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CODIFICATION OF THE LAW OF MARITIME NEUTRALITY

Maritime neutrality has recently come to the fore as one of the engrossing problems of international law and relations of the present. The last years of the war marked a low point in neutral rights, and, incidentally, a high point in the enforcement of neutral duties. The general reaction to the world war was that neutrality was a cowardly and unethical position to maintain, and, instead of a demand for a restatement and extension of neutral rights, there was a wide-spread conviction that neutrality as a policy or status ought no longer to be tolerated. It was believed in many quarters that war could no longer be localized anyway, and that, therefore, the cause of peace would be better served by setting up procedural machinery for the settlement of international disputes, followed by joint action against an "aggressor" state. These ideas and principles found expression in the Covenant and organization of the League of Nations.

But it must not be thought that adherents to the older system of neutrality had entirely disappeared. In fact, the pendulum at the present moment seems to be swinging somewhat in the direction of the older conception. The most pronounced statement of this conception is found in the projected codification of international law being carried on under the auspices of the Pan American Conferences.

The history of this proposed codification is briefly as follows: The Fifth Pan American Conference, which met at Santiago de Chile in 1923, unanimously adopted a resolution for the creation of an International Commission of Jurists for the purpose of codifying public and private international law. The Governing Board of the Pan American Union, under the influence of Charles Evans Hughes, then United States Secretary of State and Chairman of the Board, invited the American Institute of International Law to prepare a series of projects for the consideration of the International Commission of Jurists. The Institute drew up a series of thirty projects, which on

March 2, 1925, were presented to the Governing Board of the Pan American Union.[1]

The International Commission of Jurists took up its work in Rio de Janeiro in April and May, 1927. Twelve projects and a code of private international law were approved by the Institute and referred for further action to the Sixth Pan American Conference held at Havana, Cuba, January and February of this year. One of the projects, No. IX, deals with Maritime Neutrality, while still another, No. XI, deals with the obligation of States in case of civil war.[2]

Quite in contrast with the League of Nations Covenant, the trend of which is in the direction of a considerably limited right of neutrality, the project of the International Commission of Jurists imposes a duty of remaining neutral. Article I of the project is as follows:

> "In case of war between two or more States the other States shall consider it a duty to remain neutral and to contribute by the offer of their good offices and mediation to putting an end to the conflict.
>
> "The fulfillment of this duty shall not in any case be considered by the belligerents as an unfriendly act."

The emphasis of this article on this "new conception of neutrality," as it is called in the preamble to the project of the American Institute of International Law, is even more pronounced than in the original article in the project of the Institute, for the word used in the second clause is changed from "right" to "duty."

By contrast, the right of neutrality of a member of the League of Nations is limited by articles 10, 11 and 16 of the Covenant. Article 10 imposes the obligation "to respect and

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[1] See article by James Brown Scott, "The Gradual and Progressive Codification of International Law", in the American Journal of International Law, July, 1927, Vol. 21, 417 ff. The texts of these projects the found in Codification of International Law—Projects of Conventions, prepared at the request on January 2, 1924, of the Governing Board of the Pan American Union for the consideration of the International Commission of Jurists and submitted by the American Institute of International Law to the Governing Board of the Pan American Union, March 2, 1925 (Pan American Union, 1925); also in Special Supplement to the American Journal of International Law, Oct., 1926; Vol. 20; 279-387.

[2] The texts of these projects are found in the Special Supplement to the American Journal of International Law, January, 1928; Vol. 22, No. 1.

preserve as against external aggression the territorial integrity and existing political independence of all members of the League." Clearly, no member of the League may remain neutral in case the territory of another member of the League is being violated. Article 11 states that "any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." This article opens a large number of cases in which, subject to the decision of the League, a member State loses its individual right of remaining neutral.

A far more sweeping renunciation of the right of neutrality is found in Article 16. Under Article 12 the members of the League agree to submit their disputes either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council. Any State resorting to war in violation of this agreement shall "ipso facto be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a member of the League or not." Furthermore, it becomes the duty of the Council in such cases to recommend to the several members concerned what effective military, naval, or air force they shall severally contribute for the enforcement of the provisions of these articles.

No comment is needed to point out the utterly divergent, even conflicting, conceptions of neutrality under the League of Nations and the Pan American project. It would not seem possible that the same State could be loyal to both conceptions, and since many of the Latin American States are members of the League, the ratification by them of the International Commission of Jurists project would seem a violation of Article 20 of the Covenant, under which the members of the League "sol-

emnly undertake that they will not hereafter enter into any agreement inconsistent with the terms thereof."

The second clause of Article 1, stating that the fulfillment of the duty of good offices and mediation shall not in any case be considered by the belligerents as an unfriendly act, is certainly not a new conception. in fact, the tendering of good offices and mediation may be said to bear a semi-legal character.[3] Under the terms of the First Hague Convention a State has not only always the right, but prior to hostilities, even a semi-obligation to offer good offices and meditation.[4]

This emphasis upon the rights of neutrals, regardless of how unjust the origin of the war may have been on the part of the belligerents, is reflected in Article 2 of the Project on Maritime Neutrality.

With a view to insuring "respect for the rights of neutrals, and particularly the freedom of commerce and navigation," the Governing Board of the Pan American Union is required to meet immediately upon the declaration of war "to ascertain the common interests of the States and to suggest to them fitting measures." Thus, while the League of Nations is in this respect primarily an agency for the maintenance of peace, the Pan American Union under this provision would become primarily an agency for the maintenance of neutral rights.[5]

The anomalous position of those Latin American States which are members both of the Pan American Union and the League of Nations is most apparent under the provisions of this article. As a member of the League, these States may be called upon to

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[3] Fenwick, International Law, p. 402; Hershey, Revised Edition, p. 460.

[4] Art. 2. "In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as the circumstances allow, to the good offices or mediation of one or more friendly powers."

Art. 3. Independently of this course, the Contracting Powers deem it expedient and desirable, that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance."

"Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities."

"The exercise of this right can never be regarded by either of the parties at variance as an unfriendly act."

[5] See editorial on the project of the American Institute of International Law by Quincy Wright in the American Journal of International Law, January, 1927, Vol. 21, pp. 127 ff.

forego neutral rights and cooperate in an international boycott against an aggressive State, while as members of the Pan American Union these States may be asked to engage in a cooperative action to insure respect for neutral rights. There has been a considerable opinion in this country, that the United States government, even though not a member of the League, ought not to insist upon the customary neutral rights of its nationals to trade with a belligerent, if that belligerent has been declared an "aggressor" State, and is being subjected to a League boycott. This opinion has found expression in a joint resolution introduced in the lower house of Congress by Representative Theodore E. Burton of Ohio.

The Burton resolution would declare it to be "the policy of the United States to prohibit the exportation of arms, munitions or implements of war to any country which engages in aggressive warfare against any other country in violation of a treaty, convention or agreement to resort to arbitration or other peaceful means for the settlement of international controversies." The effect of this resolution would be to place the United States, even though not a member of the League, on the side of the League in punishing an aggressive State.

There seems also to be a conflict of principle between Articles 1 and 2 of the Pan American project. How far does the duty to remain neutral extend? If it extends so far as to prohibit any use of force in the enforcement of neutral rights, assuming that there is a continued violation of these rights after repeated protests from the Governing Board of the Pan American Union, the duty to remain neutral will certainly destroy all effectiveness of the protests against the violation of neutral rights.

A current movement, constantly gaining in strength, which throws still more uncertainty about the future development of the law of neutrality, is the movement to outlaw war. This movement which had its origin and has its greatest following in this country,[6] came to a dramatic issue in April, 1927, when

[6] As early as February 14, 1923, Senator Wm. E. Borah, a leading advocate of the outlawry of war, introduced the following resolution in the Senate, and has reintroduced it in every succeeding Congress, "that war between nations should be outlawed as an institution or means for the settlement of international controversies by making it a public crime under the law of nations . . . . that a code of in-

M. Briand, Foreign Minister of France, proposed in a public address to subscribe to an engagement with the United States to outlaw war. This proposal was officially made through diplomatic channels on July 1. On December 28, Mr. Kellogg, the American Secretary of State, proposed in reply to the Briand proposal, that the agreement be made multi-lateral instead of bi-lateral, and that it outlaw all war, and not only aggressive war. At the present moment, Franco-American negotiations seemed to have reached a deadlock. France insists that it cannot subscribe to an engagement to outlaw all war without violating her commitments and obligations under the League of Nations and the Locarno Pact, for under these France has obligations to wage war against a state which disturbs the peace. In Europe generally, and also in certain quarters in the United States, the Kellogg counter proposal is regarded as a proposal to renounce the Covenant of the League of Nations, or, as put by Senator Borah, "a system which is an alliance to go to war comes in conflict with a system not to go to war."[7]

For the purposes of this article it is important to know only what, under the system of the outlawry of wars, happens to the concept of neutrality. Contrary to what one would at first blush expect, the problem of neutrality does not entirely disappear from this system, but makes its re-appearance under a different form. Defensive war, thrown out at the front door, comes in again at the back door as self-defense. And if self-defensive is permitted, third States will still have to determine what their position will be when an outbreak occurs. Will third States have a right to remain neutral, a duty to remain neutral, or will they have a duty to go to the aid of the defensive State?

That the plan to outlaw war would not take away the right of self-defense is apparent from the statements of its various

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ternational law be created and adopted, ... and that a judicial substitute for war should be created (or if existing in part, adapted and adjusted) in the form of an international court, modeled on our Federal Supreme Court", etc. For full text see Congressional Digest, March, 1928, p. 77.

[7] New York Times, February 5, 1928. See also Foreign Policy Association report on The League of Nations and Outlawry of War, February 17, 1928.

advocates.[8] In a recent and very important article, in which he attempts to reconcile the League system and the system to outlaw war proposed by Secretary Kellogg, Senator Borah makes this very clear.

"As to France's other compacts or alliances, these are all supposed to be in harmony with the principles and provisions of the Covenant and to be filed with the League. Let us assume, for example, in the case of Belgium, which has been raised by the French, that France is absolutely obligated under her alliance to come to the relief of Belgium in case of attack. This commitment can be easily protected.

"All that is necessary is for the multi-lateral pact to be signed by Belgium, in which event all the signatories agree not to use war or force in any dispute or matter relating to Belgium. If an attack, nevertheless, is made on Belgium by one of the signatories it would constitute a breach of the multilateral treaty and would thereby ipso facto release France and enable her to fulfill her military engagements with Belgium. In other words, France's commitment to Belgium would merely be in suspense so long as the signatories kept their multilateral compact, there would be no violation thereof."[9]

Thus, if Senator Borah states the case correctly, the problem of neutrality, at least for non-members of the League remains much the same as before. If two or more States go to war in spite of their treaty obligations such countries will still have to decide on a line of conduct. It may insist upon the ancient rights of neutrals, which may, of course, be a great aid to the outlaw State; or it may adopt the policy outlined in the Burton resolution and prohibit the export of arms and munitions, and possibly all supplies as well; or it may join with other powers to put down the outlaw.

Codification of international law has also been undertaken by the League of Nations. Codification was recommended by the Commission of Jurists which drew up the Statute of the World Court and a Committee was appointed by the Council in

[8] See S. O. Levinson in the Yale Daily News, April 21, 1925; and Mr. Levinson's letter to Mr. J. C. Garnett, of March 11, 1924, issued in pamphlet form by the American Committee for the Outlawry of War, and see John Dewey's articles in the New Republic, October 3 and 24, 1923.

[9] New York Times, February 5, 1928.

1924. This Committee was instructed "to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment," to refer this list to the governments of the world, to examine their replies, and then "to report to the Council on the questions which are sufficiently ripe." All questions dealing with neutrality were deferred, on the ground evidently, that international agreement on them was not yet realizable.[10]

And now along comes Mr. Borah with the introduction in the Senate of a joint resolution for calling an international conference to codify maritime neutrality laws before the Naval Limitation Conference convenes in 1931.[11] The feeling behind the resolution seems to be that no further progress in the movement for the limitation of naval armament can be made until the rights of neutrals at sea has been clearly defined.

Should such a conference be called the whole problem of the League of Nations sanctions, such as blockade and economic boycott, would undoubtedly be raised. Will the non-members of the League insist upon the former neutral rights at sea, even if the belligerent is one of a concert of powers acting against an aggressor under the provisions of the League of Nations. Should the United States insist upon that the sanctions of the League will almost certainly prove unworkable. The two systems are incompatible. The old system of neutrality is based upon the principle that wars are of concern only to the parties to it, and that wars can be localized. This conception is based upon conditions and an age to which the world war marks an end. The League conception is based upon the idea that a war anywhere in the world concerns the rest of the world, and that a war once started, is bound sooner or later to become general.

Finally, in returning briefly to the project of maritime neutrality drawn up by the Commission of Jurists, it may be noted that its provisions, with minor modifications, appears to have been accepted by the Pan American Conference at

[10] See Special Supplement to the American Journal of International Law, January, 1928, for the report of this Committee. See article by Jesse S. Reeves, Progress of the Work of the League of Nations Codification Committee, in American Journal of International Law, October, 1927.

[11] New York Times, February 25, 1928.

Havana. However, the United States delegation entered a reservation to Article 3, which with a few verbal changes in the text, reproduces Article I of the Washington Convention on Submarines and Poison Gases. The article is designed to prevent the destruction of merchant vessels without warning and without placing the crew and passengers in safety. When this article came before the committee at the Pan American Conference the Argentine delegate moved to include armed merchant ships in the class of warships, thus removing them from the protection of this article. The United States, Uraguay, Panama and Cuba, declared themselves against such classification, but the committee voted to assimilate armed merchant ships to war ships by a vote of eleven to four.[12]

This same question of the classification of armed merchantmen came up in the very same way at the Washington Conference. There the Italian delegation, with the apparent endorsement of the French delegation, would accept the resolutions which were finally embodied in the submarine convention only on the understanding that the term "merchant vessel" in the resolution referred solely to unarmed merchantmen.[13]

The problem of the classification of armed merchantmen came up during the World War in connection with the treatment which should be accorded them in American ports. The policy of the United States in this matter was not entirely consistent. The United States recognized the right of belligerent merchantmen to resist capture, and at first made the admission of belligerent armed merchantmen into its ports dependent upon the defensive character of the weapons, such character to be determined in each case by the port officials. As evidence of the defensive character of the arms the following were to be taken into consideration; the number, caliber, character, size, and position of the guns; the quantity of ammunition carried, whether the vessel was manned by its usual crew and officers; whether the vessel intended to clear for a port lying in its usual trade route; whether the vessel took on board food and supplies sufficient to carry it to its port of destination; whether the cargo

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[12] New York Times, February 15, 1928.

[13] Proceedings, Conference on the Limitation of Armaments, Government Printing Office, Washington, 1922, pp. 688 and 692.

of the vessel consisted of commerce unsuited for the use of a ship of war in operation against an enemy, etc.[14]

The rules laid down in this circular were superseded by new rules embodied in a memorandum of March 25, 1916. The memorandum declared that the status of a belligerent armed merchantman was to be considered from two points of view, from that of a neutral when the vessel enters its ports, and from that of an enemy when the vessel is on the high seas. The status of a belligerent armed merchantman in a neutral port was to be determined from the presence on board of a "Commission of War." Unless there was such a commission the presumption was that the vessel was armed for defense.[15]

That the American State Department was not entirely certain of the correctness of its classification is indicated by a confidential letter of January 18, 1916, sent to all the belligerent governments. In this letter Mr. Lansing expressed the hope that a formula might be found by which submarine warfare could be brought within "the rules of international law and the principles of humanity without destroying its efficiency in the destruction of commerce." He pointed to the changed conditions of naval warfare brought about by the advent of the submarine. A merchant vessel carrying a small calibre gun is effective in an attack on a submarine, and since pirates are no longer found on the high seas and privateering has been abolished, the arming of merchantmen can now only be explained on the ground of a purpose to render merchantmen superior in force to submarines and to prevent warning and visit and search by them. "Any armament, therefore, on a merchant vessel, seemd to have the character of an offensive armament."

The nature of the formula which Mr. Lansing hoped would be acceptable to both belligerents can be gathered from the following paragraph of this letter:

"It would, therefore, appear to be a reasonable and reciprocally just arrangement if it could be agreed by the opposing belligerents that submarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and

[14] Circular of September 19, 1914. Text in American Journal International Law, Special Supplement, Vol. IX, 121, and also in Naval War College, International Law Topics, 1916, 93-95.

[15] Naval War College, International Law Topics, 1916, 101 ff.

passengers to places of safety before sinking the vessels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever."[16]

The Netherlands government during the World War assimilated armed merchantmen to warships and excluded them both from her ports and waters.[17] From all this it would appear that there is yet no great amount of agreement on the regulation of the use of submarines, nor the status of armed merchantmen.

It cannot be said that the project of the International Commission of Jurists represents any great advance in the codification of the law of neutrality. The project is hardly more than a restatement of the XIII Hague Convention, with a few additions, such as the articles discussed. More radical departures, attempting to solve some of the more difficult problems raised by the experiences of the World War, were found only in the form of *voeux* attached to the projects recommended by the American Institute of International Law, but these were dropped by the International Commission of Jurists. These *voeux*, four in number, dealt with the exclusion of warships from neutral ports and territorial waters, except in case of *force majeure*, the prohibition of a commercial blockade, the inviolability of merchant ships at sea, and the abolition of the right of search.

Any attempt now to restate the law of belligerent and neutral rights at sea will open large questions of the whole system or structure of international society. It will undoubtedly cause, both here and abroad, but especially here, a fresh examination of the fundamental principles on which international society shall be based. The older system, with its sharp differentiation between neutrals and belligerents proved quite unsuccessful during the last war. Nor is the United States in a very good position to stand strictly on the rights of neutrals as they stood before 1914, for when the United States entered the war, it went very nearly as far as did any of the belligerents in ignoring neutral rights, even to the extent of ignoring its own protests on the subject made only a few months before as a neutral. Moreover, this system of neutrality is utterly divorced

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[16] American Journal of International Law, Special Supplement, X, 312.

[17] Vandenbosch, Neutrality of the Netherlands During the World War, Ch. VIII.

from justice. It may mean aiding the aggressive party in the dispute. The way of the Burton resolution would remove that awkward possibility. Under it the United States would, at least to a certain extent, accept the no small burden involved in preventing the export of arms and munitions to an aggressive belligerent, but the United States would still be absent from the machinery and organization which would in many cases have to determine who was the aggressor. Under this system the United States would take the results of a system, while refusing to take part in reaching that result. The only other alternative is a full participation in all the machinery of the League of Nations.

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