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## The Traditional Legal Concept of Neutrality in a Changing Environment

Detlev F. Vagts

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# THE TRADITIONAL LEGAL CONCEPT OF NEUTRALITY IN A CHANGING ENVIRONMENT

DETLEV F. VAGTS\*

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## INTRODUCTION

Having twice addressed the issues of neutrality during World War II,<sup>1</sup> I shift my focus now to questions of the continuing vitality of neutrality law at the end of the millennium. One of the purposes of this symposium is raising the question: how should states respond to the next genocidal episode? While in a sense the Holocaust is and will remain unique in history we recognize that there is a grisly similarity between the members of a set of historical events that we have learned to call genocide. The possibility of its recurrence have sufficiently concerned nations to join together in a widely adhered to treaty on the topic.<sup>2</sup> It is natural to use the term "neutrality" in refer-

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\* Bemis Professor of International Law, Harvard Law School

1. See Detlev Vagts, *Switzerland, International Law and World War II*, 91 AM. J. INT'L L. 466 (1997); Detlev Vagts, *Neutrality Law in World War II*, CARDOZO L. REV. (forthcoming 1998).

2. See Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

ence to the behavior of not becoming involved in an episode of genocide. In that context, "neutrality" means indifference, callousness, or a studied calculation of costs and benefits. The term "neutrality" in a legal sense, however, may not apply if there is no war going on because the law of neutrality only becomes effective if there is a war or something similar in progress. The legal counterpart to the moral issues about standing by is the problem of humanitarian intervention, whether under the aegis of the United Nations Security Council ("UNSC") or by a state individually.

The rules of neutrality law are still those of the Hague Conventions on war on land and naval warfare laid down in 1907.<sup>3</sup> They have not changed, even though other rules relating to the law of war were modernized in the 1920s and again after World War II. They have a slightly musty quality to them.<sup>4</sup> For example, they do not refer at all to issues of war in the air, and their dispositions with regard to naval passage through neutral waters and into neutral ports reflect a world in which sweating teams of stokers moved coal from bunkers to furnaces beneath boilers. The major reason for the neglect of neutrality law is that war and neutrality were both thought rendered obsolete by the coming of the United Nations and its regime of collective security. That is not quite accurate. Since World War II, episodes have arisen in which either the parties to the conflict or outsiders have invoked neutrality law. To update neutrality law, it is

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3. See Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 28, 1907, 36 Stat. 2310, 1 Bevans 654 [hereinafter Hague Land Convention]; Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723 [hereinafter Hague Naval Convention].

4. Recent discussions of neutrality law are scarce. Some articles approach matters from a Swiss perspective, which is idiosyncratic since Switzerland is almost the only country not a member of the United Nations. See, e.g., Dietrich Schindler, *Changing Concepts of Neutrality in Switzerland*, 44 AUSTR. J. PUB. INT'L L. 1056 (1992); Daniel Thürer, ZUR NEUTRALITÄT DER SCHWEIZ IM ZWEITEN WELTKRIEG UND DEN DARAUS ZU ZIEHENDEN LEHREN IN DER VERFASSUNGSSTAAT VOR NEUEN HERAUSFORDERUNGEN, FESTSCHRIFT FÜR YVO HANGARTNER 95 (1998). See generally Dietrich Schindler, *Transformations in the Law of Neutrality since 1945*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 367 (Astrid Delissen & Gerard Tanja eds., 1991); Patrick Norton, *Between the Ideology and the Reality, The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249 (1975); Yoram Dinstein, *The Laws of Neutrality*, 14 ISR. Y.B. HUM. RTS 80 (1984).

necessary to do so at a time when no important war-like conflict is taking place. One needs a Rawlsian veil of ignorance because if you play with the rules at a time of impending hostilities, one side will benefit from the change.

## I. A BRIEF HISTORY OF NEUTRALITY

### A. IN GENERAL

Neutrality rules are viewed in very different lights depending upon the type of conflict from which nations may stay neutral. Over time we see two polar paradigms. The first type of conflict is the simple one-on-one war. In such a confrontation two states—with perhaps some allies—fight it out for objectives that they value, but which they do not really expect other countries to take to heart. Thus, both the national leaders and the populations of Prussia and France in 1870-1871 had specific nationalistic objectives in mind when they went to war, reasons that they felt deeply and were ready to die for. They did not, however, expect Britons, Americans or Japanese to feel strongly and asked that they stay out. More recently, the Iran-Iraq war of the 1980s fits this pattern.

The second type of war is the crusade. If you are fighting to make the world safe for democracy—or for Christianity, Islam, capitalism, Communism or the Four Freedoms—you find it incomprehensible or immoral that some states will not join you. The Crusades themselves were, of course, just such a struggle and the Church preached that slacking was a sin. When the Emperor Frederick II of Hohenstaufen negotiated a perfectly reasonable compromise with respect to the holy places of Jerusalem, allocating opportunities for worship to the Christians and Muslims, he was promptly denounced by an outraged Pope who could not excommunicate him as he had already done so.<sup>5</sup> In the sixteenth century, the Reformation brought to Europe a long series of conflicts in which religious passion played a leading role. Theorists talked about just wars and unjust wars,<sup>6</sup> treating the oppo-

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5. See ERNST KANTOROWICZ, *FREDERICK THE SECOND, 1194-1250*, at 183-89 (E.O. Louder trans., 1931).

6. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (2d ed. 1992) (providing modern review of the idea of the just war); Joachim von Elbe, *The Evolution of the Just War in Interna-*

site persuasion almost as if they were Muslims. The Thirty Years War began as a war of faith and fanaticism, but by the end of the period *realpolitik* considerations crept in and there were alliances between Protestant and Catholic powers that seemed really strange from a proper religious perspective.<sup>7</sup> Wars of the eighteenth century were about dynastic issues or about the balance of power<sup>8</sup> that even the populace of the warring countries could become passionate over. International lawyers and theorists ceased to talk about "just wars" and analyzed conflicts as balance of power issues.

The French Revolution initially caught up Republican-minded enthusiasts in Europe and the Americas in a way that transcended the more detached attitudes surrounding eighteenth century wars. It later subsided into a more classic bipolar controversy between France and Great Britain. The century from 1815 to 1914 was, particularly in Europe, marked by the absence of crusades and the prevalence of wars for national unification or for balance of power reasons. It is significant that the Hague Conventions on neutrality came into being near the end of that period and are influenced by that history.

The first World War became a full blown crusade as the parties became more and more intense in their devotion to their causes. That it was a war to end wars and to make the world safe for democracy became more apparent as the participants multiplied and the sacrifices piled up. The Treaty of Versailles signaled that the victors regarded themselves as having achieved a moral triumph of universal proportions. In it the defeated enemy was compelled to take onto itself the onus of having started the war.<sup>9</sup> From the beginning World War II took on such a shape. When as cool and unemotional a participant as General Eisenhower could title part of his memoirs *Crusade in Europe*, you knew that this was not a cold-blooded enter-

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*tional Law*, 33 AM. J. INT'L L. 605 (1939) (providing legal history survey).

7. See C.V. WEDGWOOD, *THE THIRTY YEARS WAR* (1981).

8. For an account of the balance of power in international law in relation to war see Alfred Vagts & Detlev Vagts, *The Balance of Power in International Law: A History of An Idea*, 73 AM. J. INT'L L. 555 (1979). For a broader survey of the concept see MICHAEL SHEEHAN, *THE BALANCE OF POWER: HISTORY AND THEORY* (1996).

9. The German language literature on the war guilt question is enormous. See, e.g., HAJO HOLBORN, *KRIEGSSCHULD UND REPARATIONEN AUF DER PARISER FRIEDENSKONFERENZ VON 1919* (1932).

prise.<sup>10</sup> The moral revulsion at the killing of civilians, destruction of democracy, and the Holocaust made World War II a moral crusade.

## B. THE UNITED STATES EXPERIENCE

The United States has had a special relationship with "neutrality" starting from the early days of the Republic. We were strongly importuned to come to the aid of one side or the other in the successive stages of the French Revolution and the Napoleonic Age between 1789 and 1815. Plots were hatched and plans made to undermine our neutrality by both sides, and sympathies were divided in the young republic. The United States sought to defend its neutral commercial rights and did so by all the means available to it, even though the military might of the United States was not then impressive in relation to that of the contesting European powers. The Embargo of 1807 and the battles of the fledgling navy with French and British warships at least showed how seriously the United States took the proposition that it had the right to remain neutral and to conduct its trade with both parties and with other neutrals. Questions of neutral navigation rights finally became a significant element in the coming of the War of 1812.<sup>11</sup> Neutrality next became a major topic in the United States during the Civil War. During this contest the role of the United States was different. It wanted other countries to remain neutral and let it get about the business of subduing the confederate states and, later, of emancipating the slaves. Whether Britain did or did not violate the rules when it permitted the construction and floating of the raider *Alabama*, was a highly contentious issue resolved years later by the arbitration that bears that name.<sup>12</sup> It happens that Edward Bemis contributed the chair at Harvard on which I sit because of his sense during the proceedings that American lawyers were inadequately trained in the law of neutrality. It is sometimes forgotten that a related arbitration involved quite a few claims against the United States as well.<sup>13</sup> General Sherman, in chopping a

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10. See DWIGHT EISENHOWER, *CRUSADE IN EUROPE* (1948).

11. See SAMUEL F. BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* ch. X (5th ed. 1965).

12. See THOMAS WILLING BALCH, *THE ALABAMA ARBITRATION* (1900).

13. See 1 JOHN BASSETT MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY*

swath of destruction across the lower Confederacy did not always pay heed to the distinctiveness of British-owned plantations and destroyed them too.

The guns of August 1914 found the United States comfortably removed from hostilities. President Wilson was reelected in 1916 with a slogan that "he kept us out of War."<sup>14</sup> A few months later he led the United States into war alongside the allies. The motivations of Americans included a sense that the Kaiser had, through unrestricted submarine warfare, violated the neutral rights of this country—and, of course, the sufferings of brave little neutral Belgium were cast into the balance. World War II represented a repeat of the cycle. There was a vigorous American movement in favor of neutrality, fueled by a sense that we had been misled by British propaganda against the "Huns" in 1917 and should not repeat what had been a mistaken involvement. The leadership of President Franklin D. Roosevelt moved the United States step-by-step deeper and deeper into unneutral activity, such as Lend Lease, the destroyer-bases deal and naval patrols aimed at German U-boats.<sup>15</sup> He did not, however, carry the day in the sense of getting us into the war until Japan attacked neutral Pearl Harbor and both Japan and Germany declared war on the United States. Once in the war, Americans regarded it as a crusade and had scant sympathy for those who sought to avoid involvement.

## II. THE PRESENT LEGAL STATUS OF NEUTRALITY

In the post-World War II epoch the status of neutrality has significantly changed. Some believed that neutrality would disappear. Indeed, it was a very negative sign for neutrality when the Allies proclaimed that a country had to declare war against the Axis by February 1945 or suffer the penalty of being deemed not "peace-

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683-702 (1898).

14. See generally CHARLES CALLAN TANSILL, *AMERICA GOES TO WAR* (1938); THOMAS A. BAILEY, *A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 588 (9th ed. 1974).

15. I should disclose that my grandfather, Charles Beard, was an intellectual leader of the pro-neutrality contingent. See PRESIDENT ROOSEVELT AND THE COMING OF THE WAR, 1941: A STUDY IN APPEARANCES AND REALITY (1948).

loving” and ineligible for United Nations membership.<sup>16</sup> After 1945, it was believed that, at least in legal terms, “war” was outlawed and that therefore there were no actions that would allow states to remain neutral.<sup>17</sup> The idea of neutrality’s total disappearance, however, is an exaggeration. The present legal status of neutrality depends on what a state is trying to remain uninvolved in. First, consider a situation in which the UNSC has exercised its powers under Chapter VII of the Charter to deal with a threat to or breach of peace. Under Article 41, the UNSC can require Member States to sever economic relations and communications with an offending state. It appears that the UNSC cannot go further and call upon states to provide military forces without their consent since that is predicated upon a special agreement or agreements.<sup>18</sup> The United Nations could, however, through the United Nations budgetary mechanism, compel a state to make a financial contribution to the military operation.<sup>19</sup> It is unlikely that a member state would find itself obligated to provide forces on United Nations missions rights of passage across its territory since that duty is also predicated upon agreement.<sup>20</sup> In the absence of the United Nations system, it is unlawful for a neutral to take such actions, that is, to cut off all trade with one party to the conflict, or to make passage over its territory and airspace available to one side. A country that was the target of such enforcement action could not tell a state that was participating in that action its behavior was “unneutral.” Quite a few states, most conspicuously the People’s Republic of China (“PRC”), did take the position that they were neutral during the Korea conflict of 1950-1953, which was a United Nations operation under the aegis of the UNSC.<sup>21</sup>

There is a second category of events in which two or more nations are busy shooting at and bombing each other but there has been no

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16. See LOUIS B. SOHN, *CASES ON UNITED NATIONS LAW 55-91* (1967) (providing history of the struggles over admission to the UN, in particular as to states that remained neutral during World War II).

17. See Norton, *supra* note 4, at 249-51.

18. See *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 639 (Bruno Simma ed., 1994) [hereinafter *THE CHARTER*].

19. See *Certain Expenses of the United Nations*, 1962 I.C.J. 151 (Jul. 20).

20. See *THE CHARTER*, *supra* note 18.

21. See Norton, *supra* note 4, at 263-67.



decisive reaction from the UNSC. One such case involved the off and on hostilities between Israel and its Arab neighbors from 1948 to 1973.<sup>22</sup> Although there was even a declared state of war during some of this period neither the combatants nor non-participants invoked the law of neutrality in a consistent way. States delivered arms to belligerents in a manner clearly contrary to the Hague Conventions. One notes that the UNSC did not impose a formal embargo on trade with either side, although it made numerous appeals for a cease-fire and took other positions as to the issues involved. This was the case, for example, with the eight-year war between Iran and Iraq in the 1980's. The UNSC appealed to the belligerents to join in a cease-fire, but did not issue an order under its enforcement powers.<sup>23</sup> In the absence thereof third countries found themselves trying to act as neutrals. There was in particular a sudden reappraisal of long forgotten rules about blockades, prohibited zones, minelaying, and other features of the law of maritime neutrality. The speed with which Great Britain recovered the Falklands Islands prevented it from generating the quantity of interesting case law that emerged from the Gulf War.<sup>24</sup> The traditional obligation to remain neutral in such a situation is perhaps reinforced by the fact that resorting to force by joining in the conflict would likely constitute a violation of Article 2(4) of the Charter.

Finally, there are cases in which the genocidal atrocities are strictly internal to a state. None of the actions cross national frontiers, and there may not even be internal fighting because the targeted portion of the population is incapable of resort to force in self-defense. The traditional law of neutrality takes hold in these situations only in the event that the contending force attains a level of power that causes other nations to recognize it as a belligerent. Until that time arrives traditional international law favored the government in power. In the orthodox view of neutrality law no obligation to remain neutral arose so long as the rebellious force was not recognized

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22. See *id.* at 257-62.

23. See S.C. Res. 479, U.N. SCOR, 2244th mtg., U.N. Doc. S/Res./479 (1980); S.C. Res. 582, U.N. SCOR, 41st Sess., at 11-12, U.N. Doc. S/RES/582 (1986).

24. *But see, e.g.,* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (dismissing a claim against the Argentinean government for destroying two cargo ships during the military conflict over the Falkland Islands).

as a belligerent. No rule prevented a country from providing assistance to a government that asked for help in putting down a rebellion against its lawful authority. Giving aid to rebels not recognized as belligerents violated the sovereign rights of the lawful state.

The salient examples of the application of neutrality rules in civil wars before the United Nations age were the American civil war in the nineteenth century and the Spanish Civil War in 1936-1939.<sup>25</sup> The United States has relied in various situations upon the local government's permission to send counter-insurgency advisers, arms and equipment, and the like. The United States categorized its last great experiment with non-neutrality, the Vietnam War, as assistance to the government in Saigon.<sup>26</sup> When a rebelling force has reached the degree of stability and power to become a recognized belligerent is of course a matter of judgment as to which outside states will differ from each other and from the country trying to restore its authority. If the PRC were to attempt to recover Taiwan by force, most states would regard that as implicating neutrality law even though the PRC would likely characterize it as a purely internal quarrel. Note that the question is parallel to, but not identical with, the question whether a conflict is international so as to bring into play the various Geneva conventions that govern the conduct of international fighting.<sup>27</sup>

Thus, there still is room for neutrality rules to operate in the post-1945 world. That is true even though there is almost never a willingness to refer to what is going on as a "war," the term that classically was cited before one could invoke the law of neutrality. There is, then, some purpose in thinking about how to change the law of neutrality.

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25. See NORMAN PADELFORD, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL WAR* (1939).

26. Compare Richard Falk, *International Law and the United States Role in the Vietnam War*, 75 *YALE L.J.* 1122 (1966), with JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* (1972)

27. For recent reviews of these problems examine Steven Ratner, *The Schizophrenias of International Criminal Law*, 33 *TEX. INT'L L.J.* 237 (1998); Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 *AM. J. INT'L L.* 236 (1998).

### III. RIGHTS AND DUTIES OF NEUTRALS

If a country settles into a position as neutral, what are its rights and duties *vis-à-vis* the belligerents? The basic statement of these rules is still embodied in the Hague Conventions of 1907.<sup>28</sup> As one might predict, these ninety-year-old rules, unlike other law of war documents, have never been formally amended. One is not quite sure whether the effort to amend them is worthwhile, given all of the other possible uses for scholars' and diplomats' time. Let us look at them, however, in general terms.

First, a neutral should not fight. More or less by definition that seems to be an obvious rule. There are some marginal questions, particularly in that it is not always forbidden for citizens of neutral countries to enlist themselves privately in the armies of the combatants.<sup>29</sup> Spain, for example, seems to have crossed the line rather obviously when it sent a full division under government auspices to fight with Hitler in Russia.<sup>30</sup> Most outsiders did not accept the Chinese position that the forces that came over the Yalu to drive the United Nations forces back to the 38th parallel were purely volunteers.<sup>31</sup> American individuals' participation in the Eagle Squadron for England and the Flying Tigers for China, on the other hand, seemed permissible.

Secondly, belligerents should respect the territorial integrity of a neutral state.<sup>32</sup> A neutral should defend its land and airspace, by force if necessary. On land the rules seems quite straightforward, as does the exception for wounded personnel and such corollary duties as the obligation to intern troops that flee across the border.<sup>33</sup> The law of neutrality at sea developed from a different tradition and is distinctly more complex. It allows war vessels to pass through neutral waters

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28. See sources cited *supra* note 1 (analyzing the issues of neutrality that arose during World War II).

29. See Hague Land Convention, *supra* note 3, art. VI.

30. See GERALD KLEINFELD & LEWIS TAUBS, *THE BLUE DIVISION IN Russia* (1979).

31. See Howard Taubenfeld, *International Actions and Neutrality*, 47 AM. J. INT'L L. 377, 392 n.92 (1953).

32. See Hague Land Convention, *supra* note 3, arts. I & II.

33. See *id.* arts. XI & XIV.

and to stop in neutral ports. These privileges are qualified in complex ways and stated in terms that seem antiquarian, stemming from the days of bunkering and coal.<sup>34</sup> Customary law generated the corresponding rules on air transit.<sup>35</sup> The first aviation experiments of 1907 occurred too soon for the drafters to include the topic in either convention. By 1918 the law had settled on the proposition that air war was like land war and not like war at sea. Warring states were not supposed to fly over neutral airspace and neutrals air forces were to do their best to stop them if they did. Sweden and Switzerland in World War II had their hands full trying to carry out that obligation.<sup>36</sup> There are quite a few details of air war neutrality left obscure by the customary law. What about satellite passages over neutral territory at very high altitudes? Is there a duty on the part of neutrals to warn before shooting? Can neutral fighters hotly pursue violators of their airspace back over other states' territory?

Some people are aghast that neutrals went on trading with the enemy during both world wars. That is explicitly allowed, however, by the Hague rules. The only restrictions they impose are (1) that the neutral state, as distinguished from private merchants of death, may not sell munitions to the belligerents, (2) that whatever restrictions on trade are imposed are even handed as between the warring states.<sup>37</sup> That evenhandedness has been measured in terms of the content of the rules themselves rather than of substantive effect.<sup>38</sup> Thus, "cash and carry" policies are legitimate even if one of the warring powers cannot get together the cash or is prevented by geography or superior naval forces from doing any carrying. There are, of course, borderline questions. Was it legitimate for the state to finance arms purchases by belligerents? What about weapons sales by agencies that are basically government instrumentalities even if separately incorporated? Should the neutrality rules now be revised to prohibit all arms sales from neutral states to belligerents? That seems the humanitarian approach, but one must take into account that it may bear

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34. See Hague Naval Convention, *supra* note 3, arts. X-XIX.

35. See J.M. SPAIGHT, AIR POWER AND WAR RIGHTS ch. XVII (3d ed. 1947).

36. See *id.*

37. See Hague Land Convention, *supra* note 3, arts. VII & IX.

38. For a statement of this position during World War I, examine 7 GREENE HACKWORTH, DIGEST OF INTERNATIONAL LAW 450-51 (1940).

very unevenly on the contestants if one is more self-sufficient than the other, as was the case with the League of Nations arms embargo during the war between Italy and Ethiopia in the 1930s.

Perhaps the most opaque questions are those relating to the limits, if any, to be placed on economic warfare against neutrals by the warring powers. Is it legitimate to freeze the overseas assets of neutral states and their nationals? Is it legitimate to interfere with neutral states trading with each other on the basis that such trade might lead to re-exports to enemies? Can one maintain blacklists of neutral merchants so as to punish them for trading with the other side? There was extensive practice on this score during both world wars particularly by Great Britain and the United States.<sup>39</sup> Naval interference with merchant shipping has a complex legal history. While looting of private property on land is strictly illegal, prize law always authorized expropriation of enemy vessels, even if commercial. The status of neutral shipping is complex. A proper blockade can keep them out of enemy ports. It is not clear whether less discriminating declarations of prohibited zones, enforced by somewhat random sinkings, can do the same.<sup>40</sup> The right of belligerents to check on the high seas indirect passages of contraband by neutral shipping is complex and contested.<sup>41</sup>

Finally, neutrals may render services as intermediaries, recipients of refugees, succorers of the victims, and so forth. These are not, strictly speaking, neutral duties, although only neutrals can perform them. These services are subject to certain regularizing rules. For example, the activities of neutral protecting powers with respect to prisoners of war are regulated in some detail by one of the Hague Conventions of 1907, which was then revised by the Geneva Con-

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39. See MARTIN DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* (1943); W.M. MEDLICOTT, *THE ECONOMIC BLOCKADE* (2d. ed. 1959).

40. See Ross Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, 37 INT'L & COMP. L.Q. 629 (1988).

41. For reviews of naval neutrality, actuated chiefly by the Persian Gulf war, examine Michael Bothe, *Neutrality in Naval Warfare: What is left of Traditional International Law?*, in *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD* 387 (Astrid Delissen & Gerard Tanja eds., 1991); NATALINO RONZITTI, *THE CRISIS OF TRADITIONAL LAW REGULATING INTERNATIONAL ARMED CONFLICTS AT SEA AND THE NEED FOR ITS REVISION IN THE LAW OF NAVAL WARFARE* 1 (Natalino Ronzitti et al. eds., 1988).

vention of 1929, and again in 1949, unlike neutrality law itself.<sup>42</sup>

#### IV. MODERN "NEUTRALITY"—THE MORAL ISSUES

One of the consequences of the 1990s revival of interest in neutrality in World War II, particularly its relationship to the Holocaust, is to highlight questions about the morality of neutrality in the broader sense. Recall that the concept of neutrality in the traditional international law sense does not capture all of the subject matter of this section. If some other country has gone to war because of genocide somewhere, it is appropriate to think of other states as being neutral or not. The first country to act, however, confronts a set of problems under international law but not that of neutrality. The discussion of the existence of a right or an obligation to take action to prevent genocidal episodes is largely carried out under a somewhat different heading and with a somewhat different angle. Books and articles about humanitarian intervention tend to discuss the issue whether intervention to prevent genocidal or similar misbehavior is permissible under the United Nations Charter. First of all, there is the question whether the UNSC can act on an issue. That is particularly debatable when the existence of a threat to the peace is questionable. The first extensive reading of its powers took place in 1965 with respect to the unilateral declaration of independence by Rhodesia.<sup>43</sup> This episode involves neither atrocities nor the sending of armed forces. Since the ending of the Cold War and the almost automatic resort of the great powers to the veto such episodes are now more common. Somalia and Haiti have seen the UNSC authorize the sending of troops in cases where that threat seemed quite attenuated.<sup>44</sup> Theoreticians seem to generally agree that the UNSC's judg-

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42. See Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135; Convention Relating to Prisoners of War, July 27, 1929, 47 Stat. 2021; Hague Convention on Laws and Customs of War on Land, Annex-Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, ch. II, 36 Stat. 2277.

43. For a discussion of this affair see FREDERIC KIRGIS, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 620-35 (2d ed. 1993).

44. See *id.* at 699-701.

ment is non-reviewable.<sup>45</sup>

Then we have the question of the licitness of unilateral intervention not under the aegis of the United Nations. Proponents of humanitarian intervention tend to argue either that Article 2(4) prohibition on the use or threat of force does not apply to a "surgical strike" that does not threaten the territorial or political integrity of the target state or else that humanitarian intervention on account of its moral significance falls entirely outside the structure of the Charter. Opponents argue that unilateral intervention is dangerous because motivations of the intervenor are likely tainted by self-interest and not subject to third party scrutiny.<sup>46</sup> The concrete cases that intervention advocates refer to are usually classical surgical operations such as Entebbe, Grenada, and Panama. They are typically launched by great powers against small states and were planned not to involve appreciable casualties or other costs. Overwhelmingly the intended beneficiaries of the strikes were nationals of the intervening state, allowing their rapid removal from the country. Indeed, arguably these actions were justified acts of self-defense within Article 51 of the Charter. Less attention is paid to incursions by lesser powers such as the Tanzanian incursion into Uganda to oust Idi Amin<sup>47</sup> or Vietnamese operations in Cambodia.

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45. Compare Thomas Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality*, 86 AM. J. INT'L L. 519, 520-22 (1992) (analyzing the ICJ holding in *Libya v. U.S.* that United Nations members must accept and carry out the decisions of the UNSC), with David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 562-66 (1993) (commenting that the UNSC may cross the bounds of legitimacy that in turn may result in United Nations members questioning its authority) and W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 95-99 (1993) (presenting a framework under which the ICJ can review aspects of UNSC decisions).

46. For an overview of the literature on unilateral intervention, see BURNS WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* 276-301 (2d ed. 1997). For a comprehensive recent treatment, see SEAN MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* (1996). In general enthusiasm over humanitarian intervention is confined to United States writers. See THE CHARTER, *supra* note 18, at 123-24. Perhaps the most enthusiastic advocate is FERNANDO TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (2d ed. 1997).

47. See CAROLINE THOMAS, *NEW STATES, SOVEREIGNTY AND INTERVENTION* 179-95 (1985).

Different issues arise if a state resorts to economic sanctions rather than to force to try to stop a genocidal program. The United States is particularly prone to use such means when offended by human rights abuses. Both the levels of the abuse and the responses thereto have varied substantially. While there were some successes, such as the use of trade pressure on the Soviet Union to let dissenters emigrate, there is general agreement that dictators are quite resistant to such measures.<sup>48</sup> While attempts are made to argue that there are international law limits on such activities, countries like the United States have taken the position that they are entirely free to impose such sanctions. The case is perhaps most doubtful when the state that is targeted is a member of the World Trade Organization. The legality of actions by the United States against Cuba and Iran has thus far escaped formal resolution.<sup>49</sup>

We now consider the question of a moral/political duty to act from the point of view of a national government charged with the task of maximizing the utilities of the citizenry of the country it leads. First, the government has to ask how passionately its citizens feel the need to save the victims. This may depend on the strength of ethnic ties between the targets and the internal population. Recall the feelings in India about the victimization of the Hindu population of East Pakistan. We now feel concern about the possible widening of the struggle in Kosovo between Serbs and Albanians to include kinsfolk in Albania and, by further extensions through Macedonia, in Greece and Bulgaria. The media also plays an important role. American enthusiasm for war against Spain a century ago was stoked by the newspaper accounts of Spanish atrocities in Cuba, for which William Randolph Hearst took much credit.<sup>50</sup> CNN's coverage of horrors in Bosnia stirred indignation, though for a long time not enough to

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48. See Richard Haass, *Sanctioning Madness*, FOREIGN AFF., Nov./Dec., 1997, at 74 (providing a survey of the efficacy of sanctions and coming to rather negative conclusions).

49. In return for concessions by the United States the European Union agreed not to raise the issue of "GATT conformity" through World Trade Organization dispute resolution procedures. See European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, Apr. 11, 1997, 36 I.L.M. 529 (1997).

50. The classic history is FRANK FREIDEL, *A SPLENDID LITTLE WAR* (1958).



cause action.<sup>51</sup>

There are some positive values of intervention. First, one sometimes avoids the possibility that the dictator will, after polishing off others, come after X and gobble X up when it is alone and friendless. That is the international version of the famous statement attributed to Martin Niemöller that appeared on the flyer announcing this conference.<sup>52</sup> Facing the issue now also avoids bracing for a long and burdensome period of armed preparedness, which would not only impose financial costs but would also require restrictions on the liberties of the population. Joining with other nations in such action would ingratiate one with that portion of the international community and might be used to bargain for specific benefits. This was the motivation for quite a few of the late adherents to the United Nations in 1945. Failure of the government of Ireland to enter into serious negotiations with the British for the exchange of anti-submarine bases in Irish ports—a surrender of neutrality—for concessions as to the six counties of Northern Ireland cost Ireland dearly, particularly Northern Ireland.<sup>53</sup>

Finally, one possible motivation for a state taking action is its knowledge that the situation was in part caused by its own policies. Thus, cold war tactics did much to set up the situations in Somalia and Cambodia that resulted in so much killing. Colonialism and haste in terminating it could underlie the disasters in Rwanda, East Timor and along the India-Pakistan frontier. The powers in question did make some effort, although too little and too late, to minimize that damage.

On the negative side of the ledger one begins with the fact that active military intervention is going to cost the intervening state lives and money. Since Vietnam, governments, including that of the United States, have been reluctant about shedding their nationals' blood. Relatively light casualties, such as those in Somalia, numbers

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51. On the effects of television in shaping reactions to genocidal events see MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR: ETHNIC WAR AND MODERN CONSCIENCE* 9-33 (1997).

52. See Martin Niemoeller, quotation, *in* FAMILIAR QUOTATIONS (John Bartlett ed., 15th ed. 1980).

53. See ROBERT FISK, *IN TIME OF WAR: IRELAND, ULSTER AND THE PRICE OF NEUTRALITY, 1939-45*, at 178-81 (1983).

that were "acceptable" daily losses for an infantry regiment in World War II, are now enough to cancel operations. Other operations have never started. It is easier to generate support for a swift surgical strike, such as those on Grenada, Entebbe, and Panama. If humanitarian intervention is to tackle tougher targets, there will have to be a change in the character of the armed forces of the major powers, a move in the direction of expendable troops such as the Foreign Legion or the Gurkhas, which did the grim work of the French and British empires. The intervening forces are not the only ones who may suffer casualties; numbers of the people we are trying to help may be victims of combat operations.

If the urge to abandon neutrality is satisfied by action less intense than military force another set of calculations is involved. Sanctions will interrupt trade and other economic activity of importance to the national economy having serious repercussions for particular sectors of the economy. The United States has learned to do without trade with Cuba but it hesitates when it comes to limiting trade with the PRC for human rights reasons. Sanctions may also damage the economies of innocent third countries. For example, in the Rhodesia crisis of the 1960s the African neighbors of Rhodesia suffered major trade losses. Finally, sanctions also impose costs on the population of the target. Where the state aimed at is governed by a dictator it is entirely likely that the dictator and his entourage are able to do very well despite the sanctions, but that the ordinary population, particularly the classes already marginal in terms of income, will suffer great deprivation. Intervention may produce lasting hostility with the state whose actions one is trying to thwart. It could also lead the state that is carrying on the genocide to accelerate the carrying out of the evil designs one is trying to stop.

One consequence of these costs for the abandonment of neutrality is that national governments have to establish priorities. One can send troops to, or cut off trade with, only so many countries at one time. One goes into what is in effect a triage way of thinking. Where can we help most with a given expenditure? Note that the decision becomes complicated by questions as to how much other states are willing to contribute. The humanitarian impulses of a state that stays neutral may be assuaged by activity on behalf of refugees, detainees, and other victims of the hostilities.

If one matches these considerations with World War II history, one observes that no country went to war on account of the Holocaust. Most countries became involved because they were attacked, including the United States that was precipitated into war by the attack on Pearl Harbor after two years of lively debate about the merits of intervention and neutrality.<sup>54</sup> It also includes the Soviet Union, which actively collaborated with the Nazis until the fateful onslaught of June 1941. As Ireland's Eamon de Valera pointedly said, "[n]eutrality is not a cowardly policy if you really mean to defend yourself when attacked. Other countries have not gone crusading until they were attacked."<sup>55</sup> England and France did declare war on Germany when it attacked Poland. They did so after the Reich broke its pledges regarding Czechoslovakia believing that they could not trust the Reich to continue its efforts to subjugate Europe step by step until their independence was also threatened. Some countries declared war on Germany in 1945 in order to be admitted to the United Nations. Turkey, for example, declared war "not a day earlier than necessary to get the ticket to San Francisco."<sup>56</sup>

How much has the situation changed since 1945? Has our full knowledge of what genocide can mean made governments more willing to intervene? Has the obligation under the Genocide Convention "to prevent" genocide made a difference?<sup>57</sup> The memory of the Holocaust remains vivid in the minds of a great many people. CNN and other media now bring us images of atrocities as they are happening, albeit in a selective fashion. What effect has the United Nations system had on behavior? Candor compels one to say that the changes are modest. The only cases of intervention entailing serious risks of loss of life and economic damage have been those where the population threatened is closely akin to that of the state that acts. That was the case, for example, with Indian intervention to stop the brutalities associated with Pakistani attempts to retain control over

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54. See The German declaration of war and United States reaction, *reprinted in* 34 AM. J. INT'L L. SUPP. 1 (1941).

55. JOHN P. DUGGAN, NEUTRAL IRELAND AND THE THIRD REICH 127 (1985).

56. See LOTHAR KRECKER, DEUTSCHLAND UND DIE TURKEI IM ZWEITEN WELTKRIEG 254 (1964).

57. See Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

Bangladesh.<sup>58</sup> It was also the case with its less successful attempts to bring peace to Sri Lanka. For the rest we have a series of "surgical strikes," that is, interventions that are undertaken with the expectation that the troops would go in and come out in short order, leaving behind a pacified and contented target country. Some of these interventions were under the aegis of the United Nations and others have been unilateral. Grenada, Panama, Uganda—twice, Somalia, Rwanda, and Cambodia come to mind. In a number of these cases, particularly Somalia and Rwanda, the attempt was swiftly given up when it appeared that costs were underestimated. One also observes that some of the most extensive genocidal operations were not the subject of any intervention effort at all. One recalls the hundreds of thousand killed by Indonesian forces in 1965 and their other victims in East Timor. Little note was taken of those slaughtered by the Khmer Rouge on the killing fields of Cambodia although action was eventually taken first by Vietnam and then by the United Nations, largely for reasons other than humanitarian.<sup>59</sup> The bloody civil war in the Sudan continues to the present day. One might add to the list the suppression of Tibetan independence by the PRC and the suppressions by various countries in the Middle East of their Kurdish minorities.

Bosnia, of course, has a special place in all of this. The history of that unhappy region highlights the hesitancy of potential intervenors. Although Bosnia is on the edge of Europe and should especially concern European states, that appeal was not enough to cause politicians to take serious risks to improve the situation. Doing nothing was, on the other hand, not an acceptable alternative. As a result peacekeeping personnel spread out in vulnerable positions were humiliatingly elbowed aside to become passive witnesses of massacres. It was basically the dramatic success of the Croatian offensive in the Krajina that made it possible to impose conditions on the Serb government and produce the somewhat unstable equilibrium that now prevails.<sup>60</sup>

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58. See Thomas Franck & Nigel Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973).

59. See David Ratner, *The Cambodian Settlement Agreements*, 87 AM. J. INT'L L. 1 (1993) (providing review).

60. For an authoritative account by an active American participant see WARREN ZIMMERMAN, *ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS*

## CONCLUSION

At the end of the century the two types of neutrality explored seem headed for quite different destinies. Neutrality in the traditional legal sense appears to have a limited future; with armed conflicts occurring between states and other entities from time to time that do not draw other states into their midst. As in the Iran-Iraq conflict there will be no UNSC action and states will try to stay clear. States will resort to the traditional rules of neutrality as they understand them. It is possible, though not likely, that the international community will be motivated to redraft and modernize those rules.

Neutrality in the moral sense will continue to be an important and painful problem. One cannot tell how often ethnic strife—the principal cause of mass atrocities in recent years—will break out during the next decade. Each outbreak will pose problems for the governments of other countries who will have to ask whether the will to intervene for humanity's sake overcomes the anxiety about the cost. As experience with such disasters grows the international community will have greater capacities to intervene swiftly and efficiently. For one thing, the development of international criminal law and institutions to enforce it may deter potential planners and executants of genocides;<sup>61</sup> however, questions of cost, particularly of human life, will remain. There is the danger that the world's populations will become jaded and inclined to let these conflagrations burn out. Much depends on how many genocidal episodes there are and how closely together they are timed. We are certainly far from having resolved these problems.

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DESTROYERS (1996).

61. See Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462 (providing review).