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THE LAW OF WAR AND NEUTRALITY AT SEA

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## VIII. RELATIONS BETWEEN NEUTRAL AND BELLIGERENT STATES IN NAVAL WARFARE

### A. THE CONCEPT OF NEUTRALITY

Under general international law states that refrain from participating in war occupy a status of neutrality. As a consequence of such non-participation international law imposes duties and confers rights upon both neutral and belligerent, and the law of neutrality comprises the totality of the duties imposed and the rights conferred upon participants and non-participants. It is to be observed, then, that although neutrality may be defined simply as the status of non-participation in war, the legal significance of such non-participation must be seen in the fact that it brings into operation numerous rules whose purpose is the regulation of neutral-belligerent relations. Not infrequently, however, these rules—the consequence of non-participation—have been identified with neutrality itself. In particular, there has long been a widespread tendency to identify neutrality with the principle of impartiality.

In a sense, the identification of neutrality with the various duties imposed upon non-participants, and especially with the duty of impartiality, is readily understandable. The principle of impartiality stands at the very summit of the duties imposed upon non-participants. Nevertheless, it is submitted that this identification of neutrality with the duties imposed by general international law upon non-participants leads—both in theory and practice—to certain difficulties and ought to be avoided.<sup>1</sup> Instead, neu-

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<sup>1</sup> In the preceding volume published in this series (Hans Kelsen, *Collective Security Under International Law*, pp. 141-4) the endeavor has been made to examine and to criticize the usual identification of neutrality with the consequences traditionally attached to the status of non-participation in hostilities. Professor Kelsen has observed that the earlier Hague Conventions use the term neutrality somewhat indiscriminately to mean, among other things, both a status of non-participation in war and an attitude of impartiality on the part of non-participants. It is further observed that writers, too, have been frequently indiscriminate in their use of the term. Professor Kelsen has concluded, correctly it is believed, that the way to avoid ambiguity and confusion "is to understand neutrality as nothing else but the status of a state which is not involved in a war between other states, and impartiality as the principle according to which a neutral state shall fulfill the obligations and exercise the rights, which a neutral state has under general international law, equally towards all other belligerents."

trality may be considered simply as the status of states which refrain from participation in hostilities. (Put in a slightly different manner, the only essential condition for neutral status is that of non-participation in hostilities.) It is—of course—quite true that as a result of non-participation in war general international law imposes certain duties and confers certain rights upon non-participants, and that these duties and rights make up what is commonly termed the traditional institution of neutrality. It is equally true that a neutral state must carry out its duties and enforce its rights in an impartial manner and that if the neutral state fails to do so the belligerent made the object of discriminatory measures is no longer bound to observe its duties toward the neutral. But so long as the neutral state refrains from participating in the hostilities, so long as it refrains from attacking one of the belligerents, and belligerents refrain from resorting to war against the neutral, a status of neutrality is preserved.<sup>2</sup>

These brief considerations would appear relevant in clarifying the legal position of states which refrain from active participation in a war though refusing to carry out the obligations imposed upon non-participants by general international law—and particularly the obligation to remain impartial toward the belligerents. In the absence of a treaty granting non-participants the right to discriminate against one of the belligerents, and obligating the belligerent to permit this discrimination, such departures as non-participants may take from duties otherwise imposed upon them clearly afford belligerents the right to take appropriate measures of reprisal. Thus in pursuing discriminatory measures against the Axis Powers in 1940-41 the United States departed from its duties as a neutral, and insofar as these measures could not be justified on the basis of the Kellogg-Briand Pact<sup>3</sup> they furnished the Axis Powers with sufficient

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<sup>2</sup> See *Law of Naval Warfare*, Section 230. The objection may be made to the identification of neutrality with non-participation in war that it suffers from a lack of precision, that it fails to indicate what "non-participation" signifies in law. The history of "neutrality" indicates that the status of "non-participation" has been regarded as compatible with quite disparate forms of behavior on the part of non-participants. Thus during the seventeenth and eighteenth centuries the passage of troops of one belligerent through the territory of a non-participant was permitted. After the nineteenth century, however, this form of "benevolent" neutrality was clearly forbidden to non-participants.—But this objection is not compelling. If anything, it would appear to add further support to the view adopted here, since it only serves to emphasize that the one essential condition for neutrality has always been that of non-participation in hostilities. It is, of course, quite true that the consequences of non-participation have varied considerably, and that the non-participation of earlier times is something quite different from the consequences attached to non-participation by the traditional or classic rules of neutrality as they developed during the course of the nineteenth and early twentieth centuries. However, the identification of neutrality with non-participation in hostilities in no way denies this fact. Nor does it obscure in any way the consequences still attached to a status of non-participation according to general international law.

<sup>3</sup> See pp. 166-70.

reason for claiming the right to resort to reprisals.<sup>4</sup> But prior to its actual entrance into hostilities as an active participant the United States retained its status as a neutral state.

If the foregoing observations are accepted as correct then the legal significance of policies of "non-belligerency" becomes equally clear. It has already been observed that to the extent that this term has not been used merely as a synonym for the usual position occupied by non-participants it has served to indicate varying degrees of departure from the duties traditionally consequent upon a status of non-participation in war. And once again it is to be noted that in the absence of a treaty granting non-participants the right—and, perhaps, even the duty—to discriminate against a belligerent, the failure of a neutral to observe the duties imposed upon non-participants by the traditional law affords belligerents the right to take measures of reprisal against the neutral. By abandoning its duties the neutral thereby surrenders its right to demand from belligerents that behavior which it would otherwise be entitled to claim. At the same time, a neutral status is maintained so long as the "non-belligerent" refrains from actively participating in the hostilities, either through attacking one of the belligerents or through being attacked by a belligerent. In turn, this must imply that the traditional duties and rights attending a status of non-participation in hostilities continue to remain applicable. Nor does it appear that the events of World War II—a period during which a number

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<sup>4</sup> There is no need to inquire here into the political motives a state may have in departing from the duties imposed upon it as a non-participant. In resorting to discriminatory measures a state may claim that its vital interests are threatened by the course a war is taking. In part, the justification for both the destroyer-base agreement with Great Britain and the Lend-Lease Act (see p. 207(n)) rested upon considerations that may be regarded as devoid of proper legal foundation. However, in testifying (January 16, 1941) before Congress on behalf of the then pending Lend-Lease Act, the Secretary of State declared that although the provisions of the proposed act would admittedly lead to violations of established rules of neutrality under "ordinary circumstances . . . we are not here dealing with an ordinary war situation. Rather we are confronted with a situation that is extraordinary in character." *U. S. Naval War College, International Law Documents, 1940*, p. 109. In reviewing these same acts Hyde (*op. cit.*, pp. 2234-7) also denies their character as violations of international law, contending that a neutral need not establish "that inherently illegal action has been directed against itself by the belligerent . . . before it can properly free itself from restrictions that normally rest upon it. . . ." Hyde draws a distinction between the "breach and the inapplicability of particular rules of neutrality," concluding that the acts in question fell within the latter category, their inapplicability following from the alleged right of a neutral to depart from neutral duties in order to preserve what it considers to be its vital interests.

It is extremely difficult to accept this argument. According to general international law, neutral departure from the duty of impartiality may be justified only as a reaction to the belligerent's violation of neutral rights. Even then, it seems correct to state that such measures of reprisal must be taken *against the offending belligerent* and not take the form of assistance furnished to the other belligerent. On the other hand, it is quite true that a neutral can disregard its duties as a non-participant if it considers its vital interests threatened—as the United States obviously did so feel in 1940-41. But in so doing the neutral forfeits the right to demand from the offended belligerent that behavior to which it would otherwise be entitled.

of non-participants declared themselves to occupy a status of "non-belligerency"—provide substantial reason for suggesting any contrary conclusions.<sup>5</sup>

## B. THE COMMENCEMENT AND TERMINATION OF NEUTRALITY

Unlike the law governing the mutual behavior of combatants, a large part of which may be considered operative in any international armed conflict,<sup>6</sup> the rules regulating the behavior of neutrals and belligerents remain

<sup>5</sup>An excellent survey of World War II events in this regard is given by J. L. Kunz, "Neutrality and the European War 1939-1940," *Michigan Law Review*, 39 (1940-41), pp. 747-54. Italy, Turkey, Hungary and Spain—among other states—proclaimed a status of "non-belligerency." Professor Kunz has concluded that the latter "has no foundation in law, is exclusively a political creation. It appears in Protean forms: there are 'non-belligerents' who are practically neutral, and 'neutrals' who are 'non-belligerents'; some states are 'non-belligerent' out of their own free will, others more or less by coercion. 'Non-belligerency' . . . is born out of the desire to intervene under the name of non-intervention, to be in the war and yet not to be at war. . . . While the 'non-belligerent' is fully aware that the disfavored belligerent has a right in law to resort to reprisals or to a declaration of war, it is believed that from reasons of political expediency he will not do so" (pp. 753-4). The majority of writers concur with this position. On the other hand, the assertion that the traditional law does not "recognize" or does not attach "legal consequences" to a position of "non-belligerency" may prove somewhat misleading. The traditional law clearly does recognize this position, and precisely for the reason that it does attach to it certain legal consequences (e. g., reprisals). In fact, it would seem that what writers actually have in mind when they declare that the traditional law does not recognize a condition of non-belligerency is that this law does not grant neutral states a *right* to depart from the duties otherwise imposed upon non-participants, a right in the sense that the injured belligerent is obliged to permit these acts and to refrain from taking reprisals. It is, for example, in this sense that Stone (*op. cit.*, p. 383) may be understood when he remarks that: "The traditional law of neutrality confronts third states with only two choices, either to join in the war or to observe the duties of impartiality."—Furthermore, it is precisely the case of so-called "non-belligerency" that provides a clear illustration of the utility of identifying neutrality merely as the status of non-participation in hostilities. For although the "non-belligerent" may discriminate openly against one of the belligerents (and thereby furnish the latter with adequate cause for taking reprisals), it nevertheless retains a neutral status so long as it does not enter into the hostilities. If, on the other hand, neutrality is identified with the duty of impartiality then the discriminating non-participant must be regarded as not only violating its duties under general international law but as no longer neutral. The latter conclusion is obviously unwarranted, and its basis may be attributed to the insistence upon identifying neutrality with the principle of impartiality.—In this connection, however, it has been observed that: "The notion of neutrality as merely non-involvement in direct hostilities is inconsistent with the traditional concept, and if it should come to have this meaning, the concept would have been strikingly narrowed." Robert R. Wilson, "'Non-belligerency' in Relation to the Terminology of Neutrality," *A. J. I. L.*, 35 (1941), pp. 122-3. But the "notion of neutrality as mere non-involvement in hostilities" is not inconsistent with the traditional concept. The inconsistency is rather between the duties attached by the traditional law to a status of non-involvement in hostilities and the legally untenable contention that so-called "non-belligerents" possess the *right* to depart from these duties, while remaining non-participants. This is indeed the crux of the matter, and the events of World War II can hardly be considered as detracting from this conclusion.

<sup>6</sup> See pp. 23-5.

strictly dependent for their operation upon the existence of a state of war. It may be, however, that states engaged in armed conflict are unwilling to issue a declaration of war or even to acknowledge the existence of a state of war.<sup>7</sup> In such situations it would appear that the decision as to whether or not to recognize the existence of a state of war, and thereby to bring into force the law of neutrality, must rest principally with third states. The attitude of the parties engaged in armed conflict need not prove decisive for third states, the latter being at liberty either to accept the position of the contestants (i. e., the position that war does not exist) or to reject this position and to invoke the law of neutrality.<sup>8</sup>

Although it is customary for belligerents to notify third states of the outbreak of hostilities<sup>9</sup> the latter cannot rely on the absence of such notification as a justification for the non-performance of neutral duties if it is estab-

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<sup>7</sup> Thus both parties to the Sino-Japanese conflict of 1937 refused to acknowledge the existence of a state of war—though the Assembly of the League of Nations later found that Japan had “resorted to war” in violation of her obligations under the Kellogg-Briand Pact.

<sup>8</sup> This, at least, would seem to be the only feasible solution to the difficult situation that may arise in cases of undeclared hostilities. In practice, however, third states are likely to take the position of the contestants at face value, since the rules of neutrality invariably operate to restrict the behavior of non-participants—particularly with respect to trade. It is only to be expected that third parties will normally desire to avoid bringing these restrictions into effect. Distinguish, though, between the operation of the law of neutrality as determined by international law and the operation of municipal neutrality laws. The latter may be applied to situations other than war in the sense of international law. Thus Section 1 (c) of the Neutrality Act of May 1, 1937, declared that: “Whenever the President shall find that a state of civil strife exists in a foreign State and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms, ammunition, or implements of war from the United States to such foreign State would threaten or endanger the peace of the United States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to such foreign State, or to any neutral State for transshipment to, or for the use of, such foreign State.” For text, see *U. S. Naval War College, International Law Situations, 1939*, pp. 101 ff.

It should be observed that operation of the international law of neutrality presupposes, and is dependent upon, the recognition of insurgents in a civil war as belligerents. Prior to such recognition—whether by the parent state or by third states—there can be no condition of belligerency, hence no neutrality in the sense of international law. Although third states may grant any kind of material assistance to the parent government fighting insurrectionists, aid to the latter amounts to intervention in the internal affairs of the parent state and is forbidden. Of course, once the parent state recognizes the insurgents as belligerents, or once third states so recognize the insurgents independent from any act of recognition by the parent state, the civil war is transformed into an international war, and the rules of neutrality come into force. For a survey of the problems arising in this regard, see H. Lauterpacht, *Recognition in International Law* (1947), Part III. And for U. S. practice, Hyde, *op. cit.*, pp. 2330-5.

<sup>9</sup> According to Article 2 of Hague III (1907), Relative to the Opening of Hostilities, a state of war “must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may even be given by telegraph. Neutral Powers, nevertheless, cannot plead the absence of notification if it is established beyond doubt that they were in fact aware of the state of war.”

lished that knowledge of the commencement of war in fact existed. Third states, in turn, are not required to issue special declarations proclaiming their intention to refrain from participating in the war and to observe the duties of a neutral state.

In practice, however, third states generally do issue, upon the outbreak of war, neutrality declarations or proclamations that are directed not only to their own officials and subjects but also to the belligerents. International law in laying down the scope of a neutral's duties and rights leaves to the neutral state the task of fulfilling these duties and of exercising these rights. Within the limits prescribed by international law the neutral state may act at its discretion. It must regulate, in various ways, the behavior of individuals located within neutral jurisdiction. It must decide, within the limits imposed by international law, upon the use it is to allow belligerents of its waters and ports. Thus the neutral state may choose to allow the use of its waters and ports up to the limits prescribed by international law; but it may choose to place severe restrictions upon the entrance and stay of belligerent warships. Still further, the neutral state may desire to place restrictions upon the activities of its subjects—particularly with respect to trading with belligerents—in excess of any requirements laid upon the neutral state by international law.<sup>10</sup> Neutrality declarations form a practical necessity, therefore, not only for the information of the officials and the subjects of the neutral state but for the information of belligerents as well.<sup>11</sup>

<sup>10</sup> As did the United States in its Neutrality Acts of 1935, 1937 and 1939 (see p. 210(n)).

<sup>11</sup> It is for the reasons discussed above that the preamble to Hague Convention XIII (1907) declares that "it is desirable that the powers should issue detailed enactments to regulate the results of the attitude of neutrality when adopted by them." An invaluable collection of neutrality legislation and declarations has been compiled by F. Deak and P. C. Jessup, *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries* (1939), 2 vols. (Neutrality declarations issued by third states upon the outbreak of World War II are contained in a loose-leaf supplement.)

In 1939, upon the commencement of hostilities in Europe, the majority of non-participating states did issue neutrality declarations. For a general survey of World War II practice in this regard, see J. L. Kunz, *op. cit.*, pp. 729-32. Hyde (*op. cit.*, pp. 2316-7) has described United States practice in the following general terms: "Upon the outbreak of war, the executive issues a so-called neutrality proclamation addressed primarily to persons 'residing or being within the territory or jurisdiction of the United States.' By this means he endeavors to minimize the danger of the commission of acts which, unless retarded, may either expose the Government to the charge of neglect of its acknowledged duties as a neutral, or render their performance more burdensome. To that end the proclamation calls attention (a) to the several acts which the local statutory law prohibits; (b) to the decision of the executive as to the extent and nature of the privileges to be accorded belligerent ships of war within American waters; and (c) to the requirements of the law of nations as well as of the statutes and treaties of the United States, that no person within its territory and jurisdiction 'shall take part, directly or indirectly in the war. The individuals concerned are enjoined, moreover, to commit therein no act contrary to the law whether national or international. A warning is appended as to the impropriety of certain unneutral services on the high seas, and of the risks and penalties to be anticipated in case of capture. American citizens and others claiming the protection of the

The termination of neutral status presents no special difficulty, being subject to essentially the same considerations as those determining the commencement of neutrality. Just as there is no duty imposed by customary international law upon third states to refrain from participating in a war that has once broken out, or for belligerents to respect a status of non-participation, so there is no duty either on the part of the neutral or on the part of the belligerent to refrain from resorting to war against one another at any time thereafter. It is one of the seeming paradoxes of the traditional law that it may be violated only by acts of neutral or belligerent which fall short of war, though not by the act of resorting to war itself.<sup>12</sup> And even though it may now be contended that a belligerent is no longer free to attack non-participants for whatever reasons it may deem desirable, in view of the changes—earlier discussed<sup>13</sup>—in the legal position of war, there is no doubt that if a non-participant has been so attacked the status of neutrality has come to an end.

### C. THE NEUTRAL'S DUTY OF IMPARTIALITY

Among the duties imposed upon non-participants by the traditional system the duty of impartiality occupies a central position.<sup>14</sup> Despite its

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Government, 'who may misconduct themselves in the premises,' are informed that they can in no wise obtain any protection from the United States 'against the consequences of their misconduct.'" Upon the outbreak of war in September, 1939, the President issued, on September 5, 1939, two proclamations of neutrality. The first, a "general neutrality proclamation," outlined those acts forbidden within the jurisdiction of the United States. The proclamation was based upon the rules and procedure of international law as well as upon domestic statutes in conformity with these rules. The second, a "special" neutrality proclamation, was based upon the Neutrality Act of May 1, 1937, later replaced by the Neutrality Act of November 4, 1939.

<sup>12</sup> For a clear presentation of this and related aspects of the traditional institution of neutrality see J. L. Kunz (*Kriegsrecht und Neutralitätsrecht*, pp. 214 ff.) who properly emphasizes that as there is no obligation under customary law to take up a neutral status at the commencement of war, so there is no obligation to remain neutral for the duration of war. The same lack of obligation applies, *mutatis mutandis*, in the relation of the belligerent to the neutral. Occasionally, however, writers have refused to draw these conclusions, despite the fact that they constitute the obvious consequences of the traditional status of war itself. Thus it has been stated that in a war in which the rules governing neutral-belligerent relations are being observed, a neutral ought not to abandon its status of non-participation "except for a reason not connected with the cause of the war in progress, nor ought a belligerent to draw the neutral into the war." To declare war "simply because it does not suit the belligerent any longer to recognize its [neutral's] impartial attitude, or because it does not suit the neutral to remain neutral any longer . . . *ipso facto* constitutes a violation of neutrality. . . ." Oppenheim-Luaterpacht, *op. cit.*, p. 671. But it is difficult to reconcile these and similar statements either with the traditional legal interpretation of war or with the traditional institution of neutrality.

<sup>13</sup> See pp. 3-4, 165 ff.

<sup>14</sup> Although the law of neutrality imposes duties and confers rights upon neutral and belligerent alike the focus of an inquiry into this law may perhaps best be centered around the duties of the neutral. In brief, four general duties are imposed upon neutral states: the duty to act impartially toward the belligerents; the duty to abstain from furnishing belligerents any



admitted importance, however, the principle of impartiality has been a frequent source of controversy and misunderstanding.<sup>15</sup> As a duty imposed upon neutral states by the positive law the principle of impartiality may be defined simply as obligating neutral states to fulfill their duties and to exercise their rights in an equal (i. e., impartial or non-discriminatory) manner toward all the belligerents.<sup>16</sup> Hence the principle of impartiality, as a principle of the positive law, does not determine the contents of the

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material assistance for the prosecution of war; the duty to prevent the commission of hostile acts within neutral jurisdiction as well as to prevent the use of neutral jurisdiction as a base for belligerent operations; and, finally, the duty to acquiesce in certain repressive measures taken by belligerents against private neutral commerce on the high seas. Under these general duties—which establish correlative rights of belligerents—may be grouped almost all the specific obligations regulating the conduct of neutral states in naval warfare. The duties of a neutral state may also be classified—and frequently are so classified—as duties of abstention, prevention and acquiescence (or toleration). Duties of abstention refer to acts the neutral state itself must refrain from performing; duties of prevention refer to acts the commission of which within its jurisdiction the neutral is obligated to prevent; and, finally, duties of acquiescence have reference to neutral obligations to permit belligerent measures of repression against neutral subjects found rendering certain acts of assistance to an enemy.

It is also helpful to observe that the duties of a neutral correspond to the rights of a belligerent, and that the rights of a neutral correspond to the duties of a belligerent. The neutral's duty to observe a strict impartiality corresponds to the belligerent's right to demand impartiality on the part of the neutral. At the same time, the neutral has a right to demand that the belligerent will act toward it in such a manner as to respect its position of impartiality, and there is no question but that the belligerent is under a duty to do so. A similar analysis applies, for example, to the neutral's duty to prevent its waters and ports from being used as a base for belligerent operations. Here again, the belligerent though having a right to demand that neutrals not permit their waters and ports from being so used, also has a duty to respect these waters and ports. Conversely the neutral, though having a duty, also has a right to demand that its waters and ports not be used by belligerents as a base of operations.

<sup>15</sup> In large measure, this controversy would appear to stem from a failure to distinguish with sufficient clarity between impartiality in the sense of a moral-political postulate and impartiality in the sense of a duty imposed upon neutral states by the positive law. Historically, the significance of the idea that neutrals should occupy a position of impartiality toward the belligerents has been considerable. Elsewhere (see pp. 191-2), emphasis has been placed upon the degree to which the attitude of impartiality—and even of indifference—toward the belligerents formed part of the political structure upon which the traditional law of neutrality depended for its effectiveness during the nineteenth century. At the same time, it is a mistake to believe that the rules regulating the status of non-participants represent the “logical” application of the conviction that neutrals ought to behave impartially. It is hardly possible to derive from this conviction—as a moral-political postulate—the specific rules of the positive law regulating the conduct of neutral states, if only for the reason that the law of neutrality is the product of other factors as well (not the least of which has been the perennial conflict of interest between neutral and belligerent, and the sheer necessity for reaching a compromise as between these conflicting interests).

<sup>16</sup> The preamble to Hague Convention XIII (1907) declares that “it is, for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents.” And Article 9 of the same Convention reads: “A neutral Power must apply impartially to the two belligerents the conditions, restrictions or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent warships or of their prizes.” A brief, though excellent, discussion of the neutral duty of impartiality is contained in *Harvard Research in*

duties imposed and the rights conferred upon neutrals.<sup>17</sup> The impartiality demanded by the traditional law of neutrality does not even relate directly to the contents of other neutral obligations and rights, but to the manner in which these obligations and rights shall be applied.

Nor does the neutral's duty of impartiality require that the measures a neutral must—or may—take bear with equal effect upon the belligerents. It is entirely possible—and in many instances almost inevitable—that the strict fulfillment by a neutral of its obligations will result in the greater discomfort and disadvantage of one side in a war. A belligerent has not, for this reason, a legitimate cause for complaint.<sup>18</sup> Even more possible is the unequal effect upon belligerents that may result from the exercise of neutral rights. Thus a neutral state in the exercise of its right to place special restrictions upon the belligerents' use of its waters and ports is obligated only to see that the restrictions it imposes are applied impartially. The same may be said of the neutral state's privilege either to allow or to restrict, or to forbid entirely, the export trade carried on by its nationals with the belligerents. The fact that the exercise made of these neutral rights thereby places one of the belligerents at a disadvantage with respect to its opponent does not provide the disadvantaged belligerent with a lawful basis for claiming that it has been made the object of discriminatory measures.

Nor is it a violation of neutrality if, in the exercise of its rights, a neutral state actually intends to confer an advantage upon one side. As already observed, the traditional law of neutrality permits to neutrals a substantial measure of discretion in determining whether or not to exercise their

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*International Law, Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, A. J. I. L., 22 (1939), *Supp.*, pp. 232–5. Article 4 of the Draft Convention reads: "A neutral state, in the exercise of its neutral rights and in the performance of its neutral duties, shall be impartial and shall refrain from discriminating between belligerents." And see *Law of Naval Warfare*, Article 24ob.

<sup>17</sup> But see the statement in Oppenheim-Lauterpacht (*op. cit.*, p. 653): "Neutrality may be defined as the attitude of impartiality adopted by third States towards belligerents and recognized by belligerents, such attitude creating rights and duties between the impartial states and the belligerents." However, it is not the attitude of impartiality which "creates rights and duties." It is rather the status of non-participation in war which creates rights and duties, among which is the duty of impartiality.

<sup>18</sup> "Impartiality is one of the essential features of neutrality. But at the same time I must emphasize very strongly . . . the fact that the statement that neutrality demands impartiality means simply impartiality in the application of law; it rarely ever results in impartiality in operation. International law imposes certain obligations upon a neutral nation which it must perform with reference to each belligerent in a war; but international law does not impose any obligation on a neutral to see that the performance of these obligations should operate in the same manner on each belligerent. And, in fact, a neutral obligation rarely, if ever, operates in the same manner on each belligerent." Statement by Charles Warren to the U. S. Senate Committee on Foreign Relations, February 5, 1936, cited in Hackworth, *op. cit.*, Vol. VII, p. 377. For equally clear statements to the same effect, see Kunz, *op. cit.*, p. 217, and Verdross, *Völkerrecht*, p. 412.

rights.<sup>19</sup> Within this area of discretion neutral states necessarily will be guided by considerations of policy, and the latter may dictate an exercise of neutral rights the result of which is intended to benefit one side in the conflict. The frequent contention that such intent on the part of the neutral state is a violation of the neutral's duty of impartiality has no foundation, however. The so-called "attitude of impartiality" demanded of neutrals does not refer, in its strict legal meaning, to the *political motives* behind neutral behavior, but to that behavior itself. Hence, it may well be that in the exercise of its rights the neutral state both intends to confer and does in fact confer an advantage upon one side. In doing so it does not depart from the duty of impartiality so long as it refrains from discriminating against either belligerent in the actual application of those regulations it is at liberty to enact.<sup>20</sup>

<sup>19</sup> It is to be observed, however, that the principle of impartiality cannot be interpreted as restricting the operation of the *duties* otherwise imposed upon a neutral state. Thus a neutral state is obligated to abstain from supplying belligerents with war materials and to prevent the use of its territory as a base for the conduct of belligerent operations. The duties of abstention and of prevention are violated even though the neutral state may act impartially in supplying belligerents with war materials and in permitting the use of its territory as a base of operations. In brief, the discretion allowed to a neutral does not pertain to the fulfillment of duties—though the neutral may choose different ways in which to secure the fulfillment of its duties—but to the exercise of rights.

<sup>20</sup> It should also be apparent from these remarks that the impartiality required of a neutral state does not obligate the latter to look upon the conflict with "indifference." The neutral state may be—in spirit—wholly in sympathy with one side in the conflict, but as long as it *acts* in an impartial manner, in the sense described above, it fulfills its obligation.—The failure to distinguish clearly between the various *policies* open to a neutral and the *legal duties* imposed upon the latter characterized much of the debate over American neutrality during the years prior to this country's entrance into World War II. This confusion of policy considerations with legal principle was particularly apparent in the unfounded contention that the duty of impartiality required not only the avoidance of any intent to confer an advantage upon one side in the conflict (even though such advantage would be conferred as a result of the impartial application of neutral rights) but also the adoption of measures that would insure the belligerents a factual equality of treatment.

In this connection brief note should be taken of the possible bearing the principle of impartiality may have upon the neutral's attempt to alter its laws and regulations *during the course of a war*. When in November 1939 the United States modified certain features of its neutrality legislation the question arose as to the compatibility of such change with the duty of impartiality. One of the principal effects of the Neutrality Act of November 4, 1939, was to remove the earlier embargo placed on the sale to belligerents of arms, munitions and other implements of war. In taking this action the United States removed a restriction which, as a neutral, it need never have imposed. At the same time, the effect of the change—and, it was claimed, its intent—was to aid the Allies. It is at least doubtful, however, whether the legitimacy of such change as a neutral may make in its neutrality legislation during the course of a war can be determined by reference to the principle of impartiality. Instead, it would appear that attention must be directed toward establishing whether or not state practice does expressly limit the neutral in this respect, quite apart from the principle of impartiality. From this point of view the question is admittedly a close one, though there is much to be said for the position expressed in the preamble to Hague XIII (1907), to the effect that the neutrality regulations issued by a neutral "should not, in principle be altered, in the course of the war . . .

Finally, it must be emphasized that the duty of impartiality applies to the acts of the neutral state (i. e., to the acts of organs or officials of the neutral state) and not to the private acts of its subjects. Apart from certain limited exceptions,<sup>21</sup> the neutral state is under no obligation to prevent its subjects from giving material assistance to a belligerent, though it may forbid such behavior should it so desire. Clearer still is the absence of any duty imposed upon the neutral state to prevent its subjects from giving moral assistance to, or expressing sympathy for, one side in the conflict.<sup>22</sup>

#### D. THE NEUTRAL'S DUTY TO ABSTAIN FROM SUPPLYING BELLIGERENTS WITH GOODS AND SERVICES

Together with the duty of impartiality, and of equal importance, is the obligation laid upon neutrals by the traditional law to abstain from furnishing belligerents with certain goods or services.<sup>23</sup> In naval warfare a

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except in a case where experience has shown the necessity for such change for the protection of the rights of that (neutral) power. . . ." Certainly the United States took this position during World War I in response to complaints by the Central Powers that this country ought to place an embargo on the exportation of war implements to the Allies. The difficulty is in ascertaining when a neutral does change its regulations ostensibly for the purpose of better safeguarding its rights or fulfilling its duties, since it is commonly acknowledged that here—at least—change is permitted.

<sup>21</sup> See pp. 227-31.

<sup>22</sup> For this reason the claim advanced by the Axis Powers during World War II, that neutral states were obligated to prevent private expressions of sympathy or support for one belligerent, was wholly devoid of support in law. Known variously as "total" or "ideological" neutrality the essential features of this doctrine, as expounded by its leading protagonists, was to extend the neutral's duties to the strict control of public opinion in time of war as well as in time of peace. In particular, the neutral state was considered as obligated to maintain a rigid control over the press and to insure its impartiality. See E. H. Bockhoff, "Ganze oder halbe Neutralität," in *Nationalsozialistische Monatshefte* (1938), pp. 910 ff. Although the doctrine had no basis in law, and was repudiated by a number of writers (e. g., Edward Hambro, "Ideologische Neutralität," *Zeitschrift für öffentliches Recht*, 19 (1939), pp. 502 ff. and J. L. Kunz, "Neutrality and The European War," pp. 744-7), a number of neutral states did impose restrictions upon the freedom of private expressions of sympathy for one side. Distinguish, however, between expressions of sympathy for a belligerent by the subjects of a neutral state and by the organs or officials of the neutral government. Occasionally it has been asserted that even the latter are compatible with a strict impartiality, though this is very doubtful. For United States practice in this respect, see Hackworth, *op. cit.*, Vol. VII, pp. 374-7.

<sup>23</sup> In formulating the neutral duty under immediate consideration it is tempting to give it a broader scope than indicated above by stating that the neutral state is obliged to abstain from furnishing *any form of assistance to belligerents as would aid the latter in the prosecution of war*. Many writers formulate the neutral's duty in this manner. Nevertheless, this manner of formulation is apt to prove somewhat misleading, particularly when applied to neutral duties in naval warfare, if only for the reason that the use belligerents may make of neutral ports and waters do constitute—save perhaps in the purely formal sense—a form of assistance to belligerents. It is, of course, always possible to assert that—by definition—a neutral state is forbidden to render any assistance to belligerents as would aid the latter in the prosecution of war; hence the example of the various uses belligerents may make of neutral waters and ports cannot constitute—again by definition—assistance to belligerents. But this is surely a fiction, which can hardly succeed in hiding the legal reality, and it would appear much more accurate merely to

neutral state violates this duty if it provides belligerents with warships, munitions, or war materials of any kind.<sup>24</sup> In this respect, Article 6 of Hague Convention XIII (1907) declares that the "supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war materials of any kind whatever, is forbidden."<sup>25</sup>

Where the neutral state directly acts to sell, lend or otherwise furnish a belligerent with "warships, munitions or war materials" the situation does not admit of doubt.<sup>26</sup> Nor is the unlawful behavior of the neutral state

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state—as a general principle—that neutrals are required to abstain from rendering certain supplies or services to belligerents, whether directly or indirectly. In this connection it is of interest to note that although Article 5 of the *Harvard Draft Convention on The Rights and Duties of Neutral States in Naval and Aerial War* (*op. cit.*, p. 235) declares that a neutral state "shall abstain from supplying to a belligerent assistance for the prosecution of the war," the comment to this Article emphasizes the "considerable difficulty in drafting an adequate article on this subject. It has been found impossible to draft an article which would describe fully all the types of aid which a State may not furnish to a belligerent. There may be at least indirect types of aid which are permissible. . . . Thus . . . a neutral State may afford to belligerent warships certain facilities in its ports . . ." (p. 237).

<sup>24</sup> And, of course, if it provides belligerents with loans or credits.

<sup>25</sup> The term "war materials" can hardly be interpreted other than in relation to the prevailing conception of contraband (see pp. 263-7). In a war in which the articles considered to constitute contraband have been greatly expanded, the goods a neutral state must abstain from furnishing belligerents will be correspondingly expanded.

<sup>26</sup> Thus when judged solely by the obligations imposed by Article 6 of Hague XIII, the transfer by the United States of over-age destroyers to Great Britain in 1940 was clearly a violation of neutral duties. The same must be said of the Act to Promote the Defense of the United States, approved March 11, 1941—the so-called Lend-Lease Act. See *U. S. Naval War College, International Law Documents, 1940*, pp. 74-91, 132-7. Section 3 of the Lend-Lease Act declared:

"(a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States. (2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article . . . (3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract. (4) To communicate to any such government any defense information, pertaining to any defense article furnished to such government under paragraph (2) of this subsection. (5) To release for export any defense article disposed of in any way under this subsection to any such government."

Section 2 of the Act provided that: "The term 'defense article' means (1) any weapon, munition, aircraft, vessel or boat; (2) any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection; (3) Any component material or part of or equipment for any article described in this subsection; (4) Any agricultural, industrial or other commodity or article for defense."

But for a justification of the Lend-Lease Act and the destroyer-base agreement on grounds other than those under immediate consideration, see pp. 168-9, 198(n)).

altered in any way by the fact that the aid furnished by the neutral has as its basis a trade agreement concluded prior to the outbreak of war. On the other hand, the application of this neutral duty may not always be clear. Difficult considerations frequently arise, for example, in the attempt to determine if and when a neutral state has acted "indirectly" to supply a belligerent with the sinews of war. Thus a neutral state may follow a policy of encouraging the supply of war materials to a belligerent through private traders, while itself abstaining from any direct action.<sup>27</sup> In instances such as these it may not be immediately apparent that the neutral state has acted in violation of its obligations. In fact, the growth in the power of the state has given rise to considerable difficulties in practice, and these difficulties will be dealt with shortly. Here it is sufficient to emphasize only the strict abstention from supplying belligerents with war materials that is, in principle, required of neutral states.

This same duty of abstention serves to limit the behavior of the neutral state in other respects as well. As Hyde has observed, "the duty to abstain from giving aid is a broad one and covers a vast field of governmental activities;" for in addition to the prohibition against supplying belligerents with war materials of any kind the neutral is obligated, in general, "to abstain from placing its various governmental agencies at the disposal of a belligerent in such a way as to aid it directly or indirectly in the prosecution of the war."<sup>28</sup> Thus in naval warfare, the public vessels of a neutral state must refrain from rendering services of any kind to belligerent naval units at sea. They must not act as supply vessels or tenders to belligerent warships, they must not serve as transports for carrying members of a belligerent's armed forces, they must not communicate any information to belligerent warships which would assist the latter in operations against an enemy, and they must not interfere—in any manner—with the legitimate operations of belligerent warships.<sup>29</sup>

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<sup>27</sup> During the first year of World War II the United States resorted to a policy of making war materials owned by this Government available to Great Britain and France through the intermediary of private firms. Old stocks of arms and ammunition were turned back by the War Department to private manufacturers who then sold them through the Allied Purchasing Agency to the British and French Governments. Similar "trade in" agreements were carried out with respect to aircraft. In examining these measures one observer has noted: "None of these transactions appear to have been carried on directly between the United States and belligerent countries or their respective agencies. Yet it is clear that the purpose of the United States Government . . . was to give all possible aid to Great Britain and France in the present war, and these transactions appear to have been carried out in pursuance of that purpose, and as a result of negotiation and concerted action." Lester H. Woolsey, "Government Traffic in Contraband," *A. J. I. L.*, 34 (1940), p. 500.

<sup>28</sup> Hyde, *op. cit.*, pp. 2230-1.

<sup>29</sup> There are certain acts of a humanitarian character, however, that neutral warships may perform and that are not regarded as aiding a belligerent. The warships of a neutral state may rescue ship-wrecked survivors from a belligerent warship, provided only that the neutral prevents the survivors from participating again in hostilities. (See pp. 122-3).

It is one of the principal characteristics of the traditional system of neutrality that whereas the neutral state is under the strict obligation to abstain from furnishing belligerents with certain goods and services it is normally under no obligation to prevent its subjects from undertaking to perform these same acts of assistance.<sup>30</sup> With respect to trade in war materials carried on by the subjects of a neutral state Article 7 of Hague Convention XIII provides that a "neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which can be of use to an army or fleet." Occasionally, it is true, belligerents have questioned this absence of obligation on the part of the neutral state, especially when the export of war materials by private individuals has served to confer—in fact—a decided advantage upon one side. Thus, during World War I the Central Powers complained to the United States that the volume of traffic in arms and munitions being exported from this country to the Allies had reached such large proportions, and conferred so decided an advantage upon one side, as to raise the question whether the continuance of this traffic could be regarded as compatible with the obligations imposed upon a neutral state—and particularly with the obligation to observe a strict impartiality toward the belligerents. In rejecting the suggestion that an embargo be placed upon the export of war materials the United States contended that a neutral state was neither under an obligation to prevent private individuals from supplying war materials to belligerents nor under a duty to ensure that the resources coming from neutral territory would not serve to confer a decided advantage upon one side. It is clear that in taking this position the United States had the support of the established law.<sup>31</sup> The proper recourse open to dis-

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<sup>30</sup> There are, however, some significant exceptions to this distinction between the obligations imposed upon a neutral state with respect to its own acts and the absence of obligation with respect to similar acts when performed by subjects of the neutral state. A neutral state is not only obliged to abstain itself from performing such acts as may be regarded as serving to turn its territory into a base of operations for belligerents; it is also obliged to prevent the commission of acts by private individuals within its jurisdiction which may be considered as having a similar effect (see pp. 227-31). It is sufficient to observe here, though, that the traditional law does not regard the export of war materials—warships apart—from neutral territory, when undertaken by private individuals in the course of ordinary commercial transactions, as serving to turn such territory into a base of operations for belligerents.

<sup>31</sup> The relevant correspondence dealing with the incident in question is given in Hackworth, *op. cit.*, Vol. VII, pp. 617-21. There can be little doubt as to the correctness—in strict law—of the American position, a conclusion reached at the time by several writers in an exhaustive review of the matter in *A. J. I. L.*, 10 (1916). See W. C. Morey, "The Sale of Munitions of War," pp. 476 ff.; C. N. Gregory, "Neutrality and the Sale of Arms," pp. 543 ff.; and J. W. Garner, "The Sale and Exportation of Arms and Munitions of War to Belligerents," pp. 749 ff. At the same time, it was equally clear not only that the scale of the traffic in arms and munitions to the Allies represented an unprecedented event but that the traffic itself was very likely a decisive factor in staving off Allied defeat. See, generally, Alice M. Morrissey, *The American Defence of Neutral Rights 1914-1917* (1939). It is of interest to note that the position taken by the Central Powers did not rest directly upon an advocacy of a "principle of equalization" but

advantaged belligerents is to undertake repressive measures against the subjects of a neutral state engaged in furnishing assistance to an enemy, and the rules relating to contraband, blockade and unneutral service, as well as the rules governing visit, search and seizure, prescribe lawful means belligerents may use to accomplish this end. In turn, the neutral state must acquiesce in the repressive measures a belligerent is permitted by law to take at sea against the subjects of a neutral state engaged in assisting an enemy—whether by supplying him with war materials or by furnishing him with other forms of assistance.

But although a neutral state is under no obligation to do so it may place restrictions upon, or forbid entirely, both the export from and transit through its territory of war materials intended for belligerents. The conservation of resources or the more effective preservation of neutral status may further lead non-participants to extend restrictive measures to private trade in goods other than war materials, and to loans or credits as well.<sup>32</sup> Indeed, there is nothing to prevent a neutral state from undertaking to prevent all kinds of commercial intercourse between its subjects and belligerent states, and provided only that such restrictions are applied in an impartial manner the legislation enacted by neutral states to this purpose raises considerations of policy though not of law.<sup>33</sup>

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upon the fact—noted in the Austro-Hungarian note of June 29, 1915—“that the economic life of the United States had been made serviceable to the greatest extent [to the Allies] by the creation of new and the enlargement of existing concerns for the manufacture and exportation of war requisites and thus, so to say, been militarized, if it be permitted to use here this much-misused word . . . in the concentration of so many forces to the one end . . . lies a *fait nouveau* which weakens reference to supposed precedents in other wars.”

<sup>32</sup> In the past, a number of states when neutral have enacted such restrictions, and practice in this respect has been reviewed in *Harvard Draft Convention On The Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, pp. 281 ff.

<sup>33</sup> The neutrality legislation enacted by the Congress of the United States during the years 1935-39 undoubtedly represents the most significant recent example of a neutral state imposing restrictions upon its citizens respecting commercial intercourse with belligerents that were far in excess of the requirements laid down by international law. The Neutrality Act of May 1, 1937 declared in Section 1 that: “Whenever the President shall find that there exists a state of war between, or among, two or more sovereign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export or attempt to export, or cause to be exported arms, ammunition, or implements of war from any place in the United States to any belligerent state named in such proclamation or to any neutral state for transshipment to, or for the use of, any such belligerent state.” The 1937 Act provided further, in Section 2, that no other materials listed in a presidential proclamation could be exported to belligerent states save in foreign vessels and after American citizens had yielded all right, title or interest. Loans and credits to belligerent governments were forbidden. The 1937 Act also forbade United States citizens to travel on belligerent merchantmen or aircraft and prohibited the arming of American merchantmen. Upon the outbreak of war in September 1939, the embargo on arms, ammunition, and implements of war was put into effect by Presidential Proclamation of September 5, 1939 (Section 2 of the 1937 Act having lapsed May 1, 1939). On November 4, 1939 a new joint resolution of Congress was approved which repealed earlier legislation, and particularly the arms embargo.



It is evident that the basic distinction drawn by the traditional law between the obligations of abstention imposed upon a neutral state with respect to its own acts and the normal absence of obligation on the part of the neutral state to prevent its subjects from performing similar acts rests upon the possibility of maintaining a clear separation between the public activities of the neutral state and the private activities undertaken by subjects of the neutral state. Recent wars have made it abundantly clear, however, that the continued possibility of maintaining this separation in practice has become very difficult. The extent to which states now exercise either direct ownership or indirect control over economic activities formerly regarded as outside their proper sphere of activity may—and does—vary considerably. Nevertheless, this variation has been significantly narrowed in time of war. Where a neutral state does not nationalize its foreign trade, control over exports through a system of licensing and similar measures no longer allows such trade to be characterized as “private” in any but the most nominal sense of that term.

It is, in fact, hardly possible to reconcile the conditions that generally prevailed during the two World Wars with the conditions that are plainly assumed by the traditional law. The trading activities of neutral subjects were no longer determined by the decisions of private neutral traders, a fact that is readily apparent where the state has nationalized foreign trade. Yet it is only slightly less apparent where the neutral state exercises decisive control in determining the kinds and quantities of goods to be allowed for export, as well as the destination of such exports. During World War II, the practices initiated in an earlier war were once again adopted by neutral states, subject only to expansion and further refinement. Not only did most neutral states enact stringent export (and import) controls, many of them concluded formal trade agreements with belligerents whose purpose was to set limitations upon the quantity of goods neutrals

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According to the Act of November 1939, it was made unlawful for American vessels to carry either passengers or articles to any belligerent state named in a presidential proclamation. Among other features, the Act required the complete transfer of title (the so-called “cash and carry” provision) to all goods prior to export. It also authorized the President to declare combat areas (‘war zones’) within which American citizens and American vessels could not enter except under specially prescribed regulations. Other provisions of earlier acts—e. g., the prohibitions against loans and credits, travel by American citizens on belligerent merchantmen, and arming of American merchantmen—were re-enacted. On November 17, 1941 sections 2 (governing commerce with belligerents), 3 (dealing with combat areas) and 6 (forbidding the arming of American merchantmen) were repealed by joint resolution of Congress.—For texts of relevant Acts, Presidential Proclamations and Regulations, see *U. S. Naval War College, International Law Situations, 1939*, pp. 101–54, and *International Law Documents, 1941*, pp. 46–9. For a review of questions arising over the application of the Act of November 4, 1939, see Hackworth, *op. cit.*, Vol. VII, pp. 643–8. A general survey of the neutrality legislation of the period is given by F. Deák, “The United States Neutrality Acts,” *International Conciliation*, No. 358, March 1940.

would permit to be exported to states with which the belligerent party to the agreement was at war.<sup>34</sup>

Nor has the transformation in the economic functions undertaken by the state affected only the status and application of the rules governing neutral trade in war materials with belligerents. In naval warfare this transformation may also affect the rules governing the supply and repair of belligerent warships in neutral ports. Subject to certain restrictions<sup>35</sup> the traditional law permits belligerent warships to obtain supplies and repairs in neutral ports by recourse to the market. However, this law does not permit the neutral state, or its agencies, to provide warships with such supplies and repairs as the warship is otherwise permitted to obtain in neutral ports and the neutral state is not obligated to prevent.<sup>36</sup> But where fuel supplies and the facilities of ports are either owned or controlled by the neutral state a strict interpretation of neutral obligations would appear to forbid altogether the granting of fuel and repairs to belligerent warships.<sup>37</sup>

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<sup>34</sup> Indeed, the regulation of so-called "private" neutral trade became almost exclusively a matter to be determined between the belligerent and the neutral state. Medlicott (*op. cit.*, pp. 139) has described in considerable detail the work of the British Ministry of Economic Warfare in concluding the "war trade agreements" with neutral states. "The basic aim of these complicated negotiations," Medlicott writes, "was to ensure that the neutrals would prohibit altogether the re-export to Germany of goods reaching them through the Allied controls, and would limit the sale to Germany of other goods to 'normal' pre-war figures. In return the British Government agreed in each case to facilitate the passage through the controls of goods covered by the agreements, and to refrain from demanding individual guarantees against re-exports" (p. 55). In the draft war-trade agreements instructions sent out in September 1939, to all British missions in neutral states it was stated that: "Its (i. e., the proposed war trade agreements) underlying principle is . . . that, in return for certain undertakings as to the limitation and control of . . . trade with the enemy, His Majesty's government will undertake to permit and so far as possible to facilitate the importation by . . . of commodities essential for her domestic consumption" (p. 664).

<sup>35</sup> See pp. 240-4.

<sup>36</sup> Thus the United States Neutrality (General) Proclamation of September 5, 1939 declared: "No agency of the United States Government shall, directly or indirectly, provide supplies nor effect repairs to a belligerent ship of war." This provision merely states the neutral's obligation under the traditional law.

<sup>37</sup> In the case of *The Attilio Regolo and Other Vessels* (*Annual Digest of Public International Law Cases* (1947), Case No. 137, pp. 319-24), an arbitration between the United States, Great Britain and Italy on the one hand and Spain on the other, the Arbitrator was called upon to decide whether "the provisions of Article 19 of the Hague Convention (XIII) of 1907 entail an obligation on the neutral State to give active assistance in ensuring supplies of fuel to belligerent warships anchored in its waters, or, on the other hand, does refueling represent a right of the said ships, their inability to exercise which in good time does not preclude a strict application of the twenty-four hours' rule." The Arbitrator held that Article 19 "does not lay on the neutral State any specific obligation to assist actively in providing supplies of fuel," but that fueling does represent a "right which the belligerent warship may exercise by recourse to the market." The Arbitrator went on to point out: "In no sense—grammatical, logical or juridical—does the Article (19 of Hague XIII) under examination lay on the neutral State the duty of actively assisting in making supplies available. Such duty, we may add, is inconsistent with

It may be that revision of the law of neutrality to permit neutral states themselves to supply fuel to belligerent warships or to grant the latter use of state-owned port facilities would raise no "insurmountable difficulty," that "it is probable that even without express revision the established law of neutrality could be applied by way of a reasonable interpretation of its basic provisions in the light of new conditions."<sup>38</sup> It can be contended that the principal consideration is that belligerent warships ought not to make use of neutral ports in excess of the restrictions laid down by Hague Convention XIII (1907), and this may be ensured regardless of the fact that the limited assistance made available to warships in neutral ports is obtained directly from the neutral state itself rather than by recourse to the market.<sup>39</sup>

Even so, the major problem remains, that is of applying to present conditions the rule forbidding neutral states to supply belligerents in any manner, directly or indirectly, with war materials. In those states where foreign trade has been nationalized it seems clear that if the traditional law retains its validity the supply of war materials of any kind must be considered as a departure from the duties imposed upon a neutral state.<sup>40</sup> Nor is this conclusion subject to qualification either by the claim that this situation was not contemplated when the traditional law was established<sup>41</sup>

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the conceptions of the State, prevailing in 1907, as remote from pursuits of a commercial nature and as being exclusively a constitutional organism whose specific duty as a neutral, under the system we are now examining, was merely to exercise control and supervision in order to prevent belligerent warships received in its waters from using the latter as a base of operations and thus compromising the neutrality of the State granting them access."

<sup>38</sup> Lauterpacht, "The Problem of the Revision of the Law of War," p. 377.

<sup>39</sup> On the other hand, the dissatisfaction long felt in many quarters over the "limited assistance" neutrals may grant belligerent warships under Hague XIII is not likely to be attenuated by this possible revision of the law in order to permit the neutral state to supply fuel and carry out repairs. If anything, it would be increased—and not unreasonably so.

<sup>40</sup> ". . . a neutral state which permits its publicly-owned vessels to carry cargo which would be subject to confiscation if carried in a privately-owned vessel, or whose publicly-owned vessels are guilty of any form of conduct which would render them liable to condemnation if they were privately-owned vessels, would itself be guilty of disregarding *pro tanto* the law of neutrality. . . ." S. W. D. Rowson, *op. cit.*, p. 178. For further expressions to the same effect, see Lawrence Preuss, "Some Effects of Governmental Controls On Neutral Duties," *Proceedings*, American Society of International Law, 31 (1937), pp. 108-19, and *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, pp. 238-44. Nor is the conclusion stated above denied by those writers who nevertheless contend that retention of the traditional law serves to penalize states adopting socialist economies, e. g., W. Friedmann, "The Growth of State Control Over the Individual, and Its Effect Upon the Rules of International State Responsibility," *B. Y. I. L.*, 19 (1938), pp. 130 ff.

<sup>41</sup> This point has been frequently made by writers and is, in any event, not a matter of dispute. During World War II the application of the rule forbidding the supply of war materials by neutral states may be interpreted, in view of the extension of the notion of contraband, as forbidding almost all trade between the Soviet Union (while still a neutral) and belligerent states. That the Soviet Union did not adhere in its behavior to this prohibition is a matter of public record. It may be argued that this example of the Soviet Union during the years 1939-41 shows the futility of attempting to apply the traditional law to a major neutral state

(and, obviously, it was not) or by the attempt to differentiate between the "political" as opposed to the "commercial" character of the transactions carried out by the neutral state.<sup>42</sup>

No clear conclusion can be drawn, however, with respect to the possible liability of state-owned neutral vessels and cargoes to the law of prize. Although it has been contended that the "vessels (other than men-of-war) and cargoes of such States are subject to the ordinary incidents of the law of blockade and contraband and of other belligerent rights,"<sup>43</sup> practice to date does not as yet afford sufficient grounds for endorsing this claim. It is by no means certain that belligerents have even a right to visit and search the publicly owned vessels of a neutral which are engaged in commercial activities, let alone the right to seize and to condemn such vessels and their cargo in accordance with the rules relating to contraband and blockade.<sup>44</sup>

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that has completely collectivized its economy. Nevertheless, in the absence of wider agreement among states that this aspect of the traditional law should be abandoned, it can only be assumed that the rule forbidding neutral states to supply belligerents with war materials remains valid.

<sup>42</sup> It has been suggested that if "the *nature* of the deal, whether political or commercial, and not the fact of governmental ownership or control, is to be the test for determining legal responsibility, and if it is political favoritism and political assistance rather than governmental supervision as such which gives taint to the transaction, then what is to be looked for in this quest for a criterion as to private capacity is the amount or extent of political bias or influence manifest in any given arrangements between a belligerent government and a corporation or agency owned or controlled by a neutral state." "*Neutral Duties and State Control of Enterprise*," *U. S. Naval War College, International Law Situations, 1939*, p. 10. It may be doubted whether this suggested differentiation between the "political" and the "economic" acts of the neutral state is at all feasible, dependent as it must be upon a "search into the motives and into the details of each particular act" (p. 11). In any event, it has no basis in the traditional law, which is not concerned with whether the act of supplying a belligerent state with assistance for the prosecution of war has an "economic" or "political" motivation. Finally, it may be observed that little support for this suggestion can be found by the appeal to the principle of impartiality, since the latter too is concerned with the acts of a neutral state, not with its motives.

<sup>43</sup> Oppenheim-Lauterpacht, *op. cit.*, p. 657.

<sup>44</sup> The actual practice of states during World War II is scarcely conclusive even as to the right of visit and search. A number of writers have made much over the alleged insistence on the part of Great Britain during the early stages of World War II to subject Soviet state-owned vessels engaged in commercial activities to the same measures of control which privately owned neutral vessels are liable. It is true that on several occasions British warships exercised visit and search over Soviet vessels. The British Government, however, made no clear reply to the protests of the Soviet Government that state-owned merchant ships were exempt from the operation of belligerent rights. The matter was never put to a test since the Soviet Government thereafter avoided areas in which their vessels would possibly be subject to the British contraband control system. The incidents are recounted in some detail by Medlicott, *op. cit.*, pp. 318-20.—There are, on the other hand, certain indications in prize rules and manuals of a tendency to assimilate neutral state-owned vessels engaged in commercial activities to the position of privately owned neutral vessels. See section 500b *Law of Naval Warfare*. Note should also be taken of the German Prize Law Code of 1939, which provided in Article 1:

Undue concentration upon the criterion of state-ownership, however, ought not to lead to a neglect of the far more difficult considerations involved in applying the traditional law to neutral trade which, though not state-owned, is state-controlled. A strict application of this law would appear equally to forbid neutral trade in war materials when such trade is controlled and directed by the neutral state.<sup>45</sup> And in view of the near universal practices of neutral states in recent wars there must remain, on this consideration, only a negligible amount of neutral trade whose character does not involve the responsibility of the neutral state.<sup>46</sup>

In an admirable analysis of the numerous problems imposed by the breakdown in practice of the neutral state-neutral trader distinction Julius Stone has proposed the following "two main lines of legal reform" available to states:

One would assimilate the legal position of the trading State to the private trader, permitting the State to trade subject to belligerent controls of contraband, blockade and the like. The other would assimilate the private trader's legal position to that of the State, forbidding him and forbidding his State to permit him to engage in the affected trade. Neither line has any *a priori* validity. Which should be adopted is a matter of legislative policy. . . . Between the two alternatives offering, therefore, the Writer

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"Prize Law covers the authority to visit and search enemy and neutral ships as well as to deal with these ships and goods carried on them according to the following provisions. Warships and other public vessels which are designed or used exclusively for purposes of public administration and not for trade purposes are not subject to prize law." To date, however, these and similar manifestations have yet to stand the test of practical application. And it is difficult to avoid the conclusion of Rowson (*op. cit.*, p. 177), who declares that with respect to the liability of neutral state-owned merchant vessels the law is still "in its infancy."

<sup>45</sup> And without regard to whether such control is exercised through export controls and licensing measures or by the state's creation of trading organizations endowed with a "private character." The latter measure may furnish a means for permitting belligerents to exercise those controls that have long been exercised over private neutral traders, but it cannot do away with the fact that decisive control would still be exercised by the neutral state.

<sup>46</sup> The decisive point, therefore, is no longer that undue concentration upon the criterion of state ownership leads to conclusions that discriminate against states resorting to nationalization. Instead, it is that concentration upon the sole factor of state ownership neglects the more important—since far more widespread—practices of state control which fall short of ownership, and that these practices of state control constitute the most significant factor in subverting the clear intent of the traditional law. This is the burden of the excellent remarks of Julius Stone (*op. cit.*, pp. 410-1) in criticism of the position that "it is impossible to maintain one set of rules for countries organized on the basis of private enterprise and another for countries where the production of and trade in certain articles is in the hands of the State." Oppenheim-Lauterpacht, *op. cit.*, pp. 657-8. Professor Stone's reply is that in view of the extensive controls over trade now exercised by nearly all neutral states the insistence upon looking only at the criterion of state ownership has precisely this result—to lead to two sets of rules.

accepts the former, namely, that trading activity of neutral Governments with belligerents should be assimilated to private trading in both respects. First, that the duty of the neutral Government not to supply arms, munitions, or to grant loans should be abolished. Second, that the ships, and cargoes, and other instrumentalities of the neutral Government employed in such trade should be subject to the ordinary penalties for contraband carriage, blockade breach, and the like, and should not enjoy (while involved in such trade) the immunities ordinarily enjoyed by State owned ships and property.<sup>47</sup>

These suggestions for legal reform represent a clear attempt to close the ever widening gap that exists between the behavior prescribed by the traditional rules and the actual practices of neutral states in the two World Wars. Even further, they recognize that it is unrealistic to consider the conditions that have brought about the present decline of the neutral state—neutral trader distinction as merely transient phenomena. Nevertheless, the proposal that the position of the neutral state should now be assimilated, in matters of trade, to the position traditionally held by the private neutral trader is one involving substantial difficulty.<sup>48</sup>

It is of course true that neutral trade has always been a significant factor in warfare at sea, and belligerents have always sought to go as far as possible in cutting off this trade with the enemy. But it is hardly necessary to observe that the ever present belligerent desire to cut off neutral trade with an enemy is—for reasons already noted—far greater today than in an earlier period. In view of the increased importance of the economic arm in the conduct of modern war the proposal that the neutral state be assimilated in matters of trade to the position of the private neutral trader might well have the effect of conferring upon neutrals the legal possibility of exercising a decisive influence upon the outcome of a conflict.

Nor should it be overlooked that private neutral trade, being motivated by considerations of gain and not by political considerations, was generally

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<sup>47</sup> Stone, *op. cit.*, pp. 412-3.

<sup>48</sup> It should be made clear that the above discussion is independent of, and does not prejudice, any duties and rights of nonparticipants resulting from the changed legal position of war (see pp. 165 ff). With respect to the Charter of the United Nations it will be readily apparent that the effective operation of the collective security system established by that instrument would render any further consideration of the present problem of little more than nominal value. And even if the Security Council cannot effectively exercise the functions conferred upon it by the Charter, it may nevertheless be contended that member states have a right to assist a state made the victim of an armed attack and a duty to refrain from assisting the attacker. From this point of view the proposal to abandon the neutral state's duties of abstention would not be in accord with the obligation to refrain from assisting an aggressor. On the other hand, the alternative proposal of placing an embargo upon all neutral trade (public and private) with belligerents would not be in accord with the presumed right of third states to assist the victim of an unlawful resort to war.

without organization and direction. In this sense it was politically indifferent, and this political indifference was not substantially affected by reason of the fact that the neutral state might take up and press the cause of the private trader against belligerents. All this must change once the state is openly allowed to take over the position occupied by the private trader. Presumably, the neutral state would be under no obligation to act impartially in supplying belligerents with war materials, and, in any event, it is difficult to see how the principle of impartiality could be applied effectively in this instance. The neutral state would be able to organize and direct its assistance in a manner that would have been impossible for private traders. It does not appear realistic to expect that the neutral state would determine its trading policy in a non-political vacuum. On the contrary, the expectation must be that political considerations will prevail over considerations of economic gain.

In a word, the proposal that the neutral state's position be assimilated to that of the private neutral trader would, if accepted, result in the neutral state's interference in the conduct of a war just short of active participation in hostilities. Given the transcendent importance of the economic factor it would normally prove to be only a very short step to such active participation.<sup>49</sup> If past experience is to prove of any value it would appear to indicate that if neutrality is to be preserved at all it will be done only under the condition that it does not serve to confer a substantial—let alone a decisive—advantage upon either belligerent. This consideration may imply the desirability of forbidding all neutral trade in war materials with belligerents. The neutral state—neutral trader distinction has always been something of an anomaly, understandable in the context of the particular historic conditions in which it arose. These conditions obtain today only to a very limited extent. With their disappearance the retention of the rules which developed out of them lose further justification. Yet in altering these rules the traditional system of neutrality would seem best preserved—assuming such preservation to be the central purpose of legal reform—not by suggesting that an otherwise anomalous practice now be transformed into an even more general situation, but rather by forbidding all neutral trade with belligerents. The economic hardships complete abstention might impose upon the economy of a neutral state could un-

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<sup>49</sup> Of course, given a preponderance of belligerent power such trade would only rarely be tolerated. The proposal would work, if at all, only in a local war. Yet even here its results would probably prove undesirable, if it is assumed that the objective would be to keep the war from spreading. For the proposal under discussion would most likely have the contrary effect. Instead of isolating a conflict it would constitute an open invitation for other states to fish in troubled waters, thus running the risk of expanding the conflict. No doubt states have done just this, even under the rules laid down by the traditional law, and will continue to do so. But there seems little point in providing them with the legal justification for doing so.

doubtedly be considerable. They are certainly no greater, however, than the hardships imposed by participation in modern war.<sup>50</sup>

All this is mere speculation, though. From the point of view of the present law the traditional rules based upon the distinction drawn between neutral state and neutral trader remain valid, though marked by ever increasing difficulty in their application and—in all probability—a corresponding decline in their effectiveness.

## E. RESTRICTIONS ON THE USE OF NEUTRAL PORTS AND TERRITORIAL WATERS;<sup>51</sup> NEUTRAL DUTIES OF PREVENTION

A neutral state is obliged not only to abstain itself from the performance of certain acts; it is further obliged to prevent the commission of certain

<sup>50</sup> Admittedly, the proposal to place upon non-participants the duty to prevent all commercial intercourse with belligerents is also beset with difficulty. On balance, however, these difficulties would appear less formidable than the difficulties attendant upon the suggested assimilation of the neutral state to the position heretofore held by the neutral trader. The argument that the complete severance of trade would extend considerably the neutral's preventive duties is quite true, though not a compelling objection. Indeed, given the pervasive controls already exercised by states—when neutral—over exports, the extension involved would affect the scope of the neutral's duty of abstention far more than creating new duties of prevention. Undoubtedly, the more serious objection is the economic hardship complete abstention might impose upon a neutral state's economy. Yet it hardly seems hazardous to surmise that economic considerations generally have been far less influential in shaping neutral policies than have been considerations of a distinctly political character, and this despite Professor Stone's (*op. cit.*, p. 413) somewhat extravagant assertion that it is "fantastic" to assume that non-participants would "commit economic self-immolation for the sake of the law of neutrality." On the contrary, it is submitted that recent experience points far more clearly to the lesson that states are willing to suffer economic hardships to preserve neutrality, *if the preservation of neutral status is considered to be politically desirable*. For precisely the same reasons—i. e., political—neutral states have intervened in recent hostilities by directing economic aid to the side with whose interests they have become identified.

It may be relevant to add that the foregoing remarks are not designed to suggest either the wisdom or the folly—from a political standpoint—of self-imposed neutral policies of preventing all trade with belligerents. But it does seem clear that in the period accompanying and directly following the collapse of American neutrality during World War II many observers drew conclusions whose generality was hardly warranted by the special experience on which they were based. It is one thing to assert that in a major conflict the attempt on the part of a third state to isolate itself, when its vital interests are directly involved in the conflict, must be foredoomed to failure. It is quite another thing to insist that failure must attend any attempts to isolate the combatants in a limited war where the interests of third states may not be directly involved—or, at least, where the interests of third states in the outcome of a conflict is less than their desire to prevent the conflict from spreading. And it will be apparent that it is precisely in a limited war, where the possibilities for the preservation of neutral status will normally be most favorable, that the economic hardships suffered by the prohibition against trade with the combatants will be the least severe. All this may be viewed as pointing to the conclusion—by now, almost a truism—that neutrality will prove feasible only where war is limited in the number, and power, of the participants. Yet the decisive point is that it may prove feasible in just such situations, and hence suggestions for legal reform of the traditional system must concentrate—to be realistic—upon this possible contingency.

<sup>51</sup> See, generally, *Law of Naval Warfare*, section 440 and notes thereto.



acts by anyone within its jurisdiction. Those acts a neutral state is obligated to prevent may be performed either by belligerents or by private individuals. In naval warfare attention is directed to the acts a neutral must forbid in its ports and territorial waters. The most authoritative source for an inquiry into the rules restricting the use of neutral ports and territorial waters remains Hague Convention XIII (1907).<sup>52</sup>

In defining the scope of a neutral's duties with respect to its waters and ports Hague Convention XIII does not purport to indicate the acts a neutral state may forbid but the acts it must forbid. There is nothing to prevent a neutral from placing restrictions upon the use of its waters and ports which are in excess of the requirements laid down by international law, and in practice many states when neutral do exercise their right to impose restrictions beyond those required by law. In so doing the neutral state is only under the obligation to see that its regulations are applied impartially toward all belligerents.<sup>53</sup>

#### 1. *Belligerent Acts of Hostility in Neutral Waters*

Article 2 of Hague Convention XIII declares that: "Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden." In principle, the rule enjoining belligerent respect for the inviolability of neutral waters appears quite plain. In practice, however, certain questions have arisen that concern the precise scope of the belligerent's duty of abstention.

It is clear, to begin with, that this belligerent duty toward the neutral state is not without limitation. A belligerent is not obligated to refrain *under all circumstances* from taking hostile measures against the naval forces of an enemy located in neutral waters. In the event that the forces of one belligerent violate neutral waters (or ports) and the neutral state willfully permits such violation it cannot complain if the other belligerent—as an extreme measure—attacks his enemy while still in the waters of the neutral state. The neutral state has not only the right to prevent the misuse of its waters and ports but also a duty to take adequate measures of prevention. This neutral duty is owed to the belligerent that has otherwise respected the rights of the neutral state and that will be placed at a disadvantage in

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<sup>52</sup> Though never ratified by Great Britain (nor, for that matter, by Russia) and not technically binding in either World War, the provisions of Hague Convention XIII (1907), have nevertheless been considered—on the whole—as declaratory of the customary rules restricting belligerent use of neutral ports and waters. However, there are certain provisions of the Convention that have not received the acceptance of numerous naval powers, and these provisions will be noted in the following pages. It should also be observed that Hague XIII does not deal with the rules concerning belligerent rights with respect to neutral commerce at sea. Even in relation to neutral waters and ports the Convention is not to be considered as exhaustive, which is one reason for Article 1 obligating belligerents "to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted, constitute a violation of neutrality."

<sup>53</sup> Hague XIII, Article 9.

war by the unlawful use made of neutral waters and ports by an enemy. In allowing the forces of one belligerent to misuse its waters and ports the neutral state thereby violates its duty toward the other belligerent, and the acts of hostility that the offended belligerent may take against the forces of his enemy in neutral waters may be interpreted as permitted measures of reprisal against the delinquent neutral.<sup>54</sup>

The scope of the belligerent's obligation to abstain from committing hostile acts in neutral waters must therefore depend, in large measure, upon the nature and scope of the neutral's obligation to prevent the unlawful use by belligerents of its waters and ports. In naval warfare the generally accepted standard the neutral is obliged to meet in fulfilling its duties—and certainly the standard imposed by Hague XIII—is that it use the "means at its disposal."<sup>55</sup> But the fact that a neutral fulfills its duty so long as it exercises such surveillance as the means at its disposal allow to prevent violations of its waters and ports need not mean, however, that the belligerent's obligation of abstention is unqualified by the effectiveness of the preventive measures taken by the neutral.

It is evident that in the event the neutral state cannot effectively enforce its rights against an offending belligerent the ensuing situation may lead to one of considerable difficulty. Belligerent warships may be threatened with attack by an enemy while in neutral waters, and the shore state may be unable to exercise adequate measures of prevention. The forces of a belligerent may persistently violate the waters of a neutral state to the grave disadvantage of an enemy that has heretofore respected neutral waters. In these, and other, circumstances the neutral state, while using the means at its disposal, may be wholly unable to enforce its rights effectively. Must the belligerent whose interests suffer as a result of an enemy's violation of neutral waters nevertheless abstain from taking hostile measures in neutral waters against his adversary?

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<sup>54</sup> These are measures of reprisal against the neutral, not against the belligerent. In misusing neutral waters the belligerent has violated no right of its enemy.

<sup>55</sup> Article 25 of Hague XIII declares: "A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles in its ports or roadsteads, or in its waters.—Article 26 of the 1928 Habana Convention on Maritime Neutrality provides a substantially similar formulation in stating: "Neutral States are bound to exert all the vigilance within their power in order to prevent in their ports or territorial waters any violation of the foregoing provisions."—In the *Harvard Draft Convention On the Rights and Duties of Neutral States in Naval and Aerial War* (*op. cit.*, p. 245) the same concept of the scope of the neutral's duty is expressed. Article 6 of the Draft Convention states: "A neutral state shall use the means at its disposal to prevent within its territory the commission of any act the toleration of which would constitute a non-fulfillment of its neutral duty; the use of force for this purpose shall not be regarded as an unfriendly act."

The comment to Article 6 declares that the article expresses "the general standard by which a neutral State's fulfillment of its neutral duties is to be measured. A neutral state is not an insurer of the fulfillment of its neutral duties. It is obligated merely to use the 'means at its disposal' to secure the fulfillment of its duties" (p. 247).

It can hardly be said that the dilemma posed by the situation of the weak neutral has been clearly and satisfactorily resolved even today.<sup>56</sup> The relatively few incidents that appear to have a bearing upon this problem are not entirely free from ambiguity, and their significance as possible precedents ought not to be overestimated.<sup>57</sup> Despite this dearth of precedents it is the opinion of a number of publicists that if the neutral state is

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<sup>56</sup> Equally difficult considerations arise as a result of a neutral's inability to prevent a belligerent from shutting off the neutral state's legitimate intercourse—particularly trade—with an enemy (see pp. 252-8).

<sup>57</sup> One such incident occurred during the Russo-Japanese War when a Russian destroyer, the *Peshitelni*, which had taken refuge in a Chinese port, was seized and towed off by Japanese warships. Japan, in justifying the action, maintained that the Chinese authorities had not taken the necessary measures toward disarming the vessel and ensuring that it would take no further part in the war. The incident is not entirely clear though, since at the time of the Japanese action the *Peshitelni* had ostensibly been interned (two days earlier), and there were Chinese naval vessels in the port (Chifu) that could have ensured effective internment. In part, it seems that the Japanese action was taken as a result of previous incidents in which Chinese waters had been violated by Russian naval forces and China either would not or could not resist these transgressions.

The most frequently cited incident arising out of World War I is the case of the *Dresden*. The incident is summarized in the following passage:

"On March 9, 1915 the German cruiser *Dresden* arrived in Cumberland Bay in the Chilean Juan Fernandez Islands, cast anchor, and asked permission to remain eight days to repair her engines. The maritime governor of the port refused to grant the request, considering it unfounded, and ordered the vessel to leave within 24 hours or be subject to internment. At the end of the period he notified the captain of the vessel that the penalty of internment had been incurred. On March 14 a British naval squadron arrived and opened fire on the *Dresden* while she lay at anchor some 500 meters from shore. The *Dresden* raised a flag of truce and sent an officer to inform the British squadron that she was in neutral waters. The British squadron ordered the *Dresden* to surrender or be destroyed; the captain of the *Dresden* thereupon blew up his own ship, and the crew made their way ashore." Hackworth, *op. cit.*, Vol. VII, p. 370. The Chilean government protested the action of the British squadron, maintaining that the internment of the *Dresden* was as effective as the circumstances would permit, and contended that, in any event, the British naval squadron could have prevented, by close watch, the possibility of the *Dresden* escaping to sea and once again attacking British commerce. In its reply the British Government stated that it was prepared to offer a "full and ample apology" to the Chilean Government for the action. It added, however, that if the Chilean authorities could not prevent the *Dresden* from abusing Chilean waters and properly intern her, these circumstances would "explain the action taken by the British ship." It is difficult to determine, therefore, whether the offer of an apology by Great Britain was intended as an unqualified apology for the action of the British squadron or whether it was offered because the British Government was not certain that under the circumstances the Chilean authorities might have been able to take the measures necessary to intern the *Dresden*.

The incident of the *Altmark* (see pp. 236-9) during World War II, though also frequently cited by writers, is of doubtful relevance. In the *Altmark* incident there appeared little doubt that Norway had the "means at its disposal" to enforce its neutrality. Nor did the British Government attempt to justify the measures of hostility it finally resorted to within Norwegian waters on the grounds that Norway was unable to enforce her rights. On the contrary, the British contention was that Norway had the means but was unwilling to use these means. The British action, if justifiable, must be interpreted then as a reprisal against Norway for the

unable to enforce its rights against one belligerent making unlawful use of its waters the other belligerent may—as an extreme measure—resort to hostile action against the forces of its enemy, though in neutral waters.<sup>58</sup> If this opinion is correct, as it is believed to be, then a belligerent's duty to abstain from committing acts of hostility in neutral waters must be limited not only by the willingness but also by the ability of the neutral to enforce its rights effectively.<sup>59</sup> At the same time, there is general agreement that where a neutral state is employing the means at its disposal (though ineffectively) to prevent belligerent violations of its waters, a belligerent ought not to take hostile measures against an enemy making unlawful use of these waters except when so required for reasons of self-preservation or—

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latter's failure to observe her duties toward Great Britain. Interestingly enough, however, most of the writers approving the British action in the *Altmark* incident refer to the measure as one of "self help" rather than of reprisal.

More relevant in this connection is the British and French resort to the mining of Norwegian territorial waters in April 1940, on the eve of the German invasion of Norway. On this occasion the British and French Governments, alleging the persistent abuse by Germany of Norwegian territorial waters, declared that: "Whatever may be the actual policy which the Norwegian Government, by German threats and pressures, are compelled to follow, the Allied Governments can no longer afford to acquiesce in the present state of affairs by which Germany obtains resources vital to her prosecution of the war, and obtains from Norway facilities which place the Allies at a dangerous disadvantage . . ." cited in Hackworth, *op. cit.*, Vol. VII, p. 148. The implication was clear that the mining of Norwegian waters was a measure of "self help" justified in view of Norway's inability to prevent German misuse of her waters.

<sup>58</sup> Thus Hyde (*op. cit.*, pp. 2337-8) has stated that the "obligation resting upon the belligerent with respect to the neutral is not of unlimited scope. Circumstances may arise when the belligerent is excused from disregarding the prohibition. If a neutral possesses neither the power nor disposition to check warlike activities within its own domain, the belligerent that in consequence is injured or threatened with immediate injury would appear to be free from the normal obligation to refrain from the commission of hostile acts therein. In naval warfare such a situation may arise through the presence of vessels of war of opposing belligerents simultaneously in the same neutral port or roadstead." Also Oppenheim-Lauterpacht, *op. cit.*, p. 695n. Smith (*op. cit.*, p. 148) states that in naval, as in land, warfare the neutral "must be both willing and able to assert his exclusive sovereign rights over the area concerned." But see Kunz (*Kriegsrecht und Neutralitätsrecht*, p. 240), who asserts that the belligerent right of "self help" against the forces of an enemy violating neutral rights does not extend to the exercise of hostile acts within neutral waters.—It is interesting to note that in land warfare the standards applied to neutral and belligerent conduct have not been quite the same as in naval warfare. Although the territory of neutral powers is, according to Article 1 of Hague Convention V (1907), inviolable, the scope of the neutral's duty is not limited merely to using the "means at its disposal." And paragraph 520 of the U. S. Army *Rules of Land Warfare* states the rule applicable to land warfare in declaring that: "Should the neutral state be unable, or fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory." With respect to aerial warfare, Spaight (*op. cit.*, p. 434) asserts the legality of belligerent attack upon the aerial forces of an enemy making unlawful use of neutral jurisdiction. However, the precedents he is able to cite from World War II practice in support of this opinion are rather slight.

<sup>59</sup> See *Law of Naval Warfare*, Article 441.

though this is still a matter of some dispute—in order to prevent an enemy from gaining a material advantage in the conduct of war.<sup>60</sup>

It may appear incongruous to maintain, on the one hand, that the neutral state is bound only to use the means at its disposal to prevent belligerent transgressions of its ports and waters, while asserting, on the other hand, that should the means available to a neutral prove ineffective a belligerent is not forbidden under the circumstances referred to above from attacking an enemy that is misusing these waters. In part, however, this apparent incongruity stems from the characterization of the measures a belligerent is not forbidden to exercising in neutral waters as measures of reprisal. This characterization is mistaken, since the neutral, in using the means at its disposal, has fulfilled its duty. But although the neutral state has not violated its duty it is equally true that the belligerent, in taking hostile measures, has not violated the rights of the neutral. The seeming incongruity involved in this situation is resolved then simply by interpreting the scope of the belligerent's duty to abstain from committing hostile

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<sup>60</sup> It is still the opinion of perhaps the majority of writers that the only exception ought to be self preservation—interpreted in the most narrow sense. If this is true then belligerent forces may resort to hostile measures in neutral waters only when in imminent peril from the forces of an enemy, and the appeal to local protection is either precluded by the known weakness of the neutral or is simply not feasible in view of the imminence of the peril. Thus, Stone (*op. cit.*, p. 401) observes that “where appeal for local protection is feasible, the aggrieved State's vessel would seem not to be entitled to defend or help itself in neutral territory or waters. If appeal to local protection was impossible or pointless, the attacked vessel's right of self-defense is more arguable; it does not seem likely that it could extend beyond what its own self-preservation or escape from peril required.”—It is, of course, clear that where local protection is available—i. e., where the neutral is able to enforce its rights—measures of self help are not permissible. But then there is no problem. In practice, though, there is always the difficulty that the neutral state will later contend that it would have taken the necessary preventive measures and that the belligerent's action was hasty and unjustified. There is no easy answer to this difficulty, and each case must be judged by the attendant circumstances. But this does not alter the essential principle, which is that if such “local protection” is not available a belligerent may resort to hostile measures of self help in neutral waters. More important is the claim that hostile measures must be limited to cases of self-preservation—interpreted narrowly. Yet it should be apparent that belligerent misuse of neutral waters may thereby confer important advantages upon the lawbreaker, even though considerations of self-preservation—in the most immediate and narrow interpretation of that term—are not involved. To limit the belligerent whose interests suffer as a result of these unlawful activities merely to urging the weak neutral to use more effective measures of prevention, when it is evident such measures are not available to the neutral, would appear neither a reasonable nor a very realistic solution. No doubt the real danger attendant upon the position taken here is that the belligerent may use any alleged violation of neutral waters by an enemy—no matter how minor—and against which the neutral has not taken effective preventive measures, as an excuse for resorting to hostile acts within these same waters. Undoubtedly this danger exists, despite any attempt to restrict belligerents by laying down what can only be—at best—rather broad criteria. The only real alternative, however, is to prohibit all hostile belligerent measures in neutral jurisdiction despite neutral ineffectiveness in preventing the unlawful acts of an enemy. And it should be pointed out that even to restrict belligerents to the taking of hostile measures only for reasons of “immediate self-preservation” leaves the door more than slightly ajar to the above danger.

acts against enemy forces within neutral waters as limited, in principle, by the effectiveness with which the neutral state can enforce its rights.

One further problem warrants brief consideration here, and it concerns the geographical area within which the belligerent duty to abstain from hostile measures is applicable. In the preceding discussion the assumption has been that the belligerent's obligation extends only to the territorial waters of a neutral. Article 2 of Hague XIII expressly refers to the "territorial waters of a neutral Power" as the area within which hostile belligerent measures are forbidden, and the weight of customary practice also supports the same restriction of the area within which the belligerent duty applies.<sup>61</sup>

Nevertheless, neutral states have frequently expressed dissatisfaction in the past over the conduct of belligerent operations in waters contiguous to their territorial seas, either for the reason that such operations unduly interfered with legitimate neutral trade or because belligerent operations were alleged to constitute a danger to the security of the shore state.<sup>62</sup> During the first World War this neutral concern found occasional expression,<sup>63</sup> though there were no instances in which neutral states attempted, as a matter of legal right, to restrict belligerent operations in waters

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<sup>61</sup> It will be apparent, therefore, that the area within which belligerents may conduct their naval operations may vary, depending upon the extent of the territorial waters claimed by neutral states and recognized by the belligerents. In the past, neutrals occasionally have sought to extend the limits of their territorial waters for the special purposes of neutrality. Although such extensions generally have been of modest nature belligerents have been very slow to accord them recognition.

<sup>62</sup> For a review of neutral practice in this respect, and belligerent responses, see *U. S. Naval War College, International Law Situations, 1928*, pp. 1-37. Also *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, op. cit.*, pp. 343-53. Articles 18 and 19 of the Draft Convention state:

"Article 18. A belligerent shall not engage in hostile operations on, under or over the high seas so near to the territory of a neutral state as to endanger life or property therein.

Article 19. A belligerent shall not permit its warships or military aircraft to hover off the coasts of a neutral State in such manner as to harass the commerce or industry of that State."

In the commentary to these articles it is declared that, although sound in principle, there is little express authority for them.

<sup>63</sup> The best known instance occurred in 1915-16 and was occasioned over the United States' protest to Great Britain that the latter's practice of belligerent cruisers "patrolling American coasts in close proximity to the territorial waters of the United States and making the neighborhood a station for their observations is . . . vexatious and discourteous to the United States." The British Government replied that it was "unaware of the existence of any rules or principles of international law which render belligerent operations which are legitimate in one part of the high seas, illegitimate in another." In answering the British statement it was noted that: "The grounds for the objection of belligerent vessels of war cruising in close proximity to American ports are based, not upon the illegality of such action, but upon the irritation which it naturally causes to a neutral country." *Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War, op. cit.*, pp. 350-2. As a result of the exchange the British Government did accede, in part, to the expressed wishes of the United States, though as a matter of comity not of legal right.

contiguous to neutral territorial seas. Soon after the outbreak of hostilities in 1939 such an attempt was made, however. On October 3, 1939, the Governments of the American Republics meeting at Panama adopted a declaration whose principal provision read:

As a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air.<sup>64</sup>

The Declaration of Panama was without precedent in the recent history of neutral-belligerent relations. The "zone of security" established by the Declaration extended, in many places, as far as three hundred miles to sea. The Declaration was never accorded recognition by the belligerents whose behavior it was intended to regulate. Indeed, the various responses of the major belligerents to the Declaration were uniform in contending that it had no strict foundation in law, that it sought to infringe upon the established rights of belligerents, and that it therefore required—to achieve any legal standing—the acquiescence of the interested belligerents.<sup>65</sup> Such acquiescence was not forthcoming.

Although largely without results in regulating belligerent behavior the Declaration of Panama did serve to focus attention upon the possibility that the belligerent's duty to refrain from committing acts of hostility in neutral territorial waters might be extended, in time, to include a limited zone adjacent to the territorial seas. In principle, such an extension does not appear unreasonable. The security needs of states are no less during a period of war in which they are not active participants than they are in time of peace—if anything, they are considerably greater in time of war. The principle of a state's right to exercise a limited jurisdiction in waters contiguous to territorial seas is now recognized in time of peace. It may

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<sup>64</sup> The text of the Declaration of Panama, as well as relevant diplomatic correspondence, together with an analysis of the legal standing of the Declaration may be found in *U. S. Naval War College, International Law Situations, 1939*, pp. 61-80. Strictly speaking, the Declaration did not insist upon the legal rights of the neutral states, referring rather to "inherent right," "self protection," "fundamental interests of the American States."

<sup>65</sup> The belligerents' reaction to the Declaration was made clear in their replies to the protest made by the American Republics on December 23, 1939. The immediate occasion for the protest was the action between the German vessel *Graf Spee* and British naval vessels off the coast of Uruguay on December 13, 1939. The Naval War College concluded, in its analysis of the legal status of the Declaration, that it did not form "a part of international law. Neutral jurisdiction for defense purposes over a part of the ocean extending 300 miles from the coast is without precedent and has not been generally accepted. There is agreement upon the principle but not upon its application to such a tremendously wide belt. Great Britain, France, and Germany were acting within their legal rights when they refused to recognize the binding nature of the Panama Declaration" (p. 80).

be expected to obtain similar recognition during a period of hostilities.<sup>66</sup> If so, this will require the neutral state to take on an added burden, for it can hardly be expected that belligerents will be willing to extend the area in which they must refrain from hostile operations if neutral states are unable to exercise an effective control over these waters.

## 2. *Neutral Ports and Waters As a Base of Operations*

Although the principle that a neutral state ought to prevent the belligerent use of its territory, waters and ports as a "base of operations" received universal acceptance during the course of the nineteenth century, the interpretation and application of this principle has nevertheless been marked by a substantial measure of controversy and uncertainty.<sup>67</sup> Not infrequently attempts have been made to draw specific consequences from the rule forbidding the use of neutral jurisdiction as a base of operations that have found recognition neither in the customary practices of states nor in the rules embodied in international conventions. This has been particularly true of numerous endeavors to determine the precise scope of the neutral's duties of prevention, and the belligerent's duties of abstention, in naval warfare.

It may well be that in the "light of logic" a neutral state ought to prevent the commission of any act within its domain—whether performed by belligerent forces or by private individuals—that may constitute a "direct source of augmentation of belligerent military or naval strength."<sup>68</sup> In fact, however, the interpretations states have given in naval warfare to the phrase "base of operations" have not been governed by the canons of logic but by the various and conflicting policies of states, by the peculiarities of historical development, and by the circumstances attending naval—as distinguished from land and now aerial—warfare.

Nor can it be asserted that Hague Convention XIII has succeeded in resolving the many difficulties involved in applying to naval warfare the general principle under consideration. Although Article 5 of this Convention obligates belligerents to refrain from using "neutral ports and waters as a base of naval operations against their adversaries," it is only the erection of "wireless telegraphy stations or any apparatus for the pur-

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<sup>66</sup> See *Law of Naval Warfare*, Article 413d, and notes thereto.

<sup>67</sup> In *U. S. Naval War College, International Law Situations, 1932* (pp. 1-26), a useful historical review is made of the varying interpretations given to the term "base of operations" in naval warfare, and particularly the differences between the traditional American view, emphasizing the amount of supplies and repairs allowed in neutral ports, and the traditional British view, stressing the frequency and duration of belligerent stays.

<sup>68</sup> The phrases are Hyde's (*op. cit.*, p. 2249), who writes "that the term 'base of operations' fails to indicate with precision the character or scope of the preventive obligation which is generally acknowledged to rest upon the neutral; for as yet there seems to be no common disposition to impose upon such a State an endeavor to prevent its domain from becoming in numerous situations what, in the light of logic, must cause or permit it to be in fact a direct source of augmentation of belligerent military or naval strength."



pose of communicating with the belligerent forces on land or sea'' that is specifically defined as falling within this general prohibition. There are, of course, a large number of further provisions of Hague XIII that may be regarded properly as applications of the general prohibition contained in Article 5. But the Convention is not exhaustive in enumerating the acts a neutral state is obligated to prevent (and a belligerent is obligated to abstain from committing), and the commission of which would serve to turn the neutral's waters and ports into a base of naval operations. For this reason alone, it has not wholly succeeded in removing a measure of the uncertainty still encountered in any endeavor to elaborate upon the consequences following from the prohibition against the use of neutral jurisdiction as a base of operations for belligerent forces.<sup>69</sup>

The duty imposed upon a neutral state not to permit its territory, ports and waters to be used as a base of operations requires the neutral to prevent the commission of certain acts, whether performed by belligerent forces located temporarily within neutral jurisdiction or by private individuals. The scope of the neutral's duties of prevention with respect to acts of belligerent forces within its jurisdiction will be considered in later pages. Here it is desirable to examine the restraints a neutral state must impose upon the acts of private individuals.

It has been pointed out <sup>70</sup> that although a neutral state must abstain both from the supply of war materials to belligerents as well as from the performance of certain services that would serve to aid belligerents in the prosecution of war it is normally under no obligation to prevent its subjects from undertaking similar acts of assistance to belligerents. The neutral state is therefore under no duty to prevent its subjects from trading in war materials with belligerents; and in carrying on such trade it is immaterial whether war materials are exported to belligerent ports in neutral bottoms or are carried away from neutral ports by belligerent merchant vessels.

There are, however, certain exceptions to this distinction between the obligations of abstention imposed upon a neutral state with respect to its own actions and the absence of any obligation to prevent similar acts when performed by private individuals within neutral jurisdiction. One such exception may be seen in Article 8 of Hague XIII, which reads:

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its

<sup>69</sup> In addition, the more detailed provisions of Hague XIII are not always free from ambiguity. It is customary for writers to assume that in the event of doubt as to the meaning of these more detailed provisions such doubt must be resolved—whenever possible—by reference to Article 5. Although the Convention does not expressly establish this procedure, and does not specifically create any hierarchy among its various norms, the assumption that ambiguous provisions may be interpreted by reference to Article 5 is not unreasonable. But even if it is assumed that this procedure is justified the result may be only to return to the general prohibition whose interpretation and application created so much uncertainty in the first place.

<sup>70</sup> See pp. 209 ff.

jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.<sup>71</sup>

In explanation of the above rule it has been stated that a vessel "intended for operations of war is so complete a weapon of war, its departure may so nearly amount to the use of neutral territory as a base of operations, and its activities may be of such decisive influence, that it has now come to be regarded as not unreasonable to require a neutral government to take upon itself the comparatively simple duty of preventing such a vessel from leaving its jurisdiction".<sup>72</sup> It is tempting to find in this explanation a still more general basis for distinguishing between those acts of private individuals a neutral state is obligated to prevent within its jurisdiction and those acts the commission of which does not involve the neutral's responsi-

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<sup>71</sup> Article 8 of Hague XIII is derived from the so-called "Three Rules of Washington", which grew out of the *Alabama* controversy between Great Britain and the United States at the time of the American Civil War. By the Treaty of Washington, May 8, 1871 the parties to the controversy agreed upon the settlement of their differences by arbitration, and further agreed that the arbitrators would be bound by the three rules. The first rule is practically identical with Article 8 of Hague XIII, except that it obligated neutral governments to use "due diligence" to prevent the measures now prohibited by Article 8, whereas Article 8 uses the phrase "means at its disposal."

<sup>72</sup> J. A. Hall, *The Law of Naval Warfare* (1921), p. 150.—The applicability to aircraft of the obligations embodied in Article 8 of Hague XIII is still unsettled. According to Article 46 of the unratified 1923 Rules of Aerial Warfare, a neutral government must use the means at its disposal:

"1. To prevent the departure from its jurisdiction of an aircraft in a condition to make a hostile attack against a belligerent Power, or carrying or accompanied by appliances or materials the mounting or utilization of which would enable it to make a hostile attack, if there is reason to believe that such aircraft is destined for use against a belligerent Power.

"2. To prevent the departure of an aircraft the crew of which includes any member of the combatant forces of a belligerent Power.

"3. To prevent work upon an aircraft designed to prepare it to depart in contravention of the purposes of this Article."

The necessity of an "Alabama" rule for aircraft is evident, and in view of the greater adaptability of aircraft for hostile operations such a rule should be—if anything—more strict than the present obligations imposed upon neutrals with respect to warships. Nevertheless, no clear rule with respect to aircraft has yet emerged, although there can be little question that a neutral state in allowing aircraft to leave its jurisdiction in a *condition to make a hostile attack* against a belligerent would thereby become liable to the charge that its territory had been used as a belligerent base of operations. See Spaight, *op. cit.*, pp. 474-7. Beyond this, however, the obligations of the neutral state—even after World War II—remain undefined. It is relevant, in this connection, to quote common Article 15 (paragraph 2) of the 1938 Neutrality Regulations of the Northern European Neutrals: "Any aircraft in a condition to commit an attack against a belligerent, or which carries apparatus or material the mounting or utilization of which would permit it to commit an attack, is forbidden to leave . . . territory if there is

bility. The former may be considered to consist in acts which *directly* assist or strengthen a belligerent's military and naval forces; the latter consisting only in the *indirect* strengthening of the belligerent's general capacity to wage war. To a substantial degree this distinction can be considered as well-founded in the traditional law.<sup>73</sup> In certain respects, however, its applicability must remain doubtful. It is, for example, not even entirely applicable with respect to the neutral's obligation in Article 8 of Hague XIII, for Article 8 has been interpreted by states to imply not only the duty of a neutral to prevent the departure of vessels intended for immediate delivery at sea to a belligerent, there to be used for hostile operations, but also to imply the duty of a neutral state to prevent the departure from its jurisdiction of said vessels even though they are first to be delivered to a belligerent port in a manner similar to any other commercial transaction. Whereas the private delivery of other kinds of war materials from a neutral state to a belligerent port does not involve the responsibility of the neutral state, the same cannot be said of the delivery to belligerent ports of a vessel intended to engage in hostile belligerent operations and which has been adapted—in whole or in part—within neutral jurisdiction for warlike use.<sup>74</sup>

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reason to presume that it is destined to be employed against a belligerent Power. It is likewise forbidden to perform work on an aircraft in order to prepare its departure for the above-mentioned purpose." *A. J. I. L.*, 32 (1938), *Supp.* pp. 141 ff.—It should perhaps be made clear that the remarks in this note do not have reference to the quite different question concerning the entry into, or subsequent departure from, neutral territory of belligerent military aircraft (see pp. 251-2).

<sup>73</sup> Though it certainly does not invalidate the excellent criticism of Hyde (*op. cit.*, p. 2297), to wit: "The exportation of war material from neutral territory constitutes usually the general strengthening of the sinews of the belligerent behind the transaction, rather than the proximate cause of the augmentation of a unit of military power. Neutral territory is, nevertheless, utilized as a base of belligerent supply as certainly as if a particular force such as a fleet were the direct recipient of aid. To limit, therefore, the duty of the neutral to the case where its territory affords aid to, or is creative of, a unit of military or naval strength capable of engaging in immediate hostile operations, is to raise an artificial distinction which is hardly responsive to principle or to existing conditions of warfare."—Yet despite the admitted 'artificiality' of the distinction it remains one of the principal bases of the traditional law.

<sup>74</sup> It is occasionally contended that a distinction must still be drawn between selling armed vessels to belligerents and building them to belligerent order; that whereas the neutral state is not obligated to prevent the sale of such vessels when having the character of an ordinary commercial transaction, it is forbidden to allow building to the order of a belligerent. Thus: "An armed ship, being contraband of war, is in no wise different from other kinds of contraband, provided that she is not manned in a neutral port, so that she can commit hostilities at once after having reached the open sea. A subject of a neutral who builds an armed ship, or arms a merchantman, not to the order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms who intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a belligerent port . . . On the other hand, if a subject of a neutral builds armed ships *to the order of a belligerent*, he prepares the means of naval operations, since the ships, on sailing outside the neutral territorial waters and taking in

In those instances where warships are built to the order of a belligerent, or are otherwise intended for belligerent use, the neutral's duty is clear. Equally clear is the neutral's obligation to prevent the conversion of belligerent merchant vessels into warships while in neutral ports. Difficulties may arise, however, in the event that belligerent merchant vessels take on arms and war supplies for the purpose of conversion to warships once on the high seas. Although the scope of the neutral's duty in this latter instance is not entirely clear, it would seem that the neutral is obliged to exercise the means at his disposal in order to prevent belligerent merchant vessels suspected of intended conversion from receiving any war materials while in neutral ports. Similar care must be exercised by the neutral with respect to armed belligerent merchant vessels, if suspected of not having used such armament solely for defensive purposes. Indeed, the far-reaching transformation in the position now occupied by merchant vessels in relation to a belligerent's military effort at sea—a transformation the consequences of which are still far from being generally recognized—necessitates the re-examination of the status to be accorded these vessels while in neutral waters and ports. The contention that this transformation no longer justifies the differentiation in treatment formerly drawn between the warships and merchant vessels of a belligerent must be given serious consideration. If this contention is well founded, and it will be examined in a further section,<sup>75</sup> then the duties of a neutral state will be increased considerably. It is at least clear that in relation to belligerent merchant vessels the neutral's duties of prevention under Articles 5 and 8 of Hague XIII have become increasingly wider in scope as a result of the recent practices of belligerents.

In this connection, brief consideration may be given to one further category of acts the commission of which by private individuals may serve to turn neutral waters and ports into a base of operations. Although the neutral state is under no obligation to prevent the departure of merchant vessels carrying contraband of war to the ports of a belligerent, is it obliged

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a crew and ammunition, can at once commit hostilities." Oppenheim-Lauterpacht, *op. cit.*, p. 713. The distinction drawn by Oppenheim was relied upon in the opinion (dated August 27, 1940) of the Attorney General of the United States on the legality—under international law—of the exchange of over-age American destroyers for the lease of British naval and air bases. For text of opinion, see *A. J. I. L.*, 34 (1940), pp. 728-35. There can be little doubt, however, that the distinction in question has almost no foundation in the practice of states. See, for example, the criticism of Herbert W. Briggs, who points out that "the practice of states . . . has overwhelmingly rejected Oppenheim's distinction since 1871, and the United States Government is on record as never having accepted it." "Neglected Aspects of the Destroyer Deal," *A. J. I. L.*, 34 (1940), p. 587. It may be noted further that even if the distinction made by Oppenheim could be accepted it would not have justified the destroyer-base agreement, since the distinction refers only to the actions of neutral subjects, not to acts of the neutral state. The latter is clearly forbidden by Article 6 of Hague XIII from engaging in such transactions.

<sup>75</sup> See pp. 247-51.

to prevent the departure of merchant vessels carrying war materials intended for direct delivery to a belligerent's naval forces at sea? It should be made clear that the question raised does not refer to vessels bearing the formal status of auxiliary warships, or to vessels which—though not possessing this status—nevertheless act in the direct and continuous employ of a belligerent fleet. With respect to either of these categories of vessels there is no question, since a neutral state certainly must treat them in the same manner as belligerent warships.<sup>76</sup> Under consideration here are rather vessels—whether neutral or belligerent—not in the direct and continuous employ of a belligerent fleet but which the neutral state has reason to believe intend to deliver certain war materials to belligerent warships.

No doubt as judged by the "standards of logic" the neutral's duty is clear. To forbid belligerent warships from obtaining armaments and other supplies of war in neutral ports, while at the same time allowing neutral and belligerent merchant vessels to provide belligerent forces at sea with these materials, would not unreasonably appear to be a patent evasion of the principle forming the basis of the neutral's duty to prevent its waters and ports from becoming a base of operations. Nonetheless the matter remains unsettled in law, and it is not possible to define with certainty the scope of the neutral's duty of prevention. In practice, however, an increasing number of states when neutral do prohibit the departure of any merchant vessel from their ports when there is reason to believe that the supplies carried are destined for direct delivery to a belligerent fleet.<sup>77</sup> But whether this practice may be declared sufficient to constitute a custom presently binding upon neutral states must remain doubtful.<sup>78</sup>

a. The Passage of Belligerent Warships and Prizes Through Neutral Territorial Waters

The problem of belligerent *passage through* neutral waters must be dis-

<sup>76</sup> See pp. 39-40.

<sup>77</sup> During both World Wars most neutral states prohibited this practice.—The United States Neutrality Regulations of September 5, 1939 prohibited, in paragraph 12, the "dispatching from the United States, or any place subject to the jurisdiction thereof, any vessel, domestic or foreign, which is about to carry to a warship, tender, or supply ship of a belligerent any fuel, arms, ammunition, men, supplies, dispatches, or information shipped or received on board within the jurisdiction of the United States." In the Neutrality Act of November 4, 1939 (section 10) the President was given still broader powers to prevent the departure of vessels from American ports whenever reasonable cause existed for believing that such vessels intended to supply belligerent warships with fuel, arms or ammunition.—Common Article 14 of the 1938 Neutrality Regulations of the Northern European Neutrals provided that: "Vessels or aircraft obviously navigating with a view to supplying the combatant forces of the belligerents with fuel or other provisions are prohibited to take on supplies in ports . . . or anchorages exceeding in quantity that necessary for their own needs." *A. J. I. L.*, 32 (1938), *Supp.*, pp. 141 ff. And to the same effect, Article 5 of the Recommendation (February 2, 1940) of the Inter-American Neutrality Committee, *A. J. I. L.*, 34 (1940), *Supp.* p. 80.

<sup>78</sup> The opinions of writers are neither consistent nor altogether clear on this point, though the majority are reticent to assert that the practice referred to above may be considered as now possessing a customary character.

tinguished from the case of belligerent *entry and stay* in neutral waters and ports. Article 10 of Hague Convention XIII provides that the "neutrality of a power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents," and this conventional rule finds general support in customary international law as well.<sup>79</sup> In permitting neutral states to allow the mere passage of belligerent warships and prizes through their waters Article 10 does not thereby determine what a neutral state may forbid to belligerents. Since a neutral's rights are, in this respect, no less in time of war than in time of peace it may place severe restrictions upon—and probably forbid altogether—the passage of belligerent warships and prizes through its waters, or at least through those waters that do not connect two parts of the high seas and are not used as a highway for international navigation.<sup>80</sup> In imposing restrictions upon the

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<sup>79</sup> See *Law of Naval Warfare*, Article 443.

<sup>80</sup> See *Law of Naval Warfare*, Article 412 (and notes thereto), where it is pointed out that extension of the right of innocent passage in time of peace to warships remains an unsettled matter. It would appear that the practice of states does indicate a general reluctance to recognize a clear right of innocent passage as extending to warships, although it is true that under normal circumstances the denial of passage to foreign warships frequently has been regarded as an unfriendly act. Recently, the International Law Commission, in its final Report on the Law of the Sea, adopted at its Eighth Session (see *U. N. General Assembly, Official Records, 11th Sess. Supp. No. 9 (Doc. A/3159)*), dealt with the scope of the right of innocent passage in time of peace. Article 24 of the Report declares that the coastal state "may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of Articles 17 and 18." And paragraph 1 of Article 17 states that the coastal state "may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law." According to Article 25 a warship failing to comply with the regulations of the coastal state concerning passage through the territorial sea may be ordered to leave such waters.

It should be fairly apparent that the argument directed against conceding any right of passage through territorial waters to foreign warships is much stronger in time of war than during a period of peace. The interest of a neutral state in preventing belligerent use of its waters as a base of operations, and in preserving a strict impartiality, may well appear to dictate a policy of prohibiting altogether the lateral passage of belligerent warships through its territorial waters. As presently noted in the text, the passage of belligerent warships through neutral waters is—in any event—an anomaly which finds no parallel in land or aerial warfare. Although it has been justified by pointing out that the interests of a strict neutrality must be qualified in this instance by the character of the sea as a highway for international navigation the argument is not impressive. There has long been a conviction that neutrals ought to have a right to deny passage altogether to warships, and this view was given expression at the Hague Conference of 1907. At that Conference, however, a number of states—and particularly Great Britain—insisted upon a right of innocent passage for warships. Article 10 of Hague XIII formed a compromise between these conflicting views. During World War I the Netherlands adopted the rule that—save in distress—belligerent warships were forbidden either to enter or to stay in Netherlands territorial waters, though this denial of passage was later justified against Germany by the argument that Netherlands waters did not constitute a normal route for the navigation of German warships. Hence, the possible significance of

passage of warships through its waters the neutral state is only required to act impartially toward all belligerents.

Although Article 10 permits neutrals to allow belligerent warships "mere passage" through their waters it leaves unanswered several questions. May the neutral state grant anything more than "mere passage," or does Article 10—without expressly so stating—indicate the scope of the neutral's duty with respect to belligerent passage through its territorial waters? In addition, if Article 10 states the scope of the neutral's duty—which is to prevent belligerent transit through its territorial waters other than for the purpose of "mere passage"—then what is the meaning of the "mere passage" a neutral may permit? Finally, and in close connection with the preceding question, is there any time limit imposed upon belligerent passage through neutral waters?

There would appear to be general agreement that Article 10 does define the scope of the neutral's preventive obligation. There is less agreement, however, upon the precise nature of the neutral's obligation to prevent belligerent transit through its waters other than for purposes of "mere

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the Netherlands action is not altogether clear. Nevertheless, it is believed that a neutral state would not violate international law if it did forbid passage—however innocent—through its territorial sea to the warships of belligerents (the same position is taken in the *Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, pp. 422-4).

One clear exception to the position advanced above may be seen in the case of straits connecting two parts of the high seas and used as a highway for international navigation; here the belligerent would appear to have a right to claim innocent passage for its warships and prizes. In the case of canals that are regulated by international agreement passage is governed by the terms of the agreement. In either case, however, passage is subject to the right of the neutral littoral state to take reasonable measures to secure the protection of the waterway and to insure the integrity of its neutral status. According to treaty, when the United States is neutral the Panama Canal shall be free and open, on terms of entire equality, to the vessels of commerce and of war of all nations observing the rules laid down in the Hay-Pauncefote Treaty concluded November 18, 1901 between the United States and Great Britain. On September 5, 1939 two Executive Orders were proclaimed setting forth the regulations governing neutrality in the Canal Zone and the passage of warships through the Panama Canal. For texts of orders, *U. S. Naval War College, International Law Situation, 1939*, pp. 139-43. Among other things these Orders restricted belligerent passage or stay in the waters of the Canal Zone to twenty-four hours (with certain exceptions) in addition to the time required to transit the Canal, limited the number of warships of one belligerent permitted at any one time in either port or waters to three, restricted the total number of warships of all belligerents allowed at any one time in the Canal and the waters of the Canal Zone to six, and prohibited warships from effecting repairs and obtaining fuel and provisions except under written authorization from Canal authorities. Finally, a belligerent warship was permitted to pass through the Canal "only after her commanding officer has given written assurance to the authorities of the Panama Canal that the rules, regulations, and treaties of the United States will be faithfully observed."—A detailed survey of the practice of states with respect to the passage of belligerent warships through international waterways, when the littoral or riparian state is neutral, may be found in R. R. Baxter, "Passage of Ships Through International Waterways in Time of War," *B. Y. J. L.*, 31 (1954), pp. 192-202.

passage.”<sup>81</sup> It has been contended that the passage a neutral may permit belligerents must be considered, both by custom as well as by convention, together with, and restricted by, the neutral obligation to prevent its waters from being used as a belligerent base of naval operations; that in terms of Hague XIII Article 10 must be read along with Article 5 of the Convention. According to this interpretation the “mere passage” a neutral may permit belligerent warships must be of an innocent nature, in the sense that it is strictly incidental to the normal requirements of navigation and not intended in any way to turn neutral waters into a base of operations. Thus the circuitous and prolonged passage through neutral territorial waters for the ostensible purpose of avoiding combat with an enemy has been held to fall within the prohibition—contained in Article 5—against using neutral waters as a base of operations, and for this reason cannot be considered as constituting “mere passage” allowed in Article 10.<sup>82</sup>

In principle, this argument would appear well founded and reasonable. The practice of permitting belligerent warships (and prizes) to use neutral territorial waters for passage is, in any event, an anomaly which finds no parallel either in land or in aerial warfare.<sup>83</sup> Recent experience indicates that if belligerent passage through neutral waters is to be tolerated at all it must be kept within the narrowest of limits. At the same time, it must be pointed out that even if it is assumed that—from the point of view of Hague XIII—Article 10 is to be interpreted by reference to Article 5 (i. e., “mere passage” must not be so used as to turn neutral waters into a “base

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<sup>81</sup> There is no doubt at all, however, that the passage allowed a belligerent warship through neutral waters does not permit taking on provisions or making repairs. But a neutral state may allow, according to Article 11 of Hague XIII, the use of neutral pilots by belligerent warships.

<sup>82</sup> “While according to customary International Law and to Hague Convention XIII the neutral State is entitled to permit the passage of men-of-war through its territorial waters, the nature and duration of such passage are governed by the overriding principle that neutral territorial waters must not be permitted to become a basis for warlike activities of either belligerent. The prolonged use of neutral territorial waters by belligerent men-of-war or their auxiliaries for passage not dictated by normal requirements of navigation and intended, *inter alia*, as a means of escaping capture by superior enemy forces must, therefore, be deemed to constitute an illicit use of neutral territory which the neutral State is by International Law bound to prevent by the means at his disposal or which, in exceptional cases, the other belligerent is entitled to resist or remedy by way of self-help.” Oppenheim-Lauterpacht, *op. cit.*, pp. 694-5. A substantially similar view has been taken by the majority of British writers. For the position of the British Government in the *Altmark* incident, see pp. 237-8.

<sup>83</sup> See, for example, the observations of Hyde (*op. cit.*, p. 2312), who considers the present use belligerents may make of neutral waters as “grotesque and unrealistic,” and also suggests that “passage of belligerent vessels of war through neutral waters should, by general agreement, be greatly restricted, if not entirely forbidden.” Also B. M. Telders, “L’Incident De L’Altmark,” *Revue Générale De Droit International Public*, 68 (1941-45), p. 100, who suggests that the moral of the *Altmark* incident, considered below, is to support the belief that the prohibition of entry to belligerent warships into neutral waters—save in case of distress—is the best means of insuring the neutrality of non-participants.



of operations”), this will result only in raising the question—the answer to which is hardly self-evident—as to when belligerent transit through neutral waters does clearly cease to be “mere passage” and constitutes instead the use of such waters as a base of operations. Apart from the express prohibition already contained in Hague XIII, the nature of the acts that may be regarded, when performed by belligerent warships, as turning neutral waters into a base of operations has admittedly long been a matter of controversy and uncertainty. If the answer to this question may not be found in the provisions of Hague XIII, it is still less probable that it will be found in the customary law; for it is the latter that has always provided so much uncertainty as to the specific meaning to be accorded the phrase “base of operations.” The interpretation is not altogether excluded, therefore, that passage through neutral territorial waters, although undertaken in order to avoid an enemy, “does not diminish the privilege of using the territorial waters for transit.”<sup>84</sup>

Whether or not any time limit is imposed upon the “mere passage” neutrals may permit to belligerent warships forms a related, though some-

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<sup>84</sup> Edwin Borchard, “Was Norway Delinquent in the Case of the Altmark,” *A. J. I. L.*, 34 (1940), p. 294. Other writers share this opinion; e. g., Erik Castren (*op. cit.*, p. 515) asserts that: “Warships entering neutral waters in order to escape from the enemy may also pass through them.” This position hardly seems sustainable, however, if passage through neutral waters also involves following a circuitous route having no reasonable relation to normal requirements of navigation. But the matter may not always be so clear-cut. What if belligerent passage through neutral waters does conform to ordinary navigational requirements? May it nevertheless be regarded as exceeding “mere passage” if it serves either to confer a direct military advantage upon a belligerent or to result in endangering the peace and security of the neutral state? Belligerent passage through neutral waters always forms a part of naval operations and therefore can always be interpreted as conferring some sort of advantage upon the belligerent which makes use of neutral territorial waters. It may prove next to impossible to determine whether or not passage does serve in a concrete instance to confer a direct military advantage (or, put in other terms, whether or not passage serves to turn neutral waters into a base of operations). This is particularly so when passage conforms to ordinary navigational requirements. Of course, it may be argued—as a number of writers have so argued—that the legitimacy of passage is determined not only by the specific use to which neutral waters may be put but also by the degree to which passage—whatever its actual purpose—may endanger the peace and security of the neutral state. This latter criterion is a significant one and ought not to be confused with the base of operations criterion. Although the use of neutral waters as a base of operations necessarily endangers the peace and security of the neutral the converse proposition is not always the case. The peace and security of the neutral state may be endangered by belligerent passage, but such passage clearly need not constitute the use of neutral waters as a base of operations. From this point of view, passage is no longer “innocent” (and hence no longer “mere passage”) if it is likely to result in tempting an enemy to take hostile measures in neutral waters. One obvious difficulty here, however, is that the determination of the “innocence” of passage may thereby be left in practice to the initiative of the belligerents, since the latter have only to react adversely to an enemy’s passage through neutral waters and the consequence will be to endanger the peace and security of the neutral state.—Admittedly, the preceding remarks raise difficult—and as yet unsettled—questions. Nor is it likely that these questions will ever be resolved satisfactorily short of clear change in a rule that has long been an anachronism in the law of neutrality.

what subsidiary, question. In terms of Hague XIII this latter question concerns the relation of Article 10 to Article 12. Article 12 states:

In the absence of special provisions to the contrary in the legislation of the neutral Power, belligerent ships of war are forbidden to remain in the ports, roadsteads or territorial waters of the said Power for more than twenty-four hours, except in cases covered by the present Convention.

The problem is essentially that of determining whether or not Article 10 is one of the "cases covered." Either interpretation is possible, and it would therefore appear that the matter of determining the time limit to be allowed for passage through neutral waters must be left to the decision of the neutral state concerned. In general, the practice of neutral states has been to limit belligerent passage to a period not exceeding twenty-four hours.<sup>85</sup> But it should be emphasized that whatever length of period the neutral state may establish for the passage of belligerent warships through its waters this cannot affect the nature of the passage allowed. If belligerent passage has a character other than that of "mere passage," provided for in Article 10, it is forbidden for any period of time. On the other hand, it is not unreasonable to contend that the length of the period of passage—i. e., a prolonged use of neutral waters—is itself one indication of the purposes for which transit is made.

The difficulties involved in interpreting the scope of the neutral's duty in regulating belligerent transit through its territorial waters were strikingly illustrated during the second World War in the *Altmark* incident. On February 14, 1940, the German naval auxiliary vessel *Altmark* entered Norwegian territorial waters on a return trip from the South Atlantic to Germany. The vessel carried almost three hundred captured British seamen on board, a fact which, in itself, had only a limited relevance to the principal legal issues involved. The German auxiliary was granted permission by the Norwegian authorities to navigate through the latter's territorial waters. At the same time the Norwegian authorities refused the request made by the commander of British naval forces in the area that the *Altmark* be searched in order to determine whether she carried British prisoners. On February 16, 1940, after the *Altmark* had passed through approximately four hundred miles of Norwegian waters, a British

<sup>85</sup> See p. 241 (n). In the regulations of many neutral states no attempt has been made to distinguish clearly between the time allowed for passage through neutral waters and the period governing entry and stay in neutral waters and ports. Thus the United States Neutrality Regulations of September 5, 1939 declared: "If any ship of war of a belligerent shall, after the time this notification takes effect, be found in, or shall enter any port, harbor, roadstead, or waters subject to the jurisdiction of the United States, such vessel shall not be permitted to remain in such port, harbor, roadstead, or waters more than twenty-four hours, except in case of stress of weather, or for delay in receiving supplies or repairs, or when detained by the United States . . ." The preceding regulation was interpreted, however, as applying both to passage through territorial waters as well as to stay in port.

destroyer entered these waters and forcibly released the prisoners held on board the German vessel. No attempt was made by the British destroyer carrying out the action either to capture or to sink the *Altmark*.<sup>86</sup>

In justification of the British action in the *Altmark* case it has been urged that Norway failed to comply with the obligations of neutrality by not conducting a proper investigation into the nature and object of the *Altmark's* voyage and of the use to which she was putting Norwegian territorial waters.<sup>87</sup> Still further, it has been argued that, in taking an extremely

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<sup>86</sup> A brief summary of the *Altmark* incident, and part of the diplomatic correspondence provoked by the incident, are given in Hackworth, *op. cit.*, Vol. VII, pp. 568-75. The texts of the notes exchanged between Great Britain and Norway during the period extending from February 17, 1940 to March 15, 1940 were published in 1950 by Great Britain (Norway No. 1 (1950), Cmd. 8012). In an abundant literature the clearest, and most detailed, exposition of the legal issues raised by the case—though reflecting the British position—has been given by C. H. M. Waldock, "The Release of the *Altmark's* Prisoners," *B. Y. I. L.*, 24 (1947), pp. 216-38. Upon entering Norwegian waters the *Altmark* was hailed by a Norwegian naval vessel which confined itself to an examination of the *Altmark's* papers. Although a number of writers have concentrated upon the question of the precise status of the vessel there was no disagreement between Great Britain and Norway on this point. The *Altmark* was a German naval auxiliary, listed as such by Germany, and entitled to be treated in a manner similar to any other warship. Prior to her return voyage from the South Atlantic she had operated with the *Graf Spee*, and indeed the British prisoners she carried on board were taken from ships sunk by the *Graf Spee*. Nor could there be any question about the plainly circuitous nature of the *Altmark's* voyage, since during the course of her initial examination the captain had stated that the *Altmark* was on her way from Port Arthur, Texas, to Germany. On the second day of passage another Norwegian naval vessel sought to inspect the *Altmark* but the request was refused. In response to questions put to him the captain of the *Altmark* denied carrying any nationals of another belligerent. When asked why the *Altmark* had earlier violated Norwegian neutrality regulations by making use of her wireless the captain responded that he was unaware of any prohibition against such use. During the greater part of her passage through Norwegian waters the *Altmark* was escorted by Norwegian naval vessels.

<sup>87</sup> The precise nature of this particular argument should be thoroughly understood. Initially, much was made of the fact that the *Altmark* was carrying prisoners of war, and in its earlier notes and public statements the British Government weakened its position considerably not only by its almost exclusive concentration upon this aspect but also by giving the impression of contending that the passage of a belligerent warship through neutral waters was unlawful if the warship carried prisoners of war. However, a belligerent may enter neutral waters and ports even though carrying prisoners of war on board and this fact in itself does not legally alter the position of the vessel or the obligations of the neutral. Provided that the *Altmark's* passage through Norwegian waters was in accordance with international law and Norway's neutrality regulations there was no duty on Norway's part to object to the transport of prisoners through her waters. The duty to release prisoners of war held on board a warship follows only upon the act of interning the warship for violation of neutral waters. (It is also possible that, exceptionally, the release of prisoners may occur in other circumstances. Thus the Uruguayan Government released the prisoners held by the *Graf Spee*, as a condition for granting the *Graf Spee* a seventy-two hour stay in Montevideo for the purpose of making repairs to damage incurred in battle. But it would be premature to draw any conclusions from this one incident.) Hence Norway's duty to release the British seamen held on board the *Altmark* would arise only as a result of interning the vessel for unlawful use of Norwegian waters.

The decisive point, therefore, concerned the nature of the *Altmark's* passage—i. e., its legality

circuitous route which involved making prolonged use of Norwegian waters for the evident purpose of avoiding capture by British forces, the *Altmark's* passage went far beyond the "mere passage" a neutral state may grant belligerent warships under Article 10 of Hague XIII. Given these circumstances, the passage of the German auxiliary vessel amounted to the use of Norwegian waters as a "base of operations," within the meaning of Article 5 of the same convention. Hence, Norway had the duty either to intern the vessel and to release the prisoners, or, at the very least, to order the *Altmark* out of Norwegian waters.<sup>87a</sup>

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or illegality—and the later British note of March 15, 1940 properly emphasized this point. At the same time, the note of March 15th insisted that a neutral was obliged to take those measures necessary to insure that belligerent warships do not make improper use of its waters. The final British position concentrated then upon two principal legal arguments. The first concerned what may be termed the extent of the investigative measures a neutral must take to ensure the integrity of its waters, whereas the second dealt with the problem of what actually constitutes belligerent misuse of these waters under the guise of "mere passage." Great Britain contended that the Norwegian Government in allowing its attempts at further investigation of the *Altmark* to be frustrated had violated its neutral obligations, that the refusal by the captain of the *Altmark* to permit the search of his vessel obligated Norway to order the *Altmark* out of Norwegian waters. Search of the *Altmark* would have revealed the presence of prisoners, and although the transport of prisoners through neutral waters is not in itself unlawful *their transport under these particular circumstances* would have enabled Norway to judge the true nature and purpose of the voyage—hence its unlawful character. Instead, the British note pointed out, Norway contented itself not only with making a very inadequate investigation but even went out of its way to facilitate the *Altmark's* voyage.

The *Altmark* incident thus raised the general question as to what measures—if indeed any—of an investigative character a neutral is bound to take with respect to belligerent warships entering its waters. More specifically, does a neutral have a duty—as well as a right—to search a warship in circumstances raising reasonable doubt as to the legitimacy of the use to which neutral waters may be put. In the *Altmark* case Norway insisted that the peacetime immunity accorded foreign warships was equally applicable in time of war and that the *Altmark* was merely exercising this right of immunity when she turned down the Norwegian request to search the vessel. This position is hardly conducive to an effective neutrality, however, which would rather appear to require that an exception be made to the normal immunity granted foreign warships. Certainly there is much to be said for the view "that a neutral state which has bona fide reasons for questioning a particular use of its waters by a belligerent warship has both the right and the duty to investigate the ship's activities, even to the extent of a reasonable inspection of the ship itself." Waldock, *op. cit.*, p. 221.

<sup>87a</sup> Professor Waldock's (*op. cit.*, p. 235) conclusions are as follows:

"(a) Norway's view that passage is covered only by Article 10 and is not touched by the 24 hours' rule of Article 12 ought not to be accepted. Norway was therefore in default in permitting the *Altmark's* passage to exceed 24 hours.

"(b) The *Altmark's* circuitous passage to escape attack was not 'mere passage' within the meaning of Article 10, but a use of Norwegian waters for defensive naval operations contrary to Article 5. Norway was therefore in default in allowing such passage at all.

"(c) Even if a breach of Article 5 is not regarded as conclusively established under the existing rules of international law, the *Altmark's* use of Norwegian waters was undeniably for refuge as well as for passage. In these circumstances it was inadmissible for Norway to regard the *Altmark's* passage as 'mere passage' within the meaning of Article 10, and accordingly

Whether the hostile action taken by Great Britain within Norwegian waters was justified, even under the assumption that Norway was clearly derelict in her neutral duties, may receive separate consideration.<sup>88</sup> Here it is relevant only to observe that the contention that the *Altmark's* use of neutral waters did not constitute "mere passage," but rather the use of neutral waters as a base of operations, was not without substantial foundation. In retrospect, the *Altmark* case serves to emphasize once again that a belligerent will not readily accede to his enemy's use of neutral waters for purposes other than those strictly incidental to the normal requirements of navigation. And although the matter cannot be regarded as conclusively settled it is probable that the present scope of the neutral's duty is such that it must prevent passage through its waters by belligerent warships when such passage has as its purpose the use of these waters as a refuge from enemy forces.

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Norway ought at least to have limited her use of Norwegian waters to 24 hours under Article 12."

The difficulty with Professor Waldock's last point (c) is that it simply assumes that belligerent passage cannot constitute the "mere passage" permitted under Article 10 if it is motivated by reason of seeking refuge. Yet it is just this point that—however reasonable—cannot be regarded as self-evident. Nor is the first stated conclusion (a) compelling, since the relation between Articles 10 and 12 allows either interpretation—as already noted—thus leaving it to the neutral to regulate the time limit allowed for passage through its waters. Waldock further argues that: "Norway, in its Neutrality Regulations, including that concerning the 24 hours' rule, made no distinction between entry for passage and entry for other purposes, but the evidence seems to point to the conclusion that Norway intended this provision not to apply to passage—as was shown in the *City of Flint* incident." (On the *City of Flint*, see p. 246(n)). These points are believed to be somewhat peripheral, however. The central legal issue raised by the *Altmark* incident, and which forms Professor Waldock's second conclusion, is clear: are belligerent warships permitted—for any period of time—to use neutral waters for circuitous passage in order to escape from enemy forces? The argument Professor Waldock offers in support of a negative reply to this decisive question is not easy to refute.

In Great Britain's note of March 15, 1940 the British Government reiterated its belief that "mere passage" must be interpreted to mean "innocent passage," and the latter was defined as "passage through such territorial waters as would form part of a ship's normal course from the point of her departure to her destination, and in particular through such territorial waters as form part of straits which provide access from one area of the sea to another." On the relation between Articles 10 and 12 the note went on to declare that: "His Majesty's Government regard the question of passage through territorial waters as governed by Article 10 of the Convention [Hague XIII] and not by Article 12, and, in their view, the time limit of passage is not the fixed one of 24 hours prescribed by the latter Article but that which results from the very nature of 'innocent passage' . . . but Article 12 is at any rate a refutation of the contention that no time limit exists if the ship does not enter a port or anchorage, and the existence of this general prohibition, applicable to both ports and territorial waters, reinforces the view which His Majesty's Government hold as to the nature of the passage which is permitted by Article 10.

<sup>88</sup> See p. 262(n).

## b. Belligerent Stay in Neutral Ports and Waters

### (i) Warships

It has been observed that a neutral state may prohibit altogether the passage of belligerent warships through its territorial waters. In like manner a neutral may place restrictions upon the entry and stay of belligerent warships in its waters, ports or roadsteads in excess of the obligations imposed by international law, and even forbid altogether such entry and stay.<sup>89</sup> It is generally recognized, however, that international practice requires that exception be made in the neutrality regulations of states to permit the entry of belligerent warships in distress. Entry in distress may result from weather or sea conditions, but it may also result from damage incurred in battle. Even pursuit by the enemy appears to give belligerent warships a right of entry. But this right of entry in distress cannot be held to prejudice the measures a neutral state may take once admission into its waters and ports has been granted. The belligerent has no right to repair the damage he has suffered, to take on needed supplies, or to depart freely. And in the event entry has been sought as a result of battle damage or of active pursuit by enemy forces a neutral state that has otherwise forbidden belligerent entrance into its waters or ports may properly intern the vessel, together with its officers and crew.<sup>90</sup>

So far as the scope of neutral duties is concerned Hague XIII is not entirely clear as to those circumstances—if any—in which a neutral must forbid entry and stay to belligerent warships. Article 12 merely refers to the time limits placed upon warships which “remain in” the ports, roadsteads and territorial waters of neutrals. Article 14 refers to the prolongation of neutral stay in belligerent ports “on account of damage or stress of

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<sup>89</sup> The right of neutral states to exclude belligerent warships from their waters and ports is now generally recognized, though previously subject to some doubt. During the first World War the Netherlands' Government did in fact resort to a policy of complete exclusion, exception being made only for entry in distress and for vessels employed exclusively for humanitarian and scientific purposes. In *Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War* (*op. cit.*, pp. 425 ff.), the past practice of states is reviewed. Article 26 of the Draft Convention states:

“A neutral state may exclude from its territory belligerent warships other than:

(a) Warships entering in distress; and

(b) Warships employed exclusively in scientific or humanitarian missions.”

There do not appear to have been any instances during World War II in which neutrals resorted to a policy of complete exclusion.

In addition, neutrals may—without resorting to complete exclusion—place special restrictions upon certain categories of belligerent warships. During both World Wars a number of neutral states—including the United States—prohibited the entry of belligerent submarines into their ports or waters, exception being made for distress or *force majeure* (in which cases the submarine was required to navigate on the surface).

<sup>90</sup> See *U. S. Naval War College, International Law Situations, 1939*, pp. 43-4. A general review of the problem of asylum in neutral ports is given in *U. S. Naval War College, International Law Situations, 1935*, pp. 42-53.

weather.<sup>91</sup> Neither these nor any other provisions of Hague XIII place restrictions upon the possible reasons for permitting entry and stay in neutral ports. Presumably, then, the neutral state may permit belligerent entry and stay, without liability to immediate internment, even though it is clear that this may well serve to provide a warship with a place of refuge from enemy forces. The practice of neutral states during the two World Wars leaves little doubt as to this conclusion.<sup>92</sup>

Although there is some question as to the applicability of the twenty-four hour rule to belligerent passage through neutral waters there is no question as to the application of this rule to entry and stay. Unless the neutral state expressly provides to the contrary the period of stay in neutral ports is limited to twenty-four hours.<sup>93</sup> At the same time, Article 12 of Hague XIII provides for certain exceptions to the normal twenty-four hours' limit on the period of stay, apart from exceptions that may be

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<sup>91</sup> Article 14 reads: "A belligerent ship of war must not prolong its stay in a neutral port beyond the period legally allowed except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

"The regulations as to the limitation of the length of time which such vessels may remain in neutral ports, roadsteads, or waters, do not apply to ships of war devoted exclusively to religious, scientific, or philanthropic purposes."

<sup>92</sup> It may appear inconsistent to refuse a belligerent warship passage through neutral waters, when such passage is used in order to escape from an enemy, and yet to allow a belligerent warship to stay in neutral ports for precisely the same reason. In part, this may be explained by the fact that belligerent warships staying in neutral ports can be subjected to far more effective surveillance and control by neutral authorities than would normally prove possible with vessels passing through the neutral's territorial waters. In any event, whereas Article 10 of Hague XIII does expressly restrict passage through neutral waters to "mere passage," no specific restrictions are placed upon the possible reasons for belligerent entry and stay in neutral ports. And it is clear that the practice of states does not yet permit the assertion that the belligerent's use of neutral ports as a temporary refuge imposes upon the neutral a duty to intern the vessel and its crew. During World War II the *Graf Spee* incident (see p. 245 (n)) and analogous cases served to emphasize this point.

<sup>93</sup> Smith (*op. cit.*, p. 154) states that: "The 'twenty-four hours rule' has now been so widely adopted in practice that it may be taken as almost equivalent to a general rule. In its normal application it means that the warship must leave the neutral port within twenty-four hours of receiving notice from the neutral authority, and it is the duty of the neutral to give this notice as soon as possible."—No instances are known of neutral states granting a normal stay in excess of twenty-four hours during World War II. The General Declaration of Neutrality of the American Republics, October 3, 1939, stated on this point that the signatories: "May determine, with regard to belligerent warships, that not more than three at a time be admitted in their ports or waters and in any case they shall not be allowed to remain for more than twenty-four hours. Vessels engaged exclusively in scientific, religious or philanthropic missions may be exempted from this provision, as well as those which arrive in distress." text in *A. J. I. L.*, 34 (1940), *Supp.*, p. 10. The twenty-four hour rule is equally applicable to belligerent warships in neutral ports or roadsteads at the outbreak of hostilities. Article 13 of Hague Convention XIII declares: "If a Power which has been informed of the outbreak of hostilities learns that a belligerent ship of war is in one of its ports or roadsteads, or in its territorial waters it must notify the said ship to depart within twenty-four hours or within the time prescribed by the local regulations."

specifically provided for in the legislation of the neutral state. In the first place, the twenty-four hours' rule does not apply to belligerent warships devoted exclusively to humanitarian (e. g., hospital and relief vessels), scientific, or religious purposes.<sup>94</sup> In addition, a belligerent warship may have its stay in neutral ports prolonged—according to Article 14 of Hague XIII—“on account of damage or stress of weather.” Still further, the requirement laid down in Article 16, that a minimum period of twenty-four hours must elapse “before the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other,” may also lead to extension of stay in excess of the normal period.<sup>95</sup> Finally, a belligerent warship unable to take on the fuel otherwise permitted to it in a neutral's port may be permitted by the neutral state to extend its normal period of stay by an additional twenty-four hours.<sup>96</sup>

In the event a belligerent warship either enters a neutral port in violation of the neutral state's regulations or does not leave a port where it is no longer entitled to remain, the neutral state is obliged to intern the vessel, together with its officers and crew, for the remainder of the war. This duty is a strict one, and the neutral must ensure that the measures it takes are adequate to prevent the vessel and its personnel from leaving neutral territory.<sup>97</sup>

Once admitted to neutral ports or roadsteads belligerent warships are forbidden—according to Article 5—to commit any acts that might serve to turn neutral ports into a base of operations, and it is both the right as well as the duty of neutral states to prevent such acts. It is for this reason that neutral states must not allow belligerent warships that have once entered their territorial waters to communicate in any manner with belligerent

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<sup>94</sup> Article 14.

<sup>95</sup> Articles 15 and 16.

<sup>96</sup> Article 19.

<sup>97</sup> Article 24 outlines the neutral's duties in this respect and may be cited in full:

“If, notwithstanding the notification of the neutral authorities, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either in another ship or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, always be left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.”

Although Article 24 only speaks of a neutral being “entitled” to intern, the neutral state—as emphasized above—is also under the duty to do so. On the disposition to be made of prisoners of war carried on board an interned warship, see p. 123 (n).



erent forces at sea.<sup>98</sup> It is for the same reason that Article 18 of Hague XIII forbids belligerent warships to use "neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews."

More difficult, however, are those questions concerning the supplies of food and fuel belligerent warships may obtain, and the repairs that may be undertaken, in neutral ports. It may appear that the logical consequence of forbidding belligerent warships to use neutral waters and ports as a base of operations must be to prohibit such vessels from obtaining within neutral waters and ports any supplies or repairs. This has not been the case. In principle, the right of a neutral state to allow belligerent warships to take on provisions and fuel, as well as to undertake repairs, is firmly established in the traditional law, despite the apparent inconsistency between this freedom and the prohibition against allowing belligerents to use neutral waters or ports as a base for conducting hostile operations. In question is only the extent of the neutral's right to grant supplies, fuel and repairs (or, conversely, the scope of the neutral's duty).

A review of neutral practice indicates no uniformity with respect to the amount of supplies and fuel that may be allowed belligerent warships in neutral ports. In practice, therefore, the matter of determining the conditions for replenishment and refueling belligerent warships would appear to rest largely within the discretion of the neutral state—a situation that can hardly be regarded as satisfactory.<sup>99</sup>

<sup>98</sup> The neutral practice of placing the most severe restrictions upon the use of radio and other communications by belligerent warships within neutral waters and ports became almost universal in World War II.

The United States Neutrality Regulations of September 5, 1939 declared that: "All belligerent vessels shall refrain from use of their radio and signal apparatus while in the harbors, ports, roadsteads, or waters subject to the jurisdiction of the United States, except for calls of distress and communications connected with safe navigation or arrangements for the arrival of the vessel within, or departure from, such harbors, ports, roadsteads, or waters, or passage through such waters; provided that such communications will not be of direct material aid to the belligerent in the conduct of military operations against an opposing belligerent. The radio of belligerent merchant vessels may be sealed by the authorities of the United States, and such seals shall not be broken within the jurisdiction of the United States except by proper authority of the United States."—Substantially similar provisions were laid down in Article 12 of the common neutrality regulations of the Northern European Neutrals. *A. J. I. L.*, 32 (1938) *Supp.* pp. 141 ff.

<sup>99</sup> Article 19 of Hague XIII provides, in part, that: "Belligerent ships of war cannot revictual in neutral ports or roadsteads except to complete their normal peace supply. Similarly these vessels can take only sufficient fuel to enable them to reach the nearest port of their own country. They may, on the other hand, take the fuel necessary to fill up their bunkers properly so called, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied." But neither Article 19 nor—for that matter—Article 20 ("Belligerent ships of war which have taken fuel in a port of a neutral Power can not within the succeeding three months replenish their supply in a port of the same Power") can be considered conclusive statements of the present law.—Article 10 of the 1928 Habana Convention on Maritime Neu-

Equally unsettled is the question of the repairs a neutral may permit belligerent warships to make while in its ports. Article 17 of Hague Convention XIII merely states that belligerents "can carry out only such repairs as are absolutely necessary to render them seaworthy, and cannot add in any manner whatsoever to their fighting force. The neutral authorities shall decide what repairs are necessary and these must be carried out with the least possible delay." No distinction is made between the *causes* of damage for which repairs are made absolutely necessary. It is altogether possible, then, to interpret Article 17 as permitting a neutral to allow belligerent warships to make repairs which result from damage incurred in battle. A warship does not necessarily add to its "fighting force" any more by repairing damage due to enemy fire than by repairing damage due to the sea. Nor does Article 14 clarify the matter in any real way, since in allowing a belligerent warship to extend its stay in port "on account of damage" no specification is made as to the causes of damage. Hence, taking Articles 17 and 14 together it is entirely plausible to interpret Hague XIII as permitting the repair of battle damage in neutral ports, and as further permitting belligerent warships to remain in neutral ports for a period in excess of twenty-four hours in order to effect such repairs.

In practice, the tendency of many states when neutral has clearly been toward restricting the repairs belligerents may make in their ports and of forbidding altogether the repair of damage that has been incurred in battle.<sup>1</sup> But it is more than doubtful that the law presently forbids the

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trality allows the neutral to establish the conditions for replenishing and refueling, and in the absence of neutral regulations permits belligerent warships to "supply themselves in the manner prescribed for provisioning in time of peace."—The actual practice of states has been less diverse than might be anticipated. During World War II many of the neutrals—including the United States, the Northern European Neutrals and a number of the Latin American countries—allowed replenishing supplies of food to that of peacetime standards and refuelling in quantities sufficient only to carry the vessel to the nearest port of her own country (or, in certain cases, to the nearest port of an ally).

<sup>1</sup> Article 9 of the 1928 Habana Convention on Maritime Neutrality provided that:

"Damaged belligerent ships shall not be permitted to make repairs in neutral ports beyond those that are essential to the continuance of the voyage and which in no degree constitute an increase in its military strength.

Damages which are found to have been produced by the enemy's fire shall in no case be repaired.

The neutral state shall ascertain the nature of the repairs to be made and will see that they are made as rapidly as possible."

The United States Neutrality Regulations of September 5, 1939 declared, with respect to repairs: "No ship of war of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters subject to the jurisdiction of the United States, to make repairs beyond those that are essential to render the vessel seaworthy and which in no degree constitute an increase in her military strength. Repairs shall be made without delay. Damages which are found to have been produced by the enemy's fire shall in no case be repaired." Similarly, the neutrality regulations of the Northern European Neutrals during World War II prohibited the repair of damage incurred in battle.

repair of battle damage in neutral ports, and, in fact, some states when neutral still allow such repairs.<sup>2</sup> Here again the only conclusion possible is that, as matters now stand, the scope of the neutral's duties are only vaguely defined. In permitting belligerent warships to repair damage incurred at sea the neutral state retains a large measure of discretion, despite the injunction to permit only such repairs as are absolutely necessary to render belligerent warships seaworthy.<sup>3</sup>

### (ii) Prizes

The entry and stay of prizes in neutral ports are dealt with in Articles 21, 22, and 23 of Hague Convention XIII. In many respects, the position of belligerent prizes in neutral ports is similar to that of belligerent warships. Nevertheless, there remain certain differences that require brief consideration.

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<sup>2</sup> As illustrated by the incident involving the German battleship *Admiral Graf Spee*. See Hackworth, *op. cit.*, Vol. VII, pp. 450-1. On December 13, 1939, the *Graf Spee* entered the Uruguayan port of Montevideo, following an engagement with British naval forces. A request was made to the Uruguayan authorities to permit the *Graf Spee* to remain fifteen days in port in order to repair damages suffered in battle and to restore the vessel's navigability. The Uruguayan authorities granted a seventy-two hour period of stay. Shortly before the expiration of this period the *Graf Spee* left Montevideo and was destroyed by its own crew in the Rio de la Plata. The British Government, while not insisting that Article 17 of Hague XIII clearly prohibited the repair of battle damage, did point to the widespread practice of states when neutral in forbidding the repair of battle damage in their ports. In accordance with this practice it was suggested that the *Graf Spee's* period of stay be limited to twenty-four hours. Uruguay maintained, however, that the scope of the neutral's duty required it only to prevent those repairs that would serve to augment the fighting force of a vessel but not repairs necessary for safety of navigation.—The incident is noteworthy as an example of the extent to which belligerents seemingly can make use of neutral ports without violating the prohibition against using neutral territory as a base of naval operations.

<sup>3</sup> "May one say that a neutral state may sanction such repairs as they are needed to make a vessel seaworthy, but not such further repairs as may be needed to make her 'fightworthy'." Oppenheim-Lauterpacht, *op. cit.*, p. 709. Kunz (*op. cit.*, pp. 249-54) would go further still and apply the distinction between "seaworthiness" and "fightworthiness" to food and fuel as well as to repairs. It is evident, however, that in a great number of cases to make a vessel seaworthy is, in effect, to make her fightworthy. And Hyde (*op. cit.*, p. 2269) correctly observes that: "In a strict sense, any repairs productive of seaworthiness, irrespective of the cause of damage, necessarily increase the fighting force of the recipient if it is otherwise capable of engaging in hostilities." Articles 34 and 36 of the *Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War* (*op. cit.*, pp. 462 ff.), are indicative of the dissatisfaction felt with respect to the present rules governing refuelling and the making of repairs in neutral ports. Whereas Article 34 stipulates that "a condition of distress which is the result of enemy action may not be remedied and if the vessel is unable to leave it shall be interned," Article 36 declares that the neutral state shall not allow belligerent warships (other than vessels devoted exclusively to scientific or humanitarian purposes) "to take on any supply of fuel or otherwise to augment its fighting strength." Neither draft article can be said to be declaratory of existing law, though they are, as the commentary points out, "expressive of a view, which has been reflected in some international practice, that any aid afforded to belligerent warships in neutral ports does in reality compromise the neutrality of the State" (p. 477).

Article 21 declares that a prize may be brought into a neutral port "only on account of unseaworthiness, stress of weather, or want of fuel or provisions," and that it must leave "as soon as the circumstances which justified its entry are at an end." In enumerating the possible reasons for the entry of prizes into neutral ports Article 21 is—if anything—more restrictive than the provisions dealing with the reasons for entry of belligerent warships.<sup>4</sup> And if a prize is brought into a neutral port for reasons other than those described above it is the duty of the neutral state—according to Article 22—to release the prize, together with its officers and crew, and to intern the prize crew.<sup>5</sup> The same duty falls upon the neutral state in the event that a prize will not leave a neutral port once the circumstances which justified its entry are at an end.

So much is clear. The difficulty is created by Article 23 in that it allows a neutral state to permit belligerents to send prizes to a neutral's ports "there to be sequestered pending the decision of a prize court." It is evident that this provision, if widely accepted by neutral states, would serve to restrict the effectiveness of Articles 21 and 22 and would provide a neutral state permitting sequestration in its ports with an important opportunity for assisting the naval operations of belligerents. Article 23 has never been accepted by several of the major naval powers, however, and during the two World Wars practically all neutral states did in fact forbid belligerents from laying up prizes in their ports pending the decisions of prize courts.<sup>6</sup> At the same time, it cannot as yet be said that the practice

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<sup>4</sup> Thus Article 21, taken by itself, excludes the use by prizes of neutral ports as a temporary refuge from a pursuing enemy, although such use is not prohibited to warships. In fact, whereas belligerent warships may enter neutral ports for any number of reasons, without becoming liable to internment, prizes are limited to those reasons specified in Article 21 (excepting, for the moment, Article 23).

<sup>5</sup> Thus when on November 4, 1939 the Norwegian Government released the American merchant vessel *City of Flint*, together with its officers and crew, and interned the German prize crew, it clearly acted in accordance with Articles 21 and 22 of Hague XIII. The entry of the *City of Flint* into Haugesund on November 3, 1939 was not justified by reason of any of the circumstances laid down in Article 21. During the previous month the vessel had put into the Norwegian port of Tromsø for fresh water and had been allowed to depart after having taken on needed supplies. The *City of Flint* had then proceeded to the Russian port of Murmansk where Soviet authorities after having first interned the German prize crew and informed the American captain of the *City of Flint* that he might at once take the vessel out, later reversed this decision and placed the German prize crew again in charge. Although the episode at Murmansk remained obscure it is evident that the Germans had no valid reason for putting into the port and that the Russian authorities were thereby derelict in their neutral duties in not releasing the vessel and its crew, and interning the German prize crew. The incident, together with diplomatic correspondence, is summarized in Hackworth, *op. cit.*, Vol. VII, pp. 482-8. Other accounts are given in Hyde, *op. cit.*, pp. 2277-82 and *U. S. Naval War College, International Law Situations, 1939*, pp. 24-8.

<sup>6</sup> The United States, Great Britain and Japan refused to accept Article 23 of Hague XIII. During World War I the position of the United States was made clear in the well-known case

of permitting sequestration of prizes in neutral ports is forbidden to neutral states, either through the invalidation of Article 23 or through the emergence of a contrary practice that may be considered sufficient to constitute a rule of customary international law.<sup>7</sup>

### (iii) Armed Belligerent Merchant Vessels

Discussion over the status of armed belligerent merchantmen in neutral ports has frequently suffered from the failure to distinguish sufficiently between the scope of a neutral state's duties and the extent of its rights. Whereas there is legitimate room for inquiry into the present scope of the neutral's duty in receiving armed belligerent merchant vessels into its waters and ports, there ought to be little doubt as to the scope of a neutral's rights. It is apparent that with respect to the merchant vessels of other states the rights of a neutral can be no less than they are in time of peace. Apart from the duty to accord to the merchant vessels of all states freedom of innocent passage through its territorial waters there is no further duty of a state to allow merchant vessels into its ports. So long as it acts impartially a neutral may place special restrictions upon the entry and stay of armed belligerent merchantmen or even close its ports entirely to the latter.<sup>8</sup> The difficulty, of course, concerns the scope of the neutral's duties. The obligations imposed upon neutral states by Hague Convention XIII

of the British steamship *Appam*.—In the United States Neutrality Proclamation of September 5, 1939, Articles 21 and 22 of Hague XIII are repeated almost verbatim.

<sup>7</sup> Thus while Article 29 of the *Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War* (*op. cit.*, p. 446) states that: "A neutral state shall either exclude prizes from its territory or admit them on the same conditions on which it admits belligerent warships," the commentary to this article observes: ". . . Article 23 (Hague XIII) has not been widely adopted in practice and strong objections have been raised against it. On the other hand, it could not be said that a neutral state would violate international law if it acted upon the basis of Article 23. In this unsatisfactory state of the law, it seems permissible to suggest a new rule for adoption . . ." (p. 448). Most writers, however critical of Article 23, refrain from stating that a neutral state would violate its duties were it to permit the sequestration of prizes in its ports.

<sup>8</sup> During the first World War the Government of the Netherlands did in fact choose to close its ports to all armed belligerent merchant vessels. In a note of April 7, 1915 the Netherlands Government stated that vessels provided with armament and capable of committing acts of war would be assimilated to warships and thereafter forbidden to enter the ports and territorial waters of the Netherlands. In reply, the British Government took the position that British merchant vessels were armed solely for purposes of self-defense, that the law of nations permitted this measure, and that the British vessels so armed could not be regarded as assimilated to the status of warships. Even assuming the validity of these contentions it is difficult to see how they can limit the right of a neutral state to exclude armed belligerent merchant vessels from its ports. This last point was emphasized by the Netherlands Government in a note of August 15, 1917, in which it was declared that: "The law of nations does not prescribe for neutrals the duty either of admitting armed belligerent merchant vessels within their jurisdiction, or of refusing them entry. It leaves them to determine for themselves their line of conduct on this point." cited in Hackworth, *op. cit.*, Vol. VII, p. 498.—The only possible objection a belligerent could legitimately raise would be over the neutral's denial of innocent passage through its territorial waters to armed belligerent merchant vessels.

expressly refer only to the entry and stay of "belligerent men-of-war" (and prizes) in neutral waters and ports. According to the traditional law the restrictions applicable to warships when in neutral jurisdiction are not applicable to belligerent merchant vessels, privately owned and engaged in trade. The latter enjoy, in principle, the same treatment in neutral ports as the merchant vessels of other neutral states.

At the same time, there has been little disposition to deny that the restrictions a neutral state must apply to warships in its ports and waters apply equally to belligerent vessels which, though not qualifying as warships in the formal sense and therefore not competent to exercise belligerent rights at sea,<sup>9</sup> directly assist a belligerent's naval operations. Thus a belligerent merchant vessel serving in the employ and acting under the direction of belligerent warships must be treated by neutral states in a manner similar to belligerent warships.<sup>10</sup> The reason for this similarity

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<sup>9</sup> See pp. 38-40.

<sup>10</sup> The vessels referred to in the text are not "auxiliary warships" in the strict sense of that term, that is they are not commissioned naval vessels, commanded by commissioned naval officers and flying the naval ensign. With respect to the latter there is no doubt that they are warships within the meaning of Hague Convention XIII, even though they merely perform auxiliary services to fighting vessels (i. e., supply tenders, colliers, transports). In question here is the status of vessels that perform the same auxiliary services to warships though not formally incorporated into the naval forces of a belligerent. In British practice these vessels are known as "fleet auxiliaries;" they do not fly the flag of a warship nor are they competent to exercise belligerent rights at sea. Nevertheless, with respect to neutrals they are in the same position as warships.

When the United States has been neutral, merchant vessels serving as auxiliaries to warships have been subject to the same restrictions as warships. Thus on November 8, 1914 the German steamship *Locksun* was interned at Honolulu for not having conformed to the rules governing warships. The *Locksun* served as a supply ship for the German warship *Geier*. The details of the incident are given in Hackworth, *op. cit.*, Vol. VII, pp. 506-8. The United States neutrality regulations of September 5, 1939 provided that: "The provisions of this proclamation pertaining to ships of war shall apply equally to any vessel operating under public control for hostile or military purposes."

During World War II the incident involving the German merchant vessel *Tacoma* provided a further illustration of the treatment accorded by neutrals to merchant vessels serving, in effect, as a naval auxiliary to a belligerent's forces. The *Tacoma* was found to be acting in the capacity of an auxiliary to the German battleship *Graf Spee*. For this reason the Uruguayan Government gave the *Tacoma*, upon putting into Montevideo on December 30, 1939, twenty-four hours within which to depart or suffer internment. On January 1, 1940 the vessel was interned.—In the General Declaration of Neutrality of the American Republics, approved October 3, 1939, it was declared that the American Republics "may submit belligerent merchant vessels, as well as their passengers, documents and cargo, to inspection in their own ports; the respective consular agent shall certify as to the ports of call and destination as well as to the fact that the voyage is undertaken solely for purposes of commercial interchange. They may also supply fuel to such vessels in amounts sufficient for the voyage to a port of supply and call in another American Republic, except in the case of a direct voyage to another continent, in which circumstances they may supply the necessary amount of fuel. Should it be proven that these vessels have supplied belligerent warships with fuel, they shall be considered as auxiliary transports." *A. J. I. L.*, 34 (1940), *Supp.*, p. 11.

in treatment may be attributed to the obligation imposed upon the neutral state to prevent its waters and ports from becoming a belligerent base of operations; an obligation that would be seriously restricted if the latter were free to permit merchant vessels serving as auxiliaries to warships to make unlimited use of neutral ports.

These observations would appear to bear directly upon the scope of the neutral's duties with respect to armed belligerent merchant vessels. The fact that such vessels do not possess the status of warships need not prove decisive in determining the treatment they must receive while in neutral waters and ports. It is rather the use to which the vessel's armament has been, or clearly will be, put that must form the guiding consideration. If such use is for offensive purposes the neutral state is obliged to assimilate armed belligerent merchant vessels to the position of warships. To act otherwise would result in turning neutral jurisdiction into a base for the belligerent's naval operations.<sup>11</sup>

It is in the application of this principle to armed merchant vessels that difficulties have arisen. The belligerent state that has armed its merchant vessels will naturally insist—as did Great Britain in both World Wars—that such armament is only intended for defensive purposes, and will rely upon the long established practice under which defensively armed merchantmen have enjoyed the same treatment while in neutral ports as given to other merchant vessels. The neutral state, on the other hand, must run the risk of being charged with unneutral conduct if it is established that the armed merchant vessels it has received in its ports, and treated as ordinary merchant vessels, have in fact been used for offensive operations at sea.<sup>12</sup> Neutral states have not been insensitive to the liability they may thereby incur, and the attempt has therefore been made to establish criteria that would enable the neutral state to determine—in the absence of other-

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<sup>11</sup> In the course of the prolonged diplomatic exchange between the United States and Great Britain during the years 1914-16 the principle enunciated above was not subject to dispute. In a lengthy memorandum of March 25, 1916 the Department of State declared, in part, that: "Merchantmen of belligerent nationality, armed only for the purposes of protection against the enemy, are entitled to enter and leave neutral ports without hindrance in the course of legitimate trade. Armed merchantmen of belligerent nationality, under a commission or orders of their government to use, under penalty, their armament for aggressive purposes, or merchantmen which, without such commission or orders, have used their armaments for aggressive purposes, are not entitled to the same hospitality in neutral ports as peaceable armed merchantmen." cited in Hackworth, *op. cit.*, Vol. VII, p. 495.

<sup>12</sup> It has been stated that neutral states "are under no imperative necessity to ascertain, at their peril, the nature and purpose of the armaments of the merchant vessel. There seems therefore to be no valid reason, dictated by International Law, for departing from the established practice under which defensively armed merchantmen may be admitted to neutral ports on the same conditions as other merchant-vessels so long as there is no conclusive proof that the particular vessel has used her armaments for the purposes of attack." Oppenheim-Lauterpacht, *op. cit.*, p. 712. It is difficult to share this view regarding the scope of the neutral's duties. On the contrary, the neutral state would appear to be under the obligation to take active measures to ascertain the nature and purpose of such armament.

wise conclusive evidence—the offensive or defensive nature of the armament carried by belligerent merchant vessels.<sup>13</sup> In practice, however, it has proven next to impossible to establish objective criteria enabling neutral states to draw a rational distinction between armament used solely for defensive rather than for offensive purposes.

It is submitted that a proper perspective of the problems involved in dealing with the status of armed belligerent merchantmen in neutral ports and waters cannot be gained without adequate recognition of the circumstances that have so radically altered the position traditionally occupied by belligerent merchant vessels. The nature of this transformation has already been indicated.<sup>14</sup> Here it is sufficient to observe that the extent to which the merchant vessels of belligerents were integrated into the military effort during World War II left little doubt as to the purposes for which armament would be used. There is, therefore, a distinct air of unreality in the continued attempts to analyze the position of armed belligerent merchantmen in neutral ports and waters by the assumption of conditions which have not obtained since the outbreak of World War I. In an earlier period there was legitimate reason to inquire into the nature of the armament carried by a belligerent merchant vessel. During the nineteenth century such armament—if carried—would generally have been purchased at the expense of the owner of the vessel, manned by members of his crew, and used at his discretion. At present the armament of merchant vessels is supplied by the state, manned by naval gun crews, and used in accordance with a plan established by the military authorities of the state. Hence, even if it is assumed that the armament of belligerent merchant vessels is used solely for defensive purposes—and on this point there is abundant

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<sup>13</sup> It would serve little purpose to review the many attempts made to reach such determination, in the absence of direct evidence in support of the offensive nature of a vessel's armament. During the initial stages of World War I the attempt was made to make  *motive*  the test, but it soon became apparent that this test posed insurmountable difficulties in practice. The attempt was therefore made to overcome these difficulties by setting out certain objective criteria which would enable the neutral to establish the "defensive" or "offensive" nature of the armament (e. g., number and size of guns, where mounted, how manned, and amount of ammunition). When the first World War came to a close the problem had not yet been resolved satisfactorily, and with the outbreak of war in 1939 it was once again taken up. Many neutral states, while assimilating "offensively" armed belligerent merchantment to the position of warships, gave no indication of the means to be used in determining the offensive purpose of armament. Thus the neutrality regulations of the Northern European Neutrals merely provided, in common Article 3, that: "Access to . . . ports or to . . . territorial waters is likewise prohibited to armed merchant ships of the belligerents, if the armament is destined to ends other than their own defense." *A. J. I. L.*, 32 (1938), *Supp.*, p. 143.—In the General Declaration of Neutrality of the American Republics, October 3, 1939, the latter agreed not to "assimilate to warships belligerent armed merchant vessels if they do not carry more than four six-inch guns mounted on the stern, and their lateral decks are not reinforced, and if, in the judgment of the local authorities there do not exist circumstances which reveal that the merchant vessels can be used for offensive purposes." *A. J. I. L.*, 34 (1940), *Supp.*, pp. 11-12.

<sup>14</sup> See pp. 57-70.



evidence to the contrary<sup>15</sup>—the fact remains that such use forms a definite part of the military operations of the belligerent. For this reason alone the continued relevance of attempts to determine the defensive character of armament must be seriously questioned. Despite these considerations, neutral states continue to base their treatment of armed belligerent merchant vessels upon standards that have little or no application to the circumstances under which modern naval warfare is conducted.<sup>16</sup>

### 3. *Restrictions On the Use of Neutral Air Space*

The numerous difficulties attending the determination of the extent to which belligerent warships may make use of neutral jurisdiction find little parallel in aerial warfare. The practices of states during World Wars I and II may be regarded as having firmly established both the right as well as the duty of the neutral state to forbid the entrance of belligerent military aircraft into its air space.<sup>17</sup> In consequence, the neutral state is obliged to use the means at its disposal to prevent the entry of belligerent military aircraft, to compel such aircraft to alight should they once succeed in unlawfully penetrating neutral air space, and, once compelled to land, to intern the aircraft together with its crew.<sup>18</sup>

There are, however, certain peripheral questions that have yet to be clearly and definitely resolved. One of these questions relates to the status of belligerent military aircraft in neutral territory at the time of the outbreak of hostilities. It has been suggested that in this instance a brief period of grace—usually twelve hours—should be granted such aircraft, during which period they may be permitted to leave neutral jurisdiction.<sup>19</sup> This suggestion follows a parallel rule applied to belligerent warships in neutral ports, the latter being accorded a twenty-four hour period in which

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<sup>15</sup> See pp. 57-70.

<sup>16</sup> Here again, the gap between the assumptions underlying the traditional law and the conditions characteristic of modern naval warfare will serve only to defeat the purposes of the traditional law. Nevertheless, it cannot be said that the few attempts to rectify this situation have had any considerable effect. Although Article 12 of the 1928 Habana Convention on Maritime Neutrality declared that where "the sojourn, supplying, and provisioning of belligerent ships in the ports and jurisdictional waters of neutrals are concerned, the provisions relative to ships of war shall apply equally to armed merchantmen," this provision was not accepted by the United States. Nor did it receive the acceptance of an appreciable number of other American states.—On the outbreak of war in 1939 the *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War* (*op. cit.*, pp. 435-47) suggested that: "A neutral State shall either exclude belligerent armed merchant vessels from its territory or admit such vessels on the same conditions on which it admits belligerent warships." The arguments presented therein on behalf of this recommendation are believed to be sound. During World War II, however, the general practice of neutrals was—if anything—toward a relaxation in the attitude previously manifested toward armed belligerent merchant vessels.

<sup>17</sup> See, generally, Spaight, *op. cit.*, pp. 420 ff.

<sup>18</sup> *Law of Naval Warfare*, Article 444 a, b.

<sup>19</sup> *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, p. 764, Article 94 and comment.

to leave these ports and neutral territorial waters. On the other hand, it has been argued that the neutral state ought immediately to intern all belligerent military aircraft found within its jurisdiction at the outbreak of war.<sup>20</sup> It does not appear possible to endorse either position at the present time, though it is probably safe to assert that a neutral may (even if not strictly obliged to) resort to immediate internment.

A further question concerns the entry in distress of belligerent military aircraft. Does the duty of a neutral to prevent belligerent military aircraft from entering its jurisdiction extend to such aircraft as are in evident distress? Here again, no categorical answer as to the scope of the neutral's duty seems possible, although it is doubtful that a neutral state violates any duty in permitting entry in distress. The neutral state is bound, of course, to intern the aircraft and its crew. Thus the matter of entry in distress in aerial warfare must be clearly distinguished from entry in distress in naval warfare. Whereas belligerent warships in distress enjoy a right of entry into neutral waters and ports, the entry of belligerent aircraft within neutral jurisdiction, even though in distress, is—at best—a matter within the neutral's discretion.<sup>21</sup> In addition, whereas in naval warfare the neutral state may or may not intern the belligerent vessel and crew seeking entry in distress, in aerial warfare the neutral must intern the aircraft together with its crew.<sup>22</sup>

## F. BELLIGERENT INTERFERENCE WITH PRIVATE NEUTRAL TRADE; NEUTRAL DUTIES OF ACQUIESCENCE

It has been observed earlier that whereas the neutral state is obliged to abstain from furnishing belligerents with a wide range of goods and services

<sup>20</sup> Although the 1923 Hague Rules of Aerial Warfare contain no specific provision on this point, the report of the Commission of Jurists notes—in connection with Article 42—that the “obligation to intern covers also aircraft which were within the neutral jurisdiction at the outbreak of hostilities.” *U. S. Naval War College, International Law Documents, 1924*, p. 130.

<sup>21</sup> Spaight (*op. cit.*, p. 436) is of the opinion that the “highest that one can put the neutral obligation is that asylum should be granted in all cases of evident distress, so far as the circumstances allow this obvious concession to humanitarian claims to be made. The neutral authorities remain bound, of course, to apprehend and intern the aircraft and its crew in such cases, as well as in those of error on the part of the airmen, loss of way, or miscalculation of the exact boundary line.”—During World War II there were several reported incidents of neutral states employing measures of force to drive away belligerent military aircraft seeking entry into neutral jurisdiction for reasons of distress.

<sup>22</sup> To the above stated rules two exceptions may be noted. Aircraft attached to a warship may enter neutral waters and ports so long as such aircraft are, and remain, in physical contact with the warship. In this circumstance aircraft are considered merely as items in the equipment of the vessel, and the only question is whether the vessel itself has lawfully entered neutral jurisdiction. Finally, Article 40 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea provides that, subject to such regulations and restrictions as the neutral may see fit to apply equally to all belligerents, the medical aircraft of belligerents may pass over, or land in, neutral territory (see pp. 129-31).

it is normally under no obligation to prevent its subjects from undertaking these same activities. Belligerents are permitted, however, to take certain measures to prevent the subjects of a neutral state from rendering various forms of assistance to an enemy. The neutral state, in turn, is obliged to acquiesce in the exercise by belligerents of repressive measures international law permits the latter to take against neutral merchantmen engaged in the carriage of contraband, breach—or attempted breach—of blockade, or the performance of unneutral service.<sup>23</sup>

<sup>23</sup> It remains a matter of some controversy among writers as to the proper characterization of the acts falling under the categories enumerated above. The weight of opinion in the past has been that acts constituting contraband carriage and blockade breach ought not to be regarded as unlawful under international law but only—if at all—under national law. In large measure, this opinion has been influenced by the consideration that international law does not obligate neutral states to forbid their subjects from engaging in the above mentioned activities (although a neutral state may forbid these activities on the part of its subjects). From this point of view, the repressive measures international law permits belligerents to take against neutral nationals undertaking carriage of contraband is a right corresponding to the neutral state's duty of acquiescence. But the belligerent cannot complain to the neutral state for having failed to prevent the acts in question. On the other hand, the individuals who carry contraband or undertake to break blockade are held to act at their peril; they perform a "risky" act, though one allegedly not forbidden by international law, and if caught must take the consequences of being deprived of their property (cargo or ship, or both).

The alternate view, in holding that carriage of contraband and breach of blockade are acts forbidden by international law, declares that it is by no means necessary that international law obligate the neutral state to prevent the commission of these acts in order that they may be considered unlawful. Thus a neutral national engaged in carriage of contraband may act in accordance with the law of his state, which need not and does not prohibit the act, and yet perform an act forbidden by international law. (In the same sense the act of piracy may be considered as forbidden by international law, though no state is obligated either to prohibit this act in its municipal law or to prevent its subjects from committing acts of piracy.) The neutral state need not, and is not, obligated to prevent all acts of its subjects which belligerents are entitled to repress (or, from this alternate point of view, to punish). Instead, it is bound only to prevent part of them, whereas the prevention and repression of other acts are left to the belligerents.

Although the theoretical implications of this controversy are not without a substantial measure of interest, the practical significance of whether or not contraband carriage, blockade breach and unneutral service are considered as acts forbidden by international law is negligible. From both points of view the nature and extent of the measures a belligerent is permitted to take against neutral commerce remain the same. It may be observed, however, that international law unquestionably does establish the latitude permitted belligerents in controlling the trading activities of neutrals. Similarly, international law determines—though within varying limits—the consequences belligerents may attach to these activities. It is true that these consequences are realized only by virtue of judgments rendered by national prize courts, judgments whose immediate basis must be found in municipal law. Nevertheless, in this instance the judgment of a national prize court may properly be regarded as the application of international as well as national law. Indeed, states are clearly under the obligation to insure that the substantive law applied by their prize courts conforms with international law. Hence, the application of international law is carried out through its prior transformation into national law, a transformation that ought not to be obscured for the reason that prize courts derive their immediate power from national law and are bound to apply this law even if occasionally inconsistent with international law.

So long as a belligerent confines the measures it takes against the trade of neutral subjects to the limits clearly allowed by international law there will be little occasion for controversy. Normally, the relationship involved will primarily concern the belligerent and private neutral traders. When, however, the neutral state considers a belligerent to have acted in excess of the limits prescribed by international law, when the neutral state considers a belligerent as endeavoring either to suppress legitimate neutral trade or to prevent illegitimate neutral trade though by means of otherwise unlawful measures, the matter then directly involves the duties and rights of belligerent and neutral states. This is so for the reason that it is a duty of belligerents to abstain from interfering with neutral commerce which international law does not regard as of such a character to justify belligerent measures of suppression, and a right of neutral states to demand that belligerents refrain from interfering with the legitimate commerce of their subjects. In addition, even with respect to neutral trade belligerents are permitted—in principle—to suppress, neutral states have a right to insist that belligerents employ only those measures of suppression as are sanctioned by law.

At the same time, the belligerents' duty to abstain from the suppression of legitimate neutral commerce is not without limitation. The neutral state is bound not only to acquiesce in certain permitted forms of belligerent interference with private neutral trade; it is also obliged to employ the means at its disposal to prevent belligerent encroachment upon established neutral rights at sea. Should the neutral state either openly permit or tacitly acquiesce in the unlawful interference with its trade by one belligerent it cannot complain if the other belligerent—thereby placed at a grave disadvantage—resorts to otherwise unlawful measures against neutral trade by way of reprisal against the neutral. On this point at least there would appear to be widespread agreement.

But beyond this point the greatest uncertainty—and controversy—exists even today with respect to the precise scope of the belligerent's duty to abstain from interfering with legitimate neutral commerce. In general, belligerents have sought to qualify their obligation by contending that the restriction of neutral rights may prove justified either as a necessary incidence to retaliatory measures taken in response to the unlawful behavior of an enemy (and even though such behavior has been directed, in the main, only against the retaliating belligerent) or as a result of the ineffectiveness of neutral efforts to prevent continued belligerent encroachment upon the former's rights.

It should be apparent that the position of the neutral is strongest in insisting that inter-belligerent reprisals—in the strict sense—cannot of themselves provide injured belligerents with a legitimate basis for restricting neutral rights. The neutral state, it has been asserted, cannot be held responsible in any way for unlawful belligerent measures that are directed

exclusively—or even principally—against an enemy. Nor is this conclusion modified, from the neutral's point of view, by virtue of the fact that a belligerent may be able to bring the greatest pressure to bear upon an offending enemy through measures taken against neutral commerce.<sup>24</sup>

Even if accepted, however, the neutral's position with respect to the legitimacy of inter-belligerent reprisals which adversely affect neutral rights may prove of no more than limited importance. In practice, belligerents have had a much stronger basis upon which to limit the scope of their obligations toward the commerce of neutrals. Since the unlawful conduct of a belligerent in warfare at sea will seldom be directed solely against an enemy, but will bear upon neutral commerce as well, the injured belligerent has insisted that his continued respect for neutral rights is dependent upon the effectiveness of neutral efforts in preventing the further occurrence of the unlawful measures imputed to an enemy.<sup>25</sup>

<sup>24</sup> Hyde (*op. cit.*, p. 2345) gives expression to the position summarized above by stating that: "It is a sound proposition that the illegal conduct of its enemy in prosecuting a war does not excuse a response by the offended belligerent which, insofar as it returns like for like, or otherwise marks a departure from the requirements of the law, involves an impairment of obligations normally due to unoffending and non-participating powers." A similar view may be found in the *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War* (*op. cit.*, pp. 392-419), where the conflicting—and frequently obscure—attitude of neutrals and belligerents is given careful and illuminating historical review. Article 23 of the Draft Convention declares: "A belligerent is not relieved of its duty to respect the rights of a neutral State as provided in this Convention, even when engaged in acts of reprisal or retaliation for illegal acts of its enemy." Certainly in the past this has always represented the position of the United States when neutral. Thus the British Reprisals Order of November 27, 1939 (see p. 312) brought forth the following statement by the American Government: "Whatever may be said for or against measures directed by one belligerent against another, they may not rightfully be carried to the point of enlarging the rights of a belligerent over neutral vessels and their cargoes, or of otherwise penalizing neutral states or their nationals in connection with their legitimate activities." cited in Hackworth, *op. cit.*, Vol. VII, p. 145.

<sup>25</sup> In both World Wars this provided perhaps the principal belligerent argument in justification of otherwise unlawful restrictions upon neutral trade. During World War I the British Prize Court gave expression to, and endorsed, the argument in a number of significant decisions. In *The Stigstad* [1918]—(5 *Lloyds Prize Cases*, p. 393) the Judicial Committee of the Privy Council, speaking through Lord Sumner, upheld the Reprisals Order of March 11, 1915, and expressly rejected the contention that a neutral "too pacific or too impotent to resent the aggressions and lawlessness of one belligerent, can require the other to refrain from his most effective or his only defense against it, by the assertion of an absolute inviolability for his own neutral trade, which would thereby become engaged in a passive complicity with the original offender." And in a note of April 24, 1916, replying to a United States protest against the Reprisal Order of March 11 as being "without precedent in modern warfare," the British Government observed that if one belligerent "is allowed to make an attack upon the other regardless of neutral rights, his opponent must be allowed similar latitude in prosecuting the struggle, nor should he in that case be limited to the adoption of measures precisely identical with those of his opponent." cited in Hackworth, *op. cit.*, Vol. VII, p. 144. A substantially similar argument has been urged by most British writers dealing with this same question. Thus: "The rule that belligerents must not interfere with the legitimate commerce of neutrals presupposes that both belligerents will carry it out, and that neutrals will prevent both of them from violating it. If, on the contrary, neutrals acquiesce in or are unable to prevent the violation of this rule by

In certain respects, a parallel situation to that under present consideration has already been dealt with in connection with the consequences arising from the neutral's inability to prevent misuse of neutral jurisdiction.<sup>26</sup> It was there observed that although a neutral state fulfills its duty if it employs the means at its disposal to prevent belligerent violation of its waters and ports, in the event these efforts prove ineffective the belligerent that has heretofore respected neutral jurisdiction—and whose interests would suffer from an enemy's unlawful acts—is not forbidden from resorting to hostile measures against its adversary even though within neutral jurisdiction. However, these hostile measures, exceptionally permitted to a belligerent, are not to be interpreted either as reprisals against the neutral state or as reprisals against the belligerent that has misused neutral jurisdiction. The former interpretation is unacceptable for the reason that the neutral state, by employing the means at its disposal, has fulfilled its duty. The latter interpretation is misplaced for the reason that in misusing neutral jurisdiction a belligerent commits no wrong against an enemy, and the latter is certainly not permitted to justify hostile measures taken in neutral waters by contending that he is assisting in the enforcement of the neutral's rights. Instead, it was submitted that the correct interpretation is simply that the scope of the belligerent's obligation to refrain from taking hostile measures within neutral jurisdiction is limited by the ability of the neutral effectively to enforce its rights.

If the same general analysis is applied to the problem of neutral commerce—and it is difficult to see how such application may be avoided—it may be stated that a neutral state fulfills its duty when it employs the means at its disposal to prevent unlawful belligerent interference with the trade of its subjects. Nevertheless, if one belligerent persists in unlawfully interfering with a neutral's trade, and the efforts of the latter prove clearly ineffective in terminating these illegal measures, the other belligerent thereby placed at a disadvantage is no longer obliged to refrain from taking what would otherwise prove to be unlawful measures of interference with the neutral's trade.<sup>27</sup> Admittedly, the central issue

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one belligerent to the vital disadvantage of the other belligerent, the latter cannot be expected to suffer this without redress, and must be excused if, in retaliating upon the enemy, he also violates the rule." Oppenheim-Lauterpacht, *op. cit.*, p. 679. Also see A. P. Higgins, "Retaliation in Naval Warfare," *B. Y. I. L.*, 8 (1927), pp. 129-46; H. A. Smith, *op. cit.*, p. 145; and Higgins and Colombos, *op. cit.*, pp. 565-7. It should be added that Germany and France placed equal reliance upon this same argument in resorting to "reprisal" measures affecting neutral commerce.

<sup>26</sup> See pp. 220-6.

<sup>27</sup> The position taken in the text above is still far from being shared by many writers, however. It should be carefully noted that, as stated in the text, this position amounts neither to an endorsement of the contention that inter-belligerent reprisals—in the strict sense—may operate to restrict neutral rights nor to an approval of the assertion that belligerents may take *reprisal measures* against neutrals for the reason the latter are incapable of effectively enforcing their rights. What is asserted is simply that the scope of the belligerent's obligation toward the neutral is limited by the ability of the neutral to compel the observance of its rights. Hence

involved here ought not to be obscured by the belligerent habit of characterizing these measures restricting neutral trade as "reprisals," ostensibly directed against an enemy. In violating the neutral's rights a belligerent does not, for that reason alone, violate an enemy's rights as well. Belligerents placed at a disadvantage by the unlawful measures of an enemy that are directed against neutral trade have almost invariably taken this position, though the claim has no substantial justification in law. What can be claimed, and all that can be claimed, is that the scope of the obligation imposed upon a belligerent to respect neutral rights at sea is limited—in principle—not only by the neutral's willingness to enforce its rights but by its effectiveness in doing so.<sup>28</sup>

At the same time, it must be conceded that in fact, if not in law, it may prove seriously misleading to attempt to draw too close a parallel between the hostile measures exceptionally permitted belligerents within neutral jurisdiction and the measures exceptionally permitted to belligerents against neutral trade. The former clearly must be limited to the forces of an enemy; they may be taken only for an expressly defined purpose, and once this purpose has been attained the hostile measures must cease. It is difficult to discern similar limitations on the measures taken by belligerents against neutral trade, owing to the neutral's inability to enforce its rights effectively. In character and duration these measures have been held to be subject—at best—only to the vague criteria that they conform to the "requirements of humanity" and do not impose an "unreasonable" hardship—in the light of relevant circumstances—upon the neutral. And whether or not belligerent measures restrictive of neutral trade do conform

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it is no answer to the dilemma raised by the weak neutral to declare, as does article 24 of the *Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War* (*op. cit.*, p. 419) that: "A belligerent may not resort to acts of reprisal or retaliation against a neutral State except for illegal acts of the latter, and a State is not to be charged with failure to perform its duties as a neutral State because it has not succeeded in inducing a belligerent to respect its rights as a neutral State."

<sup>28</sup> These remarks may serve to clarify a measure of the ambiguity—and confusion—that has so often characterized the problem of belligerent "reprisals" at sea. In part, this ambiguity may be attributed to the belligerent insistence upon identifying *interest* with *legal right*. Undoubtedly the belligerent has a strong interest in preserving his trade with neutral states. Nevertheless, the measures his enemy may take to shut off this trade constitute—on the whole—a violation of the belligerent's rights only to the extent that the latter's merchant vessels are rendered liable to hazards clearly forbidden by law. To the extent that unlawful measures are directed against neutral shipping it is the right of the neutral state—not of the belligerent—that has been violated. The belligerent possesses neither a right to demand that an enemy refrain from unlawful measures against neutral commerce nor a right to assist a neutral in the latter's efforts to resist an enemy's depredations at sea. In practice, it seems clear that most belligerent "reprisal" measures have actually been a compound of measures directed against an enemy for conduct directly injurious to the belligerent and measures restrictive of neutral rights. Whereas the former may be considered as reprisals in the strict sense the latter may not (unless, of course, the neutral has acted in league with the enemy).

to these criteria is a matter the belligerent has generally insisted upon having the sole right to determine.<sup>29</sup>

It is perhaps for these reasons, and in view of the evident use (or, perhaps, misuse) by belligerents of "reprisals" at sea as an instrument for subverting the traditional law, that many writers continue to express serious opposition to the position—endorsed above—that one belligerent may resort to measures restrictive of neutral rights when the neutral proves unable to prevent the transgressions of another belligerent. It seems clear, though, that this opposition may lead to even greater difficulties in practice. Nor does this opposition, quite apart from practical considerations, appear sound in principle. Despite the hazards admittedly implicit in limiting the scope of the belligerent's obligation to the effectiveness of neutral measures of prevention, there is room for insisting that belligerents may not regard themselves at liberty to resort to *any* measures against the trade of neutrals that are too weak—or too unwilling—to enforce their rights effectively.<sup>30</sup>

## G. VIOLATIONS OF NEUTRALITY

### 1. *Violations of Neutrality as Distinguished From Termination of Neutral Status*

On frequent occasions violations of neutrality have been confused with the termination of neutral status. It would appear that the principal reason for this confusion may be traced to the tendency to identify neutrality with the obligations imposed upon a non-participant by the traditional law. If neutrality is to be identified with the obligations imposed upon a state

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<sup>29</sup> The position taken in British prize proceedings whose basis rested upon "reprisal orders" issued by the executive, and bearing upon neutral rights, was laid down in *The Zamora* [1916]—(4 *Lloyds Prize Cases*, p. 97), where the Judicial Committee of the Privy Council declared that while bound to accept the Executive's statement of the facts alleged in justification of reprisal orders the prize court's function is to determine whether or not the order in question is reasonable in the hardships it imposes upon neutrals. In neither World War were the reprisal orders issued by the Executive found "unreasonable," and in the 1939 war neutral claimants do not appear to have taken the trouble even to have questioned their illegality in prize court proceedings. In this connection Stone's (*op. cit.*, p. 367) comments deserve attention. "This check," he writes of the British system, "has an obvious ambiguity. Is the 'reasonableness' of the inconvenience to be measured against the enormity of the enemy's illegality, against what is necessary to make retaliation effective, or some other test, or against all together? In any case, the neutral's position is unenviably weak. The supposed proportionality of retaliation to the original wrong is itself hardly measurable; a hardly measurable relation to this hardly measurable proportionality is not a promising basis for a cause of action." Even so, the protection offered by the British system was superior to the practice of most other belligerents. In the case of German, Italian and French prize courts the validity of retaliatory orders affecting neutrals does not appear to have been subject to any check, however imperfect, the courts considering themselves bound completely by the action of the executive. See Colombos, *A Treatise on The Law of Prize*, pp. 272-3, 276-7.

<sup>30</sup> For further reflections on this and related points, see pp. 296-315, where belligerent "reprisal" measures during the two World Wars are examined in some detail.



that does not participate in war—and particularly with the obligation of impartiality—then it seems only logical to consider that a state in abandoning these obligations thereby abandons the status of neutrality. In the present study, however, the usual identification of neutrality with the duties imposed upon a neutral state has not been followed.<sup>31</sup> Instead, the status of neutrality has been conceived as the non-participation of a state in hostilities. If this latter conception of neutrality is followed the confusion attendant upon the identification of violations of neutrality with the termination of neutral status becomes clear.

A state may abstain from active participation in a war while at the same time abandoning many of the duties imposed upon non-participants by the law of neutrality. In abandoning its duties the neutral state thereby surrenders its right to demand from belligerents that behavior it would otherwise be entitled to claim. The offended belligerent may demand appropriate measures of redress and—should it so desire—resort to reprisals against the offending neutral. But as long as the belligerent refrains from attacking the neutral, and the neutral refrains from directly joining in the hostilities by attacking one of the belligerents, a status of neutrality is maintained.

## 2. *Rights and Duties of Neutral States In the Event of Belligerent Violation of Neutral Rights*

It is one of the peculiarities of the neutral-belligerent relationship that a belligerent violation of neutrality serves to give rise to a right as well as to a duty of the injured neutral state. With respect to the offending belligerent a neutral state has the right to take those measures necessary to bring about the immediate cessation of the unlawful acts and to demand such action on the part of the offending belligerent as may be required to repair the wrong that has been done. If the offending forces of a belligerent are within neutral jurisdiction the neutral state may even resort to forceful means in order to compel a belligerent to desist from the commission of hostile, or otherwise unlawful, acts. Thus the neutral state has the right to take measures necessary to effect the release of ships that have been captured by a belligerent within neutral waters. Forcible measures may also be taken, if necessary, against belligerent warships otherwise failing to conform to the regulations governing passage through neutral waters as well as entry and stay in neutral ports. If, on the other hand, the offending belligerent forces are no longer within neutral jurisdiction the neutral state may insist upon the performance of certain measures of reparation. Prizes that have been seized by a belligerent in neutral waters must be restored upon the demand of the neutral state. Nor is it excluded that if the demand for adequate measures of reparation—material or moral<sup>32</sup>—remains

<sup>31</sup> See pp. 196-9.

<sup>32</sup> E. g., an apology on the part of a belligerent for the hostile acts its forces may have committed within neutral waters.

unsatisfied the aggrieved neutral may resort to other, and more stringent, measures.<sup>33</sup>

With respect to the belligerent that has otherwise respected the neutral's rights, the situation is somewhat more complicated. It has already been observed that the traditional law imposes upon neutral states the duty to employ the means at their disposal in order to prevent the violation by belligerents of their ports or waters.<sup>34</sup> However, this duty relates to the prevention of unlawful acts, not—at least not directly—to the measures a neutral must take against a belligerent for unlawful acts already committed.<sup>35</sup> In Hague XIII there is, apart from Articles 3<sup>36</sup> and 24,<sup>37</sup> no clear guidance as to the measures a neutral state must take—if indeed any—against a belligerent that has misused neutral ports and waters. It has been contended, therefore, that it is doubtful whether international law “imposes upon a neutral a duty to resort to retaliatory acts in response to the illegal conduct of a belligerent. It is not even clear that a neutral is under a duty to protest against illegal belligerent conduct.”<sup>38</sup>

Whatever merit the above opinion might once have enjoyed it would

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<sup>33</sup> Though it is very difficult to define, in a satisfactory manner, the nature and limits of the measures available to neutrals. Certainly, the neutral state may seek to exclude altogether the warships of the offending belligerent from entry and stay in its waters and ports. There are also instances of neutral states placing embargoes upon the export of munitions and other implements of war to an offending belligerent. Whether or not an aggrieved neutral may—as a measure of retaliation—directly assist the other party to the conflict is not altogether clear, though it would appear that the answer to this question must be negative.

<sup>34</sup> See p. 220.

<sup>35</sup> The strict wording of Article 25, Hague XIII, only obligates the neutral states “to exercise such surveillance as the means at its disposal allow to prevent any violation” of its waters or ports.

<sup>36</sup> Article 3 states: “When a ship has been captured in the territorial waters of a neutral Power, this Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

If the prize is not within the jurisdiction of the neutral Power, the captor Government, on the demand of that Power must liberate the prize with its officers and crew.”

Article 3, paragraph 2—on a strict interpretation—only implies the right, not the duty, of the neutral state to demand liberation of a prize taken within its waters but no longer within neutral jurisdiction. The United States adhered to Article 3 with the understanding that this particular provision implies a duty on the part of the neutral state, not merely a right. In practice, neutral states have demanded the restoration of neutral prizes seized within their waters, and failure to do so would no doubt be regarded by the belligerent whose vessel was seized as a dereliction on the part of the neutral state. It should be observed, however, that the restoration of such vessels by a belligerent is made to the neutral state, not to the owner of the vessel.

<sup>37</sup> In strict wording, however, Article 24 speaks only of the measures a neutral state “is entitled to take” against belligerent warships which do not leave a port where they are no longer entitled to remain, but not of measures of internment the neutral *must* take. Here again, practice has established these measures as constituting not only neutral rights but neutral duties as well.

<sup>38</sup> *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, *op. cit.*, p. 334.

appear that the present practice of states no longer allows the conclusion that a neutral's duty is fulfilled merely in taking such measures as the means at its disposal allow to prevent belligerent violation of its rights. On the contrary, it would appear that the same standard that is applied to judging the adequacy of a neutral's preventive measures must also apply to judging the adequacy of a neutral's measures to secure the vindication of rights that have once been violated. In failing to use the means at its disposal to secure this vindication the neutral state may be regarded as having acquiesced in the violation of its rights and thereby furnished assistance to one side in the conflict.<sup>39</sup>

### 3. *Belligerent Rights In the Event of Neutral Failure to Fulfill Obligations of Neutrality*

Whereas a belligerent violation of neutrality gives rise to both a right and a duty of the neutral state, a violation of neutrality on the part of the neutral state merely gives rise to a right of the injured belligerent. The decision as to whether to exercise this right or to acquiesce in a neutral's violation of its duties is one that remains at the discretion of the belligerent. In this respect the position of the injured belligerent differs from that of the injured neutral.

The remedies available to an aggrieved belligerent as a consequence of the neutral's failure to fulfill its obligations range from the demand for moral or material reparation to the taking of retaliatory measures. In general, the procedure required of belligerents prior to the taking of reprisals against an offending neutral does not differ substantially from the procedure laid down by general international law for the resort to reprisals in time of peace. In addition to the requirement that the commission of an act contrary to international law must precede a measure of reprisal, the latter is normally justified only when a demand for adequate redress has proven unavailing. It is difficult though to view this latter criterion as a rigid requirement to be fulfilled on every occasion prior to the taking of

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<sup>39</sup> Note, for example, the view in Oppenheim-Lauterpacht (*op. cit.*, p. 754): “. . . in case he [i. e., the neutral] could not prevent and repulse a violation of his neutrality, the same duty of impartiality obliges him to exact due reparation from the offender; for otherwise he would favour the one party to the detriment of the other. If a neutral neglects this obligation, he himself thereby commits a violation of neutrality, for which he may be made responsible by a belligerent who has suffered through the violation of neutrality committed by the other belligerent and acquiesced in by him.” No doubt serious difficulties may arise—and have arisen in the past—in judging whether or not a neutral state has used the means at its disposal in exacting due reparation from an offender. These difficulties are no greater, however, than those encountered in determining whether or not the neutral employed the means at its disposal to prevent the commission of the unlawful acts. Distinguish, however, between the inability of a neutral either to prevent violations of its rights or to exact due reparation, though using the means at its disposal, and the failure of the neutral state to employ such means. Whereas the latter may properly constitute a violation of neutrality on the part of the neutral the former does not, despite the fact that in both cases the belligerent suffering from his enemy's unlawful measures may be released from his obligations toward the neutral.

reprisals. Exceptionally, the circumstances attending a neutral's failure to fulfill its obligations may be of such a nature that the injury thereby inflicted upon a belligerent can never be made the subject of adequate redress. In these circumstances, it is submitted, the belligerent does not act unlawfully even though he immediately resorts to retaliatory measures. Finally, it is generally recognized that there must be at least a rough proportionality between the reprisal and the offense that has given rise to the reprisal.<sup>40</sup>

<sup>40</sup> When judged by the above criteria it is believed that there are strong grounds for supporting the action finally taken by Great Britain in the *Altmark* incident (see pp. 236-9). The Norwegian Government clearly possessed the means either to intern the German auxiliary or to require its abandonment of Norwegian territorial waters. Provided, then, that the *Altmark's* passage through Norwegian waters constituted the use of these waters as a "base of operations," and it is difficult to refute the soundness of this position, the refusal of the Norwegian Government to follow either of the courses of action indicated above may be regarded as a departure from neutral duties. The precipitate character of the British action, in forcibly removing the British prisoners held on board the *Altmark*, while the vessel remained in Norwegian waters, has been defended by Waldock (*op. cit.*, pp. 235-6) in the following terms: "A breach of the rules of maritime neutrality in favour of one belligerent commonly threatens the security if not the existence of the other belligerent. The breach is thus seldom really capable of being remedied in full by subsequent payment of compensation. Nothing but the immediate cessation of the breach will suffice. Accordingly, where material prejudice to a belligerent's interests will result from its continuance, the principle of self-preservation would appear fully to justify intervention in neutral waters." In the light of the relevant circumstances in the *Altmark* incident there is certainly much to be said for this view, though it seems preferable—for reasons already indicated—frankly to characterize the British action as a reprisal measure directed against Norway for the latter's refusal to carry out neutral obligations.