with one or both of the belligerents.

Historians have based the traditional concept of neutrality on the desire of the third states to stand aloof from power politics and not be involved in wars

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3. II Oppenheim 666.

between great powers.[4] Additionally the contemporary concept has been based on the need to maintain peace and national sovereignty. However, neutrality is a creature of economics and is based on the desire of third states to increase their economic standing at the belligerents' expense.

Neutrality is classified as either permanent or temporary. By permanent neutrality is meant the status in which the state in question will continually stand aside from all conflicts and will take affirmative steps to prevent any possible involvement in conflicts and military alliances which could develop into armed conflicts. The status of temporary neutrality signifies that the state in question will stand aside in a particular relationship or conflict. The permanent neutral has a positive duty placed on it by treaty or convention to remain neutral except in self-defense, whereas the temporary neutral has a freedom of choice. In a given relationship or conflict, the rights of a neutral are the same for both permanent neutral states and temporary neutral states.

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4. S. Roy Chowdhury, Military Alliances and Neutrality In War and Peace 150 (1966) [hereinafter cited as S. Roy Chowdhury].

While neutrality has not prevented wars, the violations of neutral rights by a belligerent have drawn otherwise non-involved states into the conflict.[5] An analysis of the violated rights will reflect that the rights in question are economic ones.

As neutrality developed into a distinct legal concept, it was considered morally unjustified. It has been likened to a citizen who watches a murder being committed and ignores it or refuses to become involved. During the 19th century, the golden age of neutrality, it was justified as the right of a state to remain outside of a conflict and the right to demand that neither belligerent should force her into a war.[6] The contemporary view, like the early view, condemns neutrality as immoral.[7] Under this view any form of neutrality favors the aggressor in that it reduces the number of adversaries that she has to contend with and that eventually the aggression will be directed towards the neutral.[8]

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5. Wright, The Present Status of Neutrality, 34 A.J. I.L. 391, 409 (1940).

6. S. Roy Chowdhury 154.

7. P. Frederic, The Legal Aspects of Neutrality, Proceedings of the Third Commission of the VII Congress of the International Association of Democratic Lawyers 82 (1960).

8. S. Roy Chowdhury 154.

CHAPTER II

THE GROWTH OF NEUTRALITY

A. Initial Development

Neutral rights first developed in the 12th century during naval conflicts, but the terms "neutral" and "neutrality" did not appear in treaties or diplomatic correspondence until the end of the 15th century.[9] Prior to the 15th century, it was exceptional when states were strong enough to remain outside of a struggle in which they had no desire to become involved.[10] As late as the 16th century legal duties and rights as such did not exist, but belligerent states had stopped forcing third states to choose sides.[11] Neutrality was not accorded a legal status until the 18th century.[12] Thus by assuming the status of neutrality, a state had a legal right to continue certain types of commercial trade with belligerent states without being drawn into the conflict. However, the distrust associated with neutrality today existed even

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9. S. Roy Chowdhury 151.

10. C. Colombus, The International Law of the Sea 567 (4th ed. 1961) [hereinafter cited as C. Colombus].

11. II Oppenheim 624.

12. S. Chowhury 151.

before that time. Michiavelli in his discourse on The Prince in the year 1513 stated this distrust:

> A prince is further esteemed when he is a true friend or a true enemy, when, that is, he declares himself without reserve in favor of some one or against another. This policy is always more useful than remaining neutral .... For, whoever wins will not desire friends whom he suspects and who do not help him when he is in trouble, and whoever loses will not receive you as you did not take up arms to venture yourself in his case. (13)

Hugo Grotius in the seventeenth chapter of his Third Book on the Law of War and Peace recognized two general principles of neutrality.[14] These principles were: first, that a neutral shall do nothing which may strengthen a belligerent whose cause is unjust, nor hinder the movements of a belligerent whose cause is just; and second, when it is doubtful whose cause is just, a neutral shall treat both belligerents alike in supplying provisions for the troops, in permitting the passage of troops, and in not rendering assistance to persons beseiged. Neither of these principles prohibited trade with belligerents, in fact the latter principle encouraged trade by implying the duty to trade with both alike when it is doubtful whose cause is just. Had traditional

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13. N. Machiavelli, The Prince 141-142 (H. Morley transl. 1893).

14. H. Grotius, De Jure Belli Oc Pocis Libri Tres 787-88 (F. Kelsey transl. 1925).

neutrality been based on the desire to remain aloof from armed conflicts rather than on economic motives, the negative duty not to trade with belligerents would have developed instead.

Though Grotius recognized the above mentioned principles of neutrality, he was firmly convinced that neutrality in face of an existing violation of the peace was immoral.[15] A quarrel between two or more states was the concern of all under his "just war" concept and to maintain neutrality was to promote an existing evil. However with the desire of third states to profit by trading with one or both of the belligerents being stronger than any moral duty, neutrality developed into a distinct legal status.

B. The Armed Neutralities

By 1780, the abuses of belligerents towards neutrals became progressively intolerable. The maritime states not only impeded commerce by neutrals with their adversaries, but also resorted to war to ruin the export trade of these rivals.[16] The neutral states were as unscrupulous and advanced their economic standing at the expense

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15. C. Colombus 563.

16. Id. at 567.

of the belligerents. At this time, Great Britain was threatened with invasion by the French and for the first time since 1690, her naval supremacy in the English Channel was in jeopardy. Catherine II of Russia, with the secret encouragement of Vergennes of France, organized the Baltic States into an alliance called the "Armed Neutrality". These small navy nations were eager to improve their economic standings at England's expense, as she had abused or ignored their neutral trading rights for years. A Declaration of Armed Neutrality proclaimed four new principles of international law concerning neutral rights.[17] First, that neutral vessels had a freedom of navigation from port to port and on the coasts of the belligerent states. Second, the principle of "free ship-free goods" was declared. Under this principle, non-contraband enemy goods carried on neutral ships were free from seizure by belligerents. Third, for a blockade to be binding it had to be effectively enforced. This principle was aimed at the abolishment of the "paper blockade", a blockade which existed on paper only but any ship caught running the blockade was subject to

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17. T. Bailey, A Diplomatic History of the American People 39 (6th ed. 1958) [hereinafter cited as T. Bailey].

confiscation by the blockading state. Fourth, that vessels of neutral states could not be stopped and searched except for just cause and upon clear evidence.

The states accepting this Declaration included Sweden, Denmark, Prussia and Austria. Three additional states; United States, France and Spain recognized the Declaration but never formally concluded any treaties concerning these principles. Nevertheless, England stood firm and refused to accept these restrictions.[18]

Within ten years, several of the accepting states had disregarded the Declaration and in 1793, Russia dis-associated herself from the Declaration and accepted the English practice of prohibiting all neutral trade with her adversaries. Great Britain and Russia justified this attitude on the grounds that their adversary was France who was the enemy of all other nations.[19] Catherine discouraged at the results of the alliance remarked that it was in fact an "Armed Nullity".[20] It did serve as a foundation on which her successor, Tsar Paul, could bring into existence the "Second Armed Neutrality" in 1800.

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18. C. Colombus 569.

19. C. Colombus 569.

20. II Oppenheim 630.

The Second Armed Neutrality came into existence in December 1800, when Russia entered into treaties with Sweden, Denmark and Prussia.[21] This alliance was based on the grounds that Great Britian refused to grant neutral merchant vessels immunity from visit and search while sailing under convoy when the commanding officer of the escorting man-of-war declared that the convoyed ships did not carry contraband. The Second Armed Neutrality lasted only a year, ending with the assassination of Tsar Paul on 23 March 1801 and Nelson's defeat of the Danish fleet in the Battle of Copenhagen on the 2nd of April.[22]

The alliance, however, led to the Maritime Convention of 1801 which was entered into between Great Britian and Russia and later acceded to by Denmark and Sweden. By this Convention Great Britian recognized the right of neutral ships to navigate from port to port and on the coast of belligerent states. She also agreed to abandon "paper blockades". As a compromise, Russia agreed to accede to the right of Great Britian to seize enemy goods on neutral ships and the right to search neutral vessels by British men-of-war.

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21. C. Colombus 569.

22. II Oppenheim 631.

In November 1807, when Russia declared war on Great Britian, she disavowed the Maritime Convention of 1801 and reasserted the principles of the First Armed Neutrality. Great Britian, likewise, restated her opposition to the principles declared by the First and Second Armed Neutralities.[23] Prior to this Great Britian declared all of the coast of France blockaded[24] and ordered her men-of-war to capture all ships destined to French ports.[25]

C. United States' Early Policy of Neutrality

Prior to the United States gaining the status of a state, international law was basically a creature of European nations. The development of the United States into a major power and the development of neutrality into a distinct legal concept of international law are closely associated together. The new world state was not involved in the many various conflicts between the European nations and by remaining apart from these conflicts, she could trade with all the European states.

The United States from its founding was a leading exponent of neutrality. Neutrality continued as the adopted national policy until shortly prior to her entry

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23. II Cranch 631.

24. An example of a paper blockade.

25. Sherman, Orders In Council and the Law of the Sea, 16 A.J.I.L. 400, 406 (1922).

into the Second World War. As early as 1775, John Adams stated that "We ought to lay it down, as a first principle and a maximum never to be forgotten to maintain an entire neutrality in future European Wars".[26] A resolution of the Continental Congress on 12 June, 1783, stated by way of preamble that "the true interest of these states requires that they should be as little as possible entangled in the politics and controversies of European nations.[27]

The failure of neutrality to keep the United States out of the European wars was caused by the desire of the new world nation to trade with both sides in an armed conflict and yet remain free from the conflict. As Thomas Jefferson stated in 1793, ". . . the life of the feeder is better than that of the fighter".[28]

In 1794, the United States used the embargo as a weapon against England to secure more respect for her neutral

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26. J. Seavey, Neutrality Legislation in the United States 3 (1939).

27. 1 C. Savage, Policy of the United States Toward Maritime Commerce 156 (2 Vols. 1934). Almost identical language was used in the 1936 Republican Party Platform: "nor shall America take on any entangling alliances in foreign affairs." Reprinted at: A Documentary History of the American People 741 (A. Craven ed. 1951).

28. C. Thomas, American Neutrality in 1793, at 15 (1931).

trading rights.[29] The United States rights that were being abused were the searching of merchant vessels, the impression of American seamen into the British Navy and the seizure of non-contraband goods. Though this embargo was directed toward all the belligerants, only England was materially affected since only she had established a profitable trade with the United States.[30] Had the embargo been directed against only one of the belligerents (England), the act would have been an act of war but by technically directing it against all the belligerent states, the United States remained neutral.[31]

D. The Caroline Case

The Caroline Case has been asserted by many writers as establishing the right of a belligerent state to violate a neutral's territory when the necessity of self-defense is instant, overwhelming and leaves no choice of means.[32] That the neutral state must also either be unable or unwilling to enforce the laws of neutrality is implied in the statement.

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29. Act of May 22, 1774; 1 Stat. 369.

30. T. Bailey 127.

31. IV Jessup 5.

32. D. Bowett, Self-Defense in International Law 58 (1958).

The case arose during the Canadian Rebellion of 1837. The Canadian insurgents were receiving active support from United States citizens living along the New York State-Canadian border.[33] An American merchant steamer Caroline was used by the insurgents in carrying reinforcements and supplies from New York State to Navy Island and Black Rock in Canadian territory. On the night of 29 December 1837, the Caroline was berthed at Schlosser, New York when British troops boarded her. The troops attacked the American crew and passengers, set fire to the ship and set her adrift over the Niagra Falls.

The United States' Secretary of State protested to the British minister in Washington. The British justified the destruction of the Caroline as an act of self-defense. Nonetheless, the British apologized and an agreement on the principles governing the right of self-defense was agreed on by both nations.[34]

E. The Declaration of Paris, 1856

After the Crimean War, in 1856 the major European

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33. Jennings, The Caroline and McLeod Cases, 32 A.J.I.L. 82 (1938).

34. 2 J. Moore, International Law Digest 409-10 (8 vols. 1906).

powers drafted the Declaration of Paris.[35] This Declaration re-asserted the principles declared in the Armed Neutralities and in addition privateering was abolished.[36] The United States never formally accepted the Declaration because of her claim of absolute immunity of private property in international waters, however she has consistently observed its provisions.[37] The United States proposed that the Declaration be drafted in order to give immunity to belligerent goods on neutral ships and to retain privateering. England, however, accepted the declaration in return for the abolition of privateering which she was plagued with during the Napoleonic Wars. When the American Civil War started, Secretary of State Seward made an unsuccessful effort to ratify the Declaration of Paris.[38]

The Declaration was ratified by Great Britian, Austria, France, Prussia, Sardinia, Russia and Turkey. It was formally adhered to by all of the nations of the world by 1914, except the United States and Venezuela.[39]

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35. T. Bailey 326.

36. 7 J. Moore, Digest of International Law 561-62 (8 vols. 1906).

37. J. Stone, Legal Controls of International Conflict 458 (2d ed. with Supp. 1959)[hereinafter cited as J. Stone].

38. T. Bailey 327.

39. Neutrality: Its History, Economics and Law (4 vols. 1935-36), Vol. III E. Turlington, "The World War Period" iv [hereinafter cited as E. Turlington].

F. The Rules of Washington, 1871

When the American Civil War started in 1861, the United States was for the first time the belligerent with the dominant naval force and Great Britian was in the role of the leading neutral. The case of the Alabama was the most famous and important controversy that arose out of this relationship. The Alabama was built in Liverpool for the Confederacy.[40] She left Liverpool in July 1862 unarmed, but was equipped with arms and ammunition from other ships which had subsequently sailed from England. The United States contended that the Alabama had been fitted out and armed within British jurisdiction. This controversy, lasting longer than the war itself, was referred to arbitration by the Treaty of Washington in 1871. In this treaty the United States and England agreed to observe between themselves three rules of neutrality and to encourage other nations to accede to them.[41] These rules were: First, that a neutral state is bound to use due diligence to prevent the arming or equipping of a warship within its jurisdiction. Second, that the neutral state has a duty to prevent the use of its ports or water as a base of

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40. C. Colombus 583.

41. 17 Stat. 863 (1871).

operations by a belligerent. Third, that the neutral state would use due diligence to prevent the violation of any of the foregoing obligations and duties within its jurisdiction.[42]

The Rules of Washington did not gain world wide acceptance, but they were a foundation for Hague Convention XIII.

G. The Second Hague Peace Conference

The Second Hague Peace Conference was called in 1907 following the Russo-Japanese War by the Czar of Russia upon the urging of President Theodore Roosevelt.[43] The goal of the Conference was to advance the efforts of peace, however twelve of the fourteen Conventions drafted by the Conference concerned the regulation of warfare. Conventions V[44] and XIII[45] of the twelve regulated the rights of a neutral state during armed conflicts. Convention V was directed toward neutral rights in land warfare and Convention

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42. C. Colombus 583.

43. Reports of the Hague Conferences of 1899 & 1907 181-182 (J. Scott ed. 1917).

44. 36 Stat. 2310 (1907); T.S. No. 540; Malloy, Treaties, Vol. II, p. 2290.

45. 36 Stat. 2415 (1907); T.S. No. 545; Malloy, Treaties, Vol. II, p. 2552.

XIII was directed toward those rights in naval conflicts. Prior to this time neutral rights were primarily concerned with only naval conflicts. The neutral states used the experience they acquired during the Russo-Japanese War to draft the Conventions in a manner to promote their interests.[46] Convention XII also promoted the interest of the neutral states in providing for the establishment of an international prize court, however this Convention was never ratified by the signatory Powers.

Article 1 of Convention V was a restatement of the basic principles of neutrality; that the territory of a neutral state is inviolable. This territorial integrity concept places an affirmative duty upon the belligerent state not to attack or infringe upon the territory of a neutral state. Likewise, the belligerent states should not use neutral territory as a theatre of war as Manchuria and Korea were used during the Russo-Japanese War in 1904-1905.[47] However this territorial integrity concept places a corresponding duty to defend that integrity against all violations by belligerents inasmuch as any violation by one belligerent would generally give that state an unfair

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46. C. Colombus 570.

47. E. Castrén, The Present Law of War and Neutrality 459 (1954) [hereinafter cited as E. Castrén].

advantage over her adversaries. Convoys of munitions and supplies belonging to a belligerent state are prohibited from crossing the territory of a neutral state by the provisions of Article 2. This Article was aimed at abolishing the "rights of transit" which were frequently granted to belligerent states in earlier wars. Prior to the United States entry into the First World War, she used this provision as a basis to deny Canada's request for a "right of transit" through Alaska for munitions.[48] This Article does not prohibit the private citizen of a neutral state from shipping supplies and munitions across the neutral territory to be sold to the belligerent state. The practical effect of this article is to encourage the belligerent state to buy these supplies and arms from a citizen of the neutral state. Convention V does not prohibit the entry of a member of a belligerent's armed forces into neutral territory if such transit is for private reasons and not used for military purposes. A neutral state may resist by armed force any attempts to violate its neutrality without commiting unneutral acts under the provisions of Convention V.[49]

Convention XIII, like Convention V, was largely a

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48. E. Castrén 460.

49. Hague Convention V, art. 10.

codification of the existing laws of neutrality. Whereas Convention V stressed the importance of territorial integrity, Convention XIII stressed the sovereign rights of the neutral state. The sovereign rights under Convention XIII are those pertaining to trade and other commercial rights. Both Conventions V and XIII clearly imply that the neutral state retains its sovereign rights of commercial intercourse with all members of the world community. Both conventions are drafted in a manner to encourage trade with all the belligerents.

The two Hague Conventions and the Declaration of Paris contain the written rules of traditional neutrality. A majority of the world powers have either accepted these conventions or have acceded to them as valid statements of international law.

H. The London Naval Conference of 1908-1909

The London Naval Conference of 1908-1909 was called by the English government to seek further agreement on the rules of maritime trade during armed conflicts and to establish an international prize court.[50] The prize court was never established. The Declaration of London which the

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50. J. Stone 109.

Conference drafted was never ratified since portions of it were contrary to the interest of the British sea power. The declaration was formally abandoned by the Allied Powers on 7 July 1916 by a memorandum addressed to the neutral states which stated that the Declaration of London "could not stand the strains imposed by the tests of rapidly changing conditions" and that the Allies would thereafter "confine themselves simply to applying the historic and admitted rules of the law of nations."[51] This declaration attempted to modifiy the law of neutrality in several areas. First, a distinction was made between degrees of offense which would warrant classification of the neutral vessel as either a contraband carrier or an enemy vessel. Second was the right to remove noxious persons from a neutral vessel without submitting to capture when the noxious person was demanded by the captain of a belligerent warship. Third, under the Declaration, the definition of noxious persons was narrower than the customary one. Fourth was the addition of the requirement of "mens rea" in the terms "specially undertaken" and "knowledge" to restrict the right of a belligerent state's prize courts to condemn neutral vessels as contraband carriers. Though the Declaration was never ratified, several of its provisions have gained a "de facto"

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51. ILS, 1955, at 188 n. 13.

status insofar as they extend the rights of a belligerent state over neutral rights. However the belligerent states have steadfastly refused to accept the additional restrictions placed on them by the Declaration.[52]

I. Neutrality and the First World War

The development of the law of neutrality carried out during the nineteenth century and the first part of the twentieth century came to an end with the First World War. It was during this era that neutrality enjoyed its greatest influence on world affairs. The rise of neutrality during this period was due to two factors. First, armed conflicts were local in nature and relatively few in number. Second, the latter half of the nineteenth century was an era of individualism with a definite separation between the individual's actions and those of the state. Under the traditional concept, an individual of a neutral state could make loans and sell munitions in vast quantities to one of the belligerents and yet the state could remain neutral.

During the First World War, the neutral states while trading with belligerents lost over 1,800 vessels valued at

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52. T. Bailey 567.

$580,000,000 with losses to cargo from confistication and destruction in the excess of $490,000,000.[53]

J. Neutrality and The League of Nations

The trend since the First World War has been to political and military alliances which has curtailed the right of a state to invoke the status of neutrality, with the exception of the few years immediately prior to the Second World War.

The Covenant of the League of Nations, drafted after the conclusion of the First World War, was based on the assumption that it be world embracing and therefore eliminate the need for neutrality.[54] In March 1920, the Council of the League declared that "the conception of neutrality of the members of the League is incompatible with the principle that all members will be obliged to co-operate in enforcing respects for their engagements."[55] President Wilson himself disillusioned with neutrality

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53. E. Turlington 150-51.

54. C. Colombus 570.

55. 1 League of Nations Official Journal No. 2, at 57 (1920).

declared that "this business of neutrality is over."[56] However the refusal of the United States to accept membership in the league, seriously diminished the value of the League as a peace keeping organ. Much of the opposition to the acceptance of membership by the United States was based on the rhetorical question asked in the United States Senate hearing on the Covenant, "Shall we abandon our traditional policy of neutrality and send our boys to fight Europe's War?"[57]

K. The Pact of Paris, 1928

The Pact of Paris, 1928, was accepted by the majority of the world powers and for practical purposes was considered world embracing, whereas the League of Nations never was.[58] The events leading to the Pact of Paris was

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56. Fenwick, International Law: The Old and the New, 60 A.J.I. L. 476, 476 (1966). Prior to the United States entry into the First World War, President Wilson was one of the leading spokesmen for neutrality. On 4 August 1914, Wilson issued a formal proclamation of neutrality and on 19 August he appealed to the American people to "be neutral in fact as in name" and to "be impartial in thought as well as in action." See: 2 Great Issues in American History, 400 (R. Hofstadter ed. 2 vols. 1958).

57. IV Jessup 18.

58. Only four states (Bolivia, El Salvador, Uruguay and Argentina) that existed in 1928 did not accept the Pact of Paris. S. Roy Chowdhury 170. Lord McNair states that the Pact has become part of the general conventional law and is now binding on every state. A. McNair, The Law of Treaties 216-17 (1961).

initiated by the United States.[59] President Coolidge, pleased with the results of the Washington Conference of 1922 which had limited the number of warships that the signtory States could maintain, called for a disarmanent parley to meet at Geneva in 1927. On 4 August 1927, this parley disbanded as a complete failure, however it resulted in the theory that the best way to insure peace was not to limit arms but to abolish war. Professor J. T. Shotwell of Columbia University was the leading spokesman of the group to abolish war. He communicated this idea to the French Foreign Minister Briand, who quickly announced that France was prepared to enter into a treaty for the outlawry of war. Therefore the treaty was signed between the United States and France outlawing warfare. This treaty, known as the Kellogg-Briand Pact and the General Treaty for the Renunciation of War, was expanded into the Pact of Paris.[60] The Pact was formally signed by fifteen states and approved by practically all the remaining states.[61] One reason for the popularity of the Pact was that it conmened the evil (war) without requiring any actions on the part of

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59. T. Bailey 648.

60. 46 Stat. 2343 (1931); T.S. No. 796.

61. T. Bailey 649.

the members except to settle all conflicts by pacific means.[62] The Pact renounced the unrestricted right of a sovereign state to go to war. While the Pact outlawed war, it contained no provisions for the enforcement of its obligations.[63] The signers, therefore, were under no obligation to abandon neutrality towards a state breaking the treaty.[64]

L. The Neutrality Policy of the United States (1934-1940)

The failure of collective security under the League of Nations and of the moral obligations under the Pact of Paris to prevent Japan's and Italy's aggression prompted

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62. Article 2.

63. In an address of 27 March 1941 before the Inter-American Bar Association, U.S. Attorney General Robert H. Jackson stated: "The Kellogg-Briand Pact . . . renounced war as an instrument of policy, made definite the outlawing of war and of necessity altered the dependent concept of neutral obligations . . . It did not impose upon the signatories the duty of discriminating against an aggressor, but it conferred upon them the right to act in that manner. Printed in 35 A.J.I.L. 353-54 (1941).

64. A criticism of the Pact is "each nation was to be the exclusive and unviewable judge of the question whether its war was one of self-defense", therefore "the Kellogg Pact has no legal force whatever". See: Borchard, War, Neutrality and Non-Belligerency, 35 A.J.I.L. 622 (1941).

the popular return to neutrality.[65] The United States was once more the leading exponent of neutrality.[66]

Late in 1934, the United States Senate appointed a committee to investigate the munitions industry during the World War. This Committee was under the chairmanship of Senator Gerald P. Nye of North Dakota and included on the committee were isolationists Arthur H. Vandenberg, Bennett Champ Clark and Homer T. Bone.[67] The Committee's report made it appear that the munitions manufacturers had caused the first World War. The Committee's findings had a heavy impact on the American Public opinion.[68] Women organized into peace societies and college students formed "Veterans of Future Wars" in order to collect their war bonuses now, before they were forced to fight and die.[69]

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65. A good example of this return to neutrality was the Declaration on Uniform Rules of Neutrality, 1938 adopted by Denmark, Sweden, Iceland, Finland and Norway. Reprinted at 32 A.J.I.L. Supp. 141 (1938).

66. For the view that the American position prior to World War II was one of traditional neutrality modified by a positive policy directed toward the prevention of war. See: G. Cohn, Neo-Neutrality, (1935).

67. Franklin D. Roosevelt and the Age of Action 226 (A. Rollins Jr. ed. 1960).

68. A Documentary History of the American People 784 (A. Craven ed. 1951).

69. A. Rollins, supra note 67.

Amist this background and the desire to remain out of the Italo-Ethiopian Conflict, Congress quickly passed the Neutrality Act of 1935.[70] This Act was re-enacted in 1936.[71] In 1937, Congress enacted a permanent neutrality statute, the Neutrality Act of 1937.[72] Senator Harry Truman, one of the senators who voted in favor of this act, describes his reasons for supporting it:

> I voted in favor of the much-disputed Neutrality Act of 1937, because I thought it would help to keep us out of involvement in the civil war then going on in Spain. However, I saw the need for its revision in 1939 and again in 1941 as global warfare made the original measure unworkable. I believe it was a mistake for me to support the Neutrality Act in the first place. I was misled by the report of the munitions investigation which was headed by Gerald Nye, a demagogue senator from North Dakota. (73)

The Neutrality Act of 1937 was a compromise between the desire to stay out of foreign conflicts and the economic conscious America unwilling to stop trading with possible belligerents. As a compromise, the Act allowed the President to list certain commodities that could be sold on a "cash and carry" basis to belligerents but retained the arms embargo provision of the earlier

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70. Act of 31 Aug. 1935 ch. 837, 49 Stat. 1081.

71. 49 Stat. 1152 (1936).

72. 50 Stat. 121 (1937).

73. 1 H. Truman, Memoirs by Harry S. Truman 153 (2 vols. 1955).

acts.[74] In August 1937 when heavy fighting broke out in China and Japan, President Roosevelt refused to invoke the Act on the theory that there was no formal declaration of war. Had the Act applied it would have aided Japan, the aggressor, which had a lucrative foreign trade and exchange in which to buy on a "cash and carry"basis whereas China did not. President Roosevelt arranged to lend China twenty-five million dollars and arranged a "moral embargo" on the sale of airplanes to Japan.[75]

During the late 1930's, Hitler was able to plan his policies of aggression based on the knowledge that Great Britian was not ready for war and could not obtain the necessary munitions from the United States because of the arms embargo. The "cash and carry" provision of the 1937 Act was limited to two years and expired in May 1939. After May of that year, the embargo provisions prevented the sale to a belligerent of any completed instruments of war, but allowed the sale of many types of unfinished war instruments and all kinds of general material and supplies. Additionally these exportable items could be transported to

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74. An exception to the Arms embargo was made in favor of the American Republics at war with a non-American state unless the Republic was co-operating with a non-American state in waging a war.

75. W. Riker, Democracy in the United States 236 (1953).

belligerent states in American ships. As a practical result the United States, with its strong public sentiment and economic position favoring England, found herself in the position of assisting the well-armed Germany by the arms embargo provisions. President Roosevelt campaigned to repeal the embargo provision of the 1937 Act to permit the United States to trade with the Allies. In one of his Fireside Chats to the American people on September 3, 1939, he stated:

> This nation will remain a neutral Nation, but I cannot ask that every American remain neutral in thought as well. Even a neutral has a right to take account of facts. Even a neutral cannot be asked to close his mind or his conscience. . . . As long as it remains within my power to prevent, there will be no black-out of peace in the United States. (76)

On 21 September 1939, President Roosevelt called a special session of Congress to repeal the embargo provisions of the Neutrality Act. In his address to the Congress he based his plea on the need to make the nation "really neutral" rather than to aid the Allies. Portions of this address are quoted below:

> Beginning with the foundation of our constitutional Government in the year 1789, the American policy in respect to belligerent nations, with one notable exception, has been based on international

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76. The Public Papers and Addresses of Franklin D. Roosevelt 462 (S. Rosenman ed. 1939).

law. . . .

The single exception . . . was the polity adopted by this nation during the Napoleonic Wars, when, seeking to avoid involvement, we acted for some years under the so-called Embargo and Non-Intercourse Acts. That policy turned out to be a disastrous failure. . . .

Our next deviation . . . from the sound principles of neutrality and peace through international law, did not come for one hundred and thirty years. It was the so-called Neutrality Act of 1935. . . .

I regret that the Congress passed the Act. I regret equally that I signed that Act. . . .

From a purely material point of view what is the advantage to us in sending all manner of articles across the ocean for final processing there when we can give employment to thousands by doing it here?. . . (77)

In November 1939, after weeks of heated discussion and agitation, the Neutrality Act of 1937 was repealed and replaced by the Act of 1939.[78] This new Act lifted the arms embargo and re-instated the "cash and carry" provision. This Act was also a compromise between the non-interventionists giving up the arms embargo and the repealists accepting "danger zones" in which American ships were forbidden to enter. Now the Allies could purchase war material from the United States but had to operate on a

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77. Id. at 515-516, 518.

78. Act of 4 Nov. 1939 ch. 2, 54 Stat. 5. Prior to this, in September 1939, twenty-one of the twenty-two American nations including the United States adopted a general Declaration of Neutrality at the Panama Conference which set forth the principles of neutrality to be observed in the European conflict. See: U.S. Naval War College, International Law Situations, 1939, at 61 (1948).

"come-and-get-it" and "cash-on-the-barrelhead" terms. During this phase of the war British seapower prevented any German ships from reaching the United States and in view of the restriction of American ships from the "danger zones", American trade with Germany stopped. Nevertheless the United States technically remained a neutral nation.

From September 1939 until November 1940, Great Britian paid out to the United States and Canada over $4,500,000,000 in cash for war materials and supplies to sustain the war against Germany. With only two thousand million cash left, Great Britian appealed to the United States for Assistance.[79] This appeal was contained in a letter from Prime Minister Churchill to President Roosevelt dated December 8, 1940. On 17 December 1940, President Roosevelt announced the Lend Lease Plan at a press conference with this simple illustration:

> Suppose my neighbor's house catches on fire and I have a length of garden hose four or five hundred feet away. If he can take my garden hose and connect it up to his hydrant, I may help him put out the fire. Now what do I do? I don't say to him before that operation, "neighbor, my garden hose cost me fifteen dollars; you have to pay me fifteen dollars for it." No! What is the transaction that goes on? I don't want fifteen dollars - I want my garden hose back after the fire is over (80)

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79. W. Churchill, Their Finest Hour 557 (1949).

80. Id. at 568.

The Lend-Lease Act[81] was signed into law on 11 March 1941.[82] Prior to this, on 3 September 1940, the President announced the destroyer-base deal where the United States received ninty-nine year leases on bases in Newfoundland and Bermuda in exchange for fifty overaged destroyers.[83] These two acts were contrary to the principles of neutrality and marked the departure of the United States from the status of the world's leading neutral power. The Lend-Lease Act has been justified as being measures of reprisal against Germany for her resort to war in violation of the Pact of Paris.[84]

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81. Act of 11 Mar. 1941, Pub. L. No. 77-11, ch. 11.

82. The opposition to the Lend-Lease Act was heated. The leading spokesman for the opposition was Senator Burton K. Wheeler of Montana who made the following comments on 12 January 1941 during Senate debate on the Act: "The lend-lease-give programs in the New Deal's triple A foreign policy; it will plow under every fourth American boy .... Never before has the Congress of the United States been asked by any President to violate international law." R. Hofstadter, supra note 66 at 400.

83. 55 Stat. 1561 (1941); T.S. No. 2.

84. ILS, 1955, at 168.

CHAPTER III

PERMANENT NEUTRALITY

Permanent neutrality bears the character of a contract in that the sovereign right to go to war is voluntarily limited by the permanent neutral to actions involving self-defense in consideration for the guarantee of protection by the other signatory powers. The status is usually established by either a treaty or covenant. Normally this status is sought by a small strategically located state which is unable to defend its sovereignty with its own resources.[85] By accepting the status of permanent neutrality, the state forfeits any territorial ambitions it may have as a price for this status.

Switzerland, the foremost permanent neutral, was neutralized by the Treaty of Versailles, 1815 and reaffirmed by the 1919 Treaty of Versailles.[86] Switzerland with but one exception has been very tenacious of this status. Likewise, she is scrupulous in performing her obligations as the leading permanent neutral. The one exception was her membership in the League of Nations.[87] She was assured

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85. A. Weiss, Violation by Germany of the Neutrality of Belgium and Luxemberg 1 (W. Thomas transl. 1915).

86. J. Brierly, The Law of Nations 129 (5th ed. 1955).

87. ILS, 1955 at 175.

on joining the League, that she would not be required to take part in any military action or to allow belligerent troops to cross her territory. However she was bound by Article 16 of the Covenant to participate in the economic sanctions imposed by the League. Yet, the imposition of any economic sanctions upon a belligerent by her would be incompatible with the status of neutrality. In 1938, as the result of her fears caused by the collective action taken by the League against Italy; Switzerland announced that she was withdrawing from the League and would no longer consider herself bound by the Covenant.[88] Switzerland has not joined the United Nations since membership in the United Nations would be a restriction on her right to remain neutral.

Belgium and Luxemburg were neutralized by the Treaty of London of 1831 and 1867 respectfully.[89] Belgium, owing to its geographical location was to be a permanent buffer between France and the newly formed Kingdom of the Netherlands.

Belgium's neutral status lasted only until the First World War. On 2 August 1914, she was given an ultimatum

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88. C. DeVisscher, Theory and Reality in Public International Law 316 (Rev. ed. P. Corbett transl. 1968) [hereinafter cited as C. DeVisscher].

89. Dea'k and Jessup, Collection of Neutrality Laws 50, 757 (1939).

by the German minister.[90] The ultimatum stated that Germany was fearful of a French invasion through Belgium and therefore she should anticipate any such hostile attack by France. On 4 August, Germany invaded Belgium ending the neutral status of Belgium.

Austria has declared her intention to be a permanent neutral. However in 1955, she became a member of the United Nations which appears incompatible with her status as a permanent neutral. A substantial number of states, including the permanent members of the Security Council have accorded recognition of her neutrality status.[91] Professor Kunz has justified the status of Austria and her membership in the United Nations in the following remarks:

> [I]t seems that Austria's permanent neutrality is not endangered by its membership...For Austria's permanent neutrality has come into existence in international law by recognition on the part of the permanent members of the Security Council and many other states; recognition binds the recognizing states to respect permanent neutrality; this respect for permanent neutrality therefore obliges the members of the Security Council not to call on a permanently neutral state for participation in economic and military sanctions. (92)

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90. Id. at 10.

91. ILS, 1966, at 173 n. 18.

92. Kunz, Austria's Permanent Neutrality, 50 A.J.I.L. 424 (1956).

Professor Kunz also points out that Austria's membership is not "unconditional", since she does not assume all the obligations imposed on other members.[93] Under this theory, whereas other members have both a right and a duty to discriminate against an aggressor, Austria has only a right to discriminate without the corresponding duty. The character of Austria's membership in the United Nations is unique and her status as a permanent neutral is questionable.

Loas was neutralized by the International Conference on the Settlement of the Laotian question.[94] This Conference was participated in by fourteen nations and lasted over a year. The Declaration on the Neutrality of Loas and the Protocol to the Declaration on the Neutrality of Loas were signed on 23 July 1962.[95] This agreement ended a full-scale civil war in which both of the world blocs accused the other of assisting one side. The West insisted that the Pathet Lao could operate only because of the assistance received from North Vietnam and the East

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93. Id. at 426.

94. Documents on American Foreign Relations, 1963, at 284 (1962).

95. The Year Book of World Affairs, 1963, at 47, 50 (1963).

insisted the United States was preventing a settlement in the interest of a "friendly Loas".[96] Like an earlier agreement, the Geneva Agreement of 1954, this agreement has proved ineffective in settling the Loatian problem.[97] The status of neutrality has not brought peace to Loas.[98] The future of Loas as a permanent neutral is not bright, since she is involved in the struggle between the two world blocs, the East and West.

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96. S. Chowdhury 237.

97. S. Chowdhury 235.

98. The Washington Post, 24 Oct. 1968, at F1, col. 1.

CHAPTER IV

THE PRESENT STATUS OF NEUTRALITY

A. Neutrality Under the United Nations

The right to remain neutral is an attribute of a state's sovereignty.[99] Implicit in membership in the United Nations is the relinguishment of the unqualified right to remain neutral.

When the United Nations is in a position to function effectively either through the Security Council or the General Assembly, a member state has no right to remain neutral in the traditional sense.[100] Under the Charter, the Security Council is charged with the responsibility to determine the existence of any threat to peace, breach of peace or acts of aggression against a member state.[101] The Security Council also makes recommendations or decisions as to the measures necessary to be taken in accordance with Articles 41 and 42 to restore the peace or prevent

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99. S. Chowdhury 152.

100. The French delegate on the committee which drafted Article 2 of the Charter requested that the following phrase be added to paragraph 5: "It follows from this obligation that the status of neutrality is incompatible with membership in the organization." The committee agreed that this was implied within the present wording of paragraph 5. Doc. 463, I/I/20, 6 U.N. C.I.O. Docs. 312 (1945).

101. U.N. Charter art. 39.

the disruption of peace.

When a decision or recommendation is made by the Security Council pursuant to the provisions of the Charter, the member nations are bound by the Charter to become involved. Paragraph 5, Article 2 places two obligations on members of the United Nations. First is a positive obligation, which requires members to give assistence in any action the Security Council recommends in accordance with the Charter. The second obligation is a negative duty to refrain from assisting any state against which the United Nations is taking preventive or enforcement action against.[102] The nature of assistance that a member is called upon to render under the positive obligation is determined also by the Security Council, therefore it is likely that some members will not be requested to take an active part in the enforcement. However the negative obligation is binding on all members whether or not they make any positive contributions to the peace effort.

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102. Paragraph 5, Art. 2: 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.

The Security Council's action is on behalf of all members of the United Nations.[103] Its action may be either under the provisions of Article 41 or Article 42. Article 41 provides for sanctions not involving the use of armed forces. These measures include complete or partial interruption of economic relations, means of communications with member states and the severance of diplomatic relations. Involvement in any of these sanctions would violate the traditional status of neutrality.

The economic embargo of Southern Rhodesia is an example of the Security Council's use of Article 41 measures in an attempt to prevent a possible breach of international peace. On 20 November 1965, the Security Council's Resolution 217 (1965) establishing an economic embargo of Southern Rhodesia was adopted by a 10-0 vote with France abstaining. Paragraphs 6 and 8 of the resolution stated:

> 6. Calls upon All States not to recognize this illegal authority and not to entertain any diplomatic or other relations with it;
>
> 8. Calls upon All States to refrain from any actions which would assist and encourage the illegal regime and, in particular, to desist from providing it with arms, equipment and military material, and to do their utmost in order to break all economic relations with Southern

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103. U.N. Charter art. 24.

Rhodesia including an embargo on oil and petroleum products . . . (104)

As a result of the embargo, Southern Rhodesia lost 60% of its export markets and a considerably higher percentage of its tobacco market.[105] Her imports of aircraft and aircraft parts declined from three million dollars in 1965 to almost nothing in 1967.[106] Only three countries appeared to continue normal trade relations with Southern Rhodesia; Zambia, Malawi and South Africa.[107]

The Southern Rodesia case is also a situation where the principles of neutrality have been applied to a situation where no actual armed conflict existed. Switzerland, a non-member, reported to the Security Council that she could not submit to the sanctions since she was a neutral, but would "strengthen the restrictions on imports from Southern Rhodesia" and to continue certain other measures she had taken so that Southern Rhodesia could not avoid the United Nations sanctions through Swiss territory.[108] Likewise, the

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104. 21 U.N. GAOR, Supp. 2, at 60, U.N. Doc. A/6302 (1965).

105. Report of Mr. J.G. DeDeus (Netherlands) to Security Council on 20 May 1966: 21 U.N. SCOR, 1284th meeting 12 (1966).

106. 22 U.N. SCOR, Supp. Oct.-Dec. 1967, at 5, U.N. Doc. S/7781/Add. 4 (1967).

107. Id. at 1.

108. 22 U.N. SCOR, Supp. Jan.-Mar. 1967, at 76, U.N. Doc. S/7781 (1967).

Laotian government notified the Security Council that she would abstain from any economic embargo of Southern Rhodesia since she was a neutral.[109] The Austrian government however, stated in a letter to the Secretary General of the United Nations that her government had complied with the embargo.[110] Nevertheless, Austria's exports to Southern Rhodesia increased in 1966 from the previous year.[111]

The failure of world states to object to the application of neutrality in the Rhodesian situation is a precedent for future application of neutrality to any crisis without regard as to the existence of a state of war.

Should the Security Council consider the sanctions under Article 41 insufficient, it is authorized under Article 42 to take such action as may be necessary including the use of blockades, demonstrations and other operations by the armed forces of the member states.

If the aggressor state is a member of the United Nations, then there is a basis to characterize the measures taken as not amounting to acts of war, in that the erring

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109. 22 U.N. SCOR, Supp. Jul.-Sept. 1967, at 12, U.N. Doc. S/7781/Add.3 (1967).

110. 22 U.N. SCOR, Supp. Jan.-Mar. 1967, at 82, U.N. Doc. S/7781 (1967).

111. 22 U.N. SCOR, Supp. Oct.-Dec. 1967, at 8,9, U.N. Doc. S/7781/Add.4 (1967).

member has in anticipation acquiesed in these measures when she originally accepted membership in the United Nations.[112] Against a non-member state these sanctions will normally amount to acts of war. In either case, the measures would violate the traditional concept of absolute impartiality. However, if neutrality is defined as simply the status of non-participation, then the member states not involved in the armed conflict could be considered neutral and the members that refrain from active participation in the conflict but who discriminate economically against the belligerent may be labeled as "qualified neutrals". The concept of qualified neutrality will be discussed later in this chapter.

The preceeding discussion in this chapter has dealt only with the effect of the United Nations' obligations when the Security Council has been in a position to act. However when the five permanent members can not agree on a course of action or recommendation, then the Security Council can not make a decision regarding any possible

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112. For the view that, "the dignity and purpose of the collective enforcement of the rule of law in international society requires that it should rank in a category different from traditional war see: Lauterpacht, The Limits of the Operation of the Law of War, 30 Brit. Y.B. Int'l L. 206, 221 (1953).

breach of peace. With the current division of the world into two blocs, disagreement among the permanent members of the Security Council will be the norm. Also, when the conflict is an insurrection that is not recognized as a belligerency does not amount to a breach of peace, the Security Council can not take any affirmative action concerning the armed conflict. In any of these situations, a member state can legally remain neutral unless restricted from doing so by either action of the General Assembly or treaty provision that she has entered into.

The General Assembly, under the Uniting For Peace Resolution, stated that when the Security Council fails to exercise its primary responsibility for the maintenance of peace because of lack of unanimity of the permanent members that it shall immediately consider the situation.[113] Any request for positive military aid under this Resolution is not obligatory upon the member states. However the Resolution reaffirms the basic duty of each member state to seek settlement of disputes by peaceful means and that failure of the Security Council to act does not relieve the states of their obligations under the Charter to maintain international peace and security.

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113. U.N. GAOR, 5th Sess. Supp. No. 20, A/1775 (1950).

This Resolution thus interprets the Charter principles set forth in Article 2 as binding even in situations where the Security Council can not or does not act. In fact, the Security Council is not even mentioned in Article 2. Paragraph 5 of this Article requires that member states refrain "from giving assistance to any state against which the United Nations is taking preventive or enforcement action." The ease with which the drafters of this provision could have limited it to action taken by the Security Council is apparent. Thus if paragraph 5 of Article 2 prevents a member state from being neutral in the traditional sense, when the Security Council acts, it is likewise legally binding on member states when action is taken by other organs of the United Nations; if the said action is in accordance with the Charter.

The majority of international law writers agree that the Uniting for Peace Resolution is in accordance with the Charter principles, yet deny that this resolution legally impairs the right of a member state to remain neutral.[114] These writers fail to recognize that action taken by the United Nations through the General Assembly is nevertheless

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114. For the view that on failure of Security Council to act only on a moral obligation arises see: II Oppenheim 650.

action taken by the United Nations. The distinction between actions taken by the Security Council and the General Assembly in this area are that under the provisions of Article 43 of the Charter the member states are bound to "make available to the Security Council" on its request "armed forces, assistance, and facilities". There is no such requirement to make forces available to the General Assembly. However the provisions of Article 2 to refrain from assisting an aggressor state is legally binding on each member state whenever action is being taken by an organ of the United Nations in accordance with the Charter.

Article 51 of the Charter gives each member state the right to assist any other member state that is a victim of an attack. This right exists until action is taken by the Security Council to restore peace. Member states have used this Article and the right to make regional arrangements for self-defense as a basis to form collective security alliances. These alliances have likewise restricted the right of member states to remain neutral in a conflict. The United States is pledged specifically to the defense of more than forty nations in addition to her commitments under the United Nations Charter.[115]

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115. 57 Dept. of State Bull. 89 (1967).

B. The Distinction Between War and Peace

One international law theorist states that the reason neutrality did not develop into a distinct legal status until after the latter part of the middle ages is due to the lack of a clear distinction between war and peace. Only when a clear separation between the two existed was it possible for a state to remain neutral.[116] This same anology may be used in our current world situation. An example of this lack of distinction is apparent in the present Middle East situation. For six days in June 1967, there was an armed conflict existing between the Middle East States. Since that time the relations between the states involved is a "quasi armed conflict."

It is the lack of distinction between a state of war and peace that makes it impossible to limit the status of neutrality to only a state of war. This limitation encourages a possible aggressor state to stockpile munitions prior to the commencement of a war and then to pressure third states to remain neutral during the actual conflict. A situation similar to this occurred with Germany in the 1930's.

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116. E. Castrén 426.

Under customary international law, the absence of peace means the commencement or continuation of a state of war.[117] However customary international law has failed to accept the lack of distinction between war and peace and this is reflected in the restriction of the status of neutrality to a state of war.

Since modern conflicts are being fought without the necessity for a formal state of war, it appears that to retain this requirement for neutrality is inconsistent.

C. The Modern Characteristics of Commerce

The nineteenth century, when neutrality reached its apex, was an era of liberalism centered on the distinction between state and private activities. The predominant economic theory of the nineteenth century was the preservation of commercial freedom of the individual. An extreme reflection of this individualism is found in Herbert Spencer's series of letters entitled The Proper Sphere of Government.[118] Spencer and his followers were more concerned with what a state should not do, rather than what the state should do. Thus the freedom of the individual to trade with a belligerent

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117. S. Chowdhury 213.

118. Great Political Thinkers 636 (W. Ebenstein ed. 1960).

state is based on the absence of a duty on the part of the neutral state to prevent the trade. However, where the neutral state exercises decisive control over its foreign commerce the distinction is no longer valid.[119]

This individualism was the dominant political theory at the time the Hague Conventions, V and XIII were drafted. Under Article 7 of Convention V, a neutral state could allow her private citizens to export arms to one of the belligerent states without violating the state's status of neutrality. However if a neutral state engaged in arms traffic with a belligerent state, this was considered a hostile act toward the other belligerent.[120]

Until the First World War, there were few cases of neutral states voluntarily prohibiting the sale of munitions to belligerent states.[121] The manufacture and export of arms were considered as private acts by her citizens. However since that time the sales of munitions have ceased to be private acts and is now almost completely under state control. This trend toward state control decreases the economic advantages of neutrality as the neutral state can not legally trade in munitions during a state of war.

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119. ILS, 1955, at 211.

120. II Oppenheim 738.

121. 19 Brit. Y.B. Int'l L. 136 (1938).

Under Convention XIII, the building of an armed vessel by a private citizen to the special order of a belligerent state violates Article 6. However if the vessel is manufactured in due course and thereafter sold by a private citizen to the belligerent state in the ordinary course of trade, the impartiality of the neutral state is not violated.[122] Likewise, private citizens may transport arms and munitions intended for belligerent states along the neutral state's railways in the normal course of business, but if the state facilitates such transportation by offering lower freight rates or other special advantages to favor one belligerent state, then the conduct of the state is unneutral.[123] Though the neutral state reaps indirect benefits from the trade of her citizens in munitions with a belligerent state, such trade is considered private acts under the present principles of neutrality.

The United States, a signatory to the Hague Conventions, recognizes the distinction between official acts of the neutral state and those of her citizens in the Department of Army's Field Manual, Law of Land Warfare. This manual approves the shipping of munitions through neutral territory

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122. II Oppenheim 713.

123. E. Castrén 475.

by a citizen and condemns similar acts by the state.[124] It also approves the sale of any thing that may be of use to a belligerent state by the private citizen if the items can be exported or transported without involving the neutral state.[125] However there are very few acts that can be accomplished now without state regulation.

The distinction between the individual and the state resulted from the assumption that commercial trade is universally private.[126] This assumption is no longer valid, as the economic freedom of the individual citizen is now limited by direct supervision or control by the state. No longer is foreign trade the private acts of citizens.

In the Soviet Union, the entire foreign trade is handled by the state and in other countries the trend is toward greater interference, control and financial support to private trade organizations by the state. Under the present principles of neutrality, the Soviet Union and possibly Great Britian and France would be prohibited from supplying munitions to a belligerent without commiting unneutral acts.[127]

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124. U.S. Dep't of Army, Field Manual 27-10, Law of Land Warfare 186 (1956).

125. Id. at 187.

126. 19 Brit. Y.B. Int'l Law 131 (1938).

127. E. Castrén 478.

An analysis of the current Middle East situation will reveal the present character of munitions trade in foreign commerce. Assuming that a state of war has existed in the Middle East at least from June 1967 until the present, (February 1969), then the status of traditional neutrality could not be applied to any of the major arms suppliers to the Middle East.

The Soviet Union is an active supplier of arms and other munitions to the Arab States. The United States' Department of State estimates that since 1955, the Soviet Union has provided well over two billion dollars in munitions to the Arab States and was the first to introduce heavy tanks and bombers into the Middle East. Additionally the Soviet Union has since replaced the munitions lost by the Arab States in the June 1967 conflict.[128]

The United States in 1968 sold Israel a number of A-4 Skyhawk jet light bombers and on 27 December 1968 announced a $200 million dollar deal with Israel to sell her fifty supersonic F-4 Phantom aircraft. This package deal includes the training of pilots and spare parts for the aircraft.[129] These transactions are acts of the state as they were financed by the United States Government.

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128. 57 Dept. of State Bull. 797 (1967).

129. The New York Times, 10 Jan. 1969, at A22, col.1.

The latter transaction was authorized by the Foreign Assistance Act of 1968 which stated that the deal was authorized "to provide Israel with an adequate deterrent force capable of preventing future Arab aggression by offsetting sophisticated weapons received by the Arab States and to replace losses suffered by Israel in the 1967 conflict."[130]

Though this action by the United States is a breach of the duty of a neutral to remain impartial, she has given ten times more military aid to the Arab States since 1948 than to Israel.[131]

In the case of France's munitions trade in the Middle East, it appears that her actions can likewise be considered as acts of the state rather than the private citizens. Prior to the June 1967 conflict, the Israel military forces had established a close relationship with the French military and the Israeli airforce was almost completely equipped with equipment purchased from the French government.

In 1966, Israel ordered fifty Mirage fighter aircraft from the government controlled Marcel Dassault Aircraft

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130. Pub. L. No. 90-554, sec. 651 (9 Oct. 1968).

131. Statement of Amb. Goldberg to U.N. Security Council on 13 June 1967 reprinted at 57 Dept. of State Bull. 7, 9 (1967).

Company. Israel has paid the French government more than fifty million dollars for these planes, but has yet to receive delivery as France imposed an embargo on the sale of aircraft to Israel following the six day war in 1967.[132] At the time this embargo was announced, a similar one was placed on Jordan, Syria and Egypt even though none of these states had expressed a desire to purchase any of the aircraft. During the same period the French government has sold and delivered fourteen of the Mirage aircraft to Lebanon. The government of France continued to sell selected munitions to Israel until the complete arms embargo was announced on 7 January 1969.[133]

During the year 1968, the government of France sold 220 armored combat cars to Saudi Arabia and seventy such cars to Iraq. Also in 1968, the government sold helicopters to Jordan and missiles to Libya.[134]

English government likewise has sold arms and equipment to Jordan during this period.[135]

A violation of the status of neutrality by a neutral state is considered an act of war toward the offended

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132. The Washington Post, 8 Jan. 1969, at A16, col.7.

133. The New York Times, 11 Jan. 1969, at C3, col.8.

134. The Washington Post, 9 Jan. 1969, at A13, col.1.

135. The Washington Post, 11 Jan. 1969, at A12, col.1.

belligerent state. Thus if the Middle East situation is considered a state of war, then under the present principles of neutrality, the Arab states would be justified in declaring war on the United States and the Israel government would likewise be justified in declaring war on both the Soviet Union and Great Britian. Thus the United States would be at war with Great Britian.

While the neutral state is restricted from trading in munitions with a belligerent state, it does not appear that such a restriction exists in trading in goods not considered contraband.[136] Thus, the current principles of neutrality do not take into an account the fact that the modern conflict is being fought in the economic field as well as on the battlefield.

The assumption that commercial trade is universally private is no longer valid except in a very limited form. Thus, the principles of neutrality must be modified in order for neutrality to regain its status in international law. There are two possible directions that may be taken in this regard. One direction would be to limit all trade by a private citizen to that which a neutral state may legally engage in during an armed conflict. However this

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136. For a good discussion on the definition of contraband see: II Oppenheim 799-801.

course of action would substantially curtail trade between neutrals and belligerents. A reduction in trade would lessen the economic advantages of neutrality and make it less attractive as a course of action by the third state when armed conflicts break out. However, since this course of action would involve less intercourse between the neutral state and the belligerent states, it is less likely that this alternative would involve the third state in the armed conflict.

The second direction would be to assimilate the neutral government's trade to that of a private citizen. Professor Stone thinks that this method is the logical direction for neutrality to take.[137] It would allow the neutral state to supply munitions and grant loans to a belligerent state the same as a private citizen. Thus the only act which would violate neutral status would be actual assistance by combat troops or assistance on the battlefield.

The problem with this course of action is that if other aspects of the law of neutrality are not changed ships and cargos of the neutral states would be subject to the ordinary penalties for contraband carriage and blockade running that a private citizen would be. This alternative would increase the economic advantages of the

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137. J. Stone 412-415.

status of neutrality by increasing the range of trade permissible to the neutral state. However since the normal immunities enjoyed by state owned ships and property would be abolished when the ship or property is involved in such trade undoubtedly there would be more disputes and conflicts under this alternative. Thus there would be a greater chance that the neutral state would be drawn into the conflict to "protect her neutral rights".

As the economic advantages of neutrality have in the past determined the direction that neutrality has taken, it appears that second alternative will be the new characteristic that neutrality will assume. This course of action will increase the chances of the neutral state being drawn into the conflict, but one they will accept. A state following this alternative could be considered a "qualified neutral".

D. Qualified Neutrality

The law of neutrality has in the past given third states only two choices, either to join in the conflict as a belligerent or to observe the neutral duty of impartiality.[138]

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138. J. Stone 383.

This neutral duty of impartiality covered both military and non-military acts.[139] Thus if a state allowed her citizens to trade in munitions with a belligerent state, she could not restrict the citizens from trading with the other belligerent states. However the duty of impartiality was sometimes avoided by technical impartiality. For example, the United States prior to her entry into the Second World War was impartial when she sold goods on a "cash and carry" basis, even though only England was in a position to do her own shipping.

To avoid one of the two alternatives of war or neutrality, the theory of non-belligerency developed. This term was first used in September 1939 to describe Italy's status and attitude before she became a belligerent.[140] By this method, Italy hoped to become an economic supporter of Germany without taking an active military part in the conflict. However, France and England refused to recognize this status and in June 1940 Italy entered the war against them. This term has been used frequently since then to describe the actions of one state in aiding a belligerent without becoming actively involved in the military conflict.[141]

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139. ILS, 1955 at 175.

140. 35 A.J.I.L. 121 (1941).

141. Kunz, Neutrality and the European War 1939-1940, 39 Mich. L. Rev. 747 (1941).

A contemporary situation which could be labeled non-belligerency is the actions of the United States and the Soviet Union in supplying the Middle East combatants with munitions and other equipment.

The status of non-belligerency has been condemned as one born out of the desire to intervene under the name of non-intervention; to be in the conflict and yet not to be in the conflict. Likewise it has been described as a modern excuse for violating the laws of neutrality and as a method to commit warlike acts while escaping the consequences of belligerency.[142] These writers have failed to realize that there is a status between the strict impartiality of a traditional neutral and a belligerent.[143]

E. Territorial Integrity

Article I of Hague Convention V states that the territory of a neutral state is invoilable. Additionally Article V of Hague Convention XIII forbids a belligerent state from using neutral ports as a base of naval operations. These two provisions form a concept of territorial integrity. This concept is the principle of neutrality most frequently violated in current armed conflicts.

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142. E. Borchard, supra note 64 at 619.

143. Contra, See: C. Colombus 772.

In the present Vietnamese conflict, both Laos and Cambodia have accused the United States and North Vietnam of violating their territorial integrity by conducting military operations in neutral territory.[144]

The concept forbids a neutral state from allowing a belligerent state to use its territory as a base or fortification, even though the territory is far removed from the theatre of war. The gathering of intelligence in a neutral territory is likewise a violation of this concept.[145] It would appear that in allowing a belligerent state to send military personnel to neutral territory for "Rest and Recuperation" leave is a violation of this concept, since the basis of this program is to improve the combat efficiency of the belligerent state's military forces.

The majority of the violations of the territorial integrity of neutrals have been justified as acts of self-defense. At the Nuremberg War Crimes Trial this justification was unsuccessfully advanced as the reason that Germany invaded Finland. Likewise, this theory was used as a justification for Germany's invasion of Belgium in 1914.

The present situation in Cambodia reflects the current dilemma between the right of a belligerent

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144. The Washington Post, 24 Oct. 1968, at f1, Col.1.

145. E. Castrén 507.

state to protect herself from attacks launched from neutral territory by her adversary and the opposite right of a neutral state to territorial integrity. Cambodia has tried to remain aloof of the conflict in Vietnam by being neutral, however the North Vietnamese have continued to use her territory as a base of operations against the military forces in South Vietnam. If Cambodia is incapable of preventing these violations from continuing, this should give the American and South Vietnamese forces the right to enter Cambodian territory and destroy these military bases established by the North Vietnamese.

Where the small neutral state is located between two possible belligerent states the theory of self-defense as a justification by one belligerent state to invade the neutral state lessens the value of neutrality as an alternative course of action for the small state.

The problem with allowing self-defense as a justification to invade neutral territory is that this exception is too easily abused. Yet to deny the right is to deny the belligerent state the right to protect herself from attacks launched against her from neutral territory.

An additional problem with the territorial integrity concept is when a neutral state allows volunteers to cross her borders to join in the conflict. Under the traditional principles of neutrality, a neutral state could allow

individuals to cross her borders to join the military forces of a belligerent state. However this principle may easily be abused, as happened in Korea when the Chinese "volunteers" crossed China's border during the Korean conflict.

The aircraft of a belligerent state crossing the territory of a neutral state is considered a violation of the territorial integrity concept also. It was for this reason that the Swiss felt compelled to fire at belligerent aircraft crossing her territory in both World Wars.[146]

The territorian integrity concept remains a vital part of the current law of neutrality. However in the modern armed conflicts, the violations of neutral territory will apparently increase rather than decrease as the conflicts are no longer confined to the limits of the battlefield.

The right of self-defense as a justification for violation of neutral territory should be limited to only those situations where the need is clear, definite, and overwhelming with no other suitable alternative available.

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146. Taubenfeld, International Actions and Neutrality, 47 A.J.I.L. 377, 395 (1953).

CHAPTER V

THE FUTURE OF NEUTRALITY

> In "cold war" on a world scale the need of undivided political direction grows with the duration and intensity of the tension. One after another the people align themselves with those who, on one side or the other, have the greatest strength. Even before total war has merged them in the combat formations, neutrality is morally and materially closed to them. (147)

In a global conflict similar to the past two world wars, the possibility that belligerents will adhere to the principles of neutrality is remote. When the vital interests of a nation are in issue, legal and moral reasons are always available to justify the violations of the neutral rights of non-involved nations. As a starving man will break the laws against larceny so will a state involved in a total war. As experienced by the United States in 1914-1916, a state can not remain aloof of a major conflict and trade with both sides without being drawn into it. Thus if a third global war occurs neutrality will be a useless concept.

The possibility of a third world war should not be dismissed, however it is more likely that minor conflicts will be the norm. In these conflicts it is likely that some states will find it to their advantage to pursue a

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147. C. DeVisscher 317.

qualified status of neutrality.

The possibility that traditional neutrality will be available and feasible is doubtful. First, a majority of world states have contracted away their right to remain neutral by membership in the United Nations and collective security treaties. Second, the economic advantages of traditional neutrality have diminished as a result of the changed concept of foreign commercial trade. Thus a status between traditional neutrality and belligerency is necessary. This would be qualified neutrality.

There will be some writers of international law who will contend that qualified neutrality is not in fact neutrality. These writers have failed to accept the ability of neutrality to change as other branches of international law have in the last two centuries.

There are three modifications needed to achieve a legal status for qualified neutrality. These modifications are:

First: Economic trade, military or otherwise, with belligerent states are not to be considered as acts of war by any belligerent state, unless such trade amounts to the establishment of a logistics base on the territory of the third state.

Under the first part of this recommendation, third states would have freedom of trade with any of the belligerent states. Additionally this part would also allow a state to trade in munitions or other contraband with any of the

belligerent states without committing unneutral acts. Thus the United States trade with Israel in airplanes would not be inconsistent with the status of neutrality. The practical effects of this modification would be to separate battlefield neutrality from economic neutrality. Thus a state could be neutral on the battlefield and active in the commercial field. This appears to be the current actual practice in the Middle East. The oddity of this modification is that it makes a distinction between battlefield neutrality and economic neutrality at a time when conflicts are being fought as much by economic means as by military means. It is this contradiction that makes even the status of qualified neutrality unworkable in a global war. However in a limited conflict like the current Middle East situation the desires of third states to limit the conflict would allow this distinction to exist.

The second portion of this recommended modification is designed to prevent the neutral state from allowing a belligerent state to establish a logistics base in its territory for the benefit of the belligerent. Thus under this provision Cambodia could trade in supplies and munitions with North Vietnam, but could not establish a logistics base in her territory near the South Vietnamese border. To allow such action and then to proclaim that the

territory of a neutral is inviolable would be inconsistent. Without this provision, belligerent states would be encouraged to establish their bases of logistics in safe neutral territory. Additionally a friendly neutral state would be prevented from establishing a convenient supply point near the zone of conflict to sell equipment and supplies to the belligerent state as needed.

Second: Ships and aircraft found within the zone of conflict are subject to be stopped and searched. Ships found with contraband goods are to be turned back to their last port. Should the same ship be found in the zone of conflict a second time with contraband goods it would be subject to seizure. Ships and aircraft belonging to states not involved in military actions are not subject to capture outside of the zone of conflict.

This modification would reduce the disputes involved in blockades, immunity of private property from capture and the right to search state owned ships. Additionally this modification should limit the conflict to the actual zone of combat and thus prevent disputes from occurring elsewhere. If third states are allowed to trade in munitions with belligerent states, there should be definite rules as to when the vessels of the third states are subject to capture and when they are not.

Third: A third state may trade with any of the belligerents without a duty to trade with the other belligerents.

Under this statement, a third state would be free to trade with only one belligerent state or give preference to trade with one of the belligerent states without committing an act of war. Without this modification in a situation similar to the current Middle East conflict the United States would be under a duty to trade in munitions with both Israel and the Arab states. Thus by selling A-4 aircraft to Israel the United States would be under a duty to treat the Arab states equally and sell similar aircraft to them, plus training pilots for them. However under the modification recommended, this duty to trade equally with each belligerent state would no longer exist. When the United Nations under action of the Security Council places an embargo on one of the belligerent states, then the other world states could refrain from trading with that belligerent state without ceasing trade with the other belligerent states.

These above listed recommendations would establish a qualified type of neutrality. However to obtain world wide agreement on any proposed changes to international law is difficult if not impossible. For example, the attempts to change the boundary limits of territorial waters have been a failure. Therefore if any changes are made in this area it will apparently be by evolution or gradual change. Some modifications in the direction recommended by this chapter have already been started. The right of

a state to trade in munitions with the belligerent states without becoming a belligerent herself appears to be one of these directions that the current trend of international law has taken.

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