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# THE LAW OF WAR AND NEUTRALITY AT SEA

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# VII. NEUTRALITY AND THE TWO WORLD WARS

In the preceding chapter an attempt has been made to inquire into the possible effects upon the traditional institution of neutrality resulting from the changed position of war in international law. In general, it may be concluded that these effects, though certainly not without significance, have been limited in nature. Undoubtedly there is, in principle, a basic antagonism between the assumptions upon which a system of collective security must rest and neutrality. Nevertheless, the actual effects that a system of collective security may have upon neutrality—particularly in its traditional form—can only be judged by the extent of the obligations imposed upon member states, by the existence of a centralized—and operative—procedure for determining when these obligations must be fulfilled, and by the effectiveness of the machinery provided for ensuring that they are so fulfilled. It should be apparent that when judged by these criteria neutrality can hardly be regarded as constituting at present only a matter of historical interest.

In considering the present status of neutrality, it is of considerable importance, therefore, to distinguish between the effects upon neutrality resulting from the transformation in the legal position of war and those effects brought about by the two World Wars. Not infrequently writers fail to make this distinction clear, and—even worse—impute to the former what is clearly the consequence of the latter. This failure can only serve to breed confusion. In fact, however, the present decline of neutrality is the consequence primarily of the two World Wars and of the circumstances that have attended these conflicts.

## A. BELLIGERENT ENCROACHMENT UPON TRADITIONAL NEUTRAL RIGHTS

It is fundamental that an equality—or an approximate equality—of neutral and belligerent rights must depend, in the first place, upon an equality of power. Where neutrals do not possess an equality of power with belligerents their interests, and hence their legal rights, will suffer accordingly. This has always been the case, even in the nineteenth century. The lesson taught by the Napoleonic Wars, which opened the nineteenth century, was—in this respect—quite clear, and the strong parallel between the prac-

tices of belligerents during the earlier wars and belligerent measures taken in World War I has not escaped the attention of writers.[1]

Historically, the major disputes between neutrals and belligerents have concerned the scope of the repressive measures permitted to belligerents against the trade of neutral subjects. It has long been customary to characterize the problems arising with respect to neutral commerce in terms of two conflicting rights· the right of the neutral state to insist upon continued freedom of commerce for its subjects despite the existence of war and the right of the belligerent to prevent neutral subjects from affording assistance to the military effort of an enemy. More accurate, perhaps, is the characterization of these problems in terms of conflicting interests rather than in terms of conflicting rights. Whereas the neutral's interest has been to suffer the least amount of belligerent interference in the trading activities of its subjects, the belligerent's interest has been to prevent neutrals from compensating for an enemy's weakness at sea. The reconciliation of these clearly diverse interests has never proven easy and, as the preamble to the Declaration of Paris stated a century ago, "has long been the subject of deplorable disputes . . . giving rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties and even conflicts. . . ." The neutral claim—that hostilities should interfere as little as possible with neutral commerce—is not an unreasonable one. Still, the belligerent claim—that the neutral ought not to be allowed to compensate for an enemy's weakness—may be regarded as equally reasonable.

These initial observations may serve as a warning against the many attempts to find in the "general principles" alleged to govern neutral-belligerent relations at sea self-evident and fixed criteria from which precise limits upon belligerent freedom to interfere with neutral trade can be deduced. In an earlier period the assumption was common that these general principles "of necessity" dictated a minimum of belligerent interference with neutral trade. At present it is the contrary conviction that forms the basis of most inquiries into the issue of "neutral rights" at sea. Neither position appears well taken. It is quite true that the neutral state has the right to demand that no repressive measures be taken by a belligerent against *legitimate* neutral commerce with an enemy, and that this neutral right corresponds to a duty of absention on the part of the belligerent. But it is hardly possible to deduce from this general principle the character of the neutral intercourse that must be regarded as legitimate and against which repressive measures by belligerents are forbidden. On the contrary, experience has shown that the practices establishing the respective rights and duties of belligerents and neutrals are not dependent upon logical de-

[1] See, for example, *Neutrality, Its History, Economics and Law* (4 vols); Vol. II, *The Napoleonic Period* (1936), by W. Alison Phillips and Arthur H. Reede, Vol. IV, *Today and Tomorrow* (1936), by Philip C. Jessup, pp. 58–85.

ductions drawn from general principles but upon the character of those concrete circumstances attending the conduct of warfare during a particular historical period.

During most of the nineteenth century a rough balance was struck between the conflicting claims of neutrals and belligerents, a balance duly reflected in the traditional law of neutrality. If anything, the traditional law inclined slightly in favor of neutral interests, and in doing so recorded the experience of the century which was one of limited warfare. Thus one of the principal assumptions underlying the traditional law, as H. A. Smith has observed, "is that the greater part of the world is at peace, that war is a temporary and local disturbance of the general order, and that the chief function of law is to keep the war from spreading, and to minimize its impact upon the normal life of the world." [2] It need hardly be pointed out that this assumption did not correspond—even remotely—to the conditions under which the two World Wars were fought, and the decline in this century of the traditional institution of neutrality may be attributed, in the first place, to the fact that this system was designed principally to regulate the behavior of belligerents and non-participants in local wars, not in global conflicts.

To the foregoing must be added the further consideration that the wars of the twentieth century have been conducted with an intensity unknown to the nineteenth century. It has become abundantly clear that if there is always a latent conflict between belligerent and neutral interests, even in a local war conducted with restraint and for limited purposes, the conflict between these interests in a major war that is total both in conduct and purpose becomes almost irreconcilable. On the one hand, a primary aim of the belligerents in recent warfare at sea has been the complete shutting off of enemy trade, the destruction or capture of all imports to and exports from enemy territory, without regard to whether this trade is carried in enemy or neutral bottoms.[3] On the other hand, the effect of the traditional law—if strictly adhered to—was to make it exceedingly difficult for the measures a belligerent could bring to bear at sea against an enemy's economy to play more than a limited role in the final decision of the war.[4] Given

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[2] H. A. Smith, *op. cit.*, p. 75.

[3] And also without regard to whether such imports to and exports from enemy territory are immediately destined to or originating from neutral territory (see pp. 284–6).

[4] This antagonism in modern war between the restraints the traditional law imposes upon belligerents with respect to neutral trade and the importance of cutting off the enemy's sources of materials for waging war cannot be emphasized too strongly. And it is probably true that belligerent encroachment upon traditional neutral rights at sea must be attributed as much to this circumstance as to the relative strength of belligerent and neutral states. Even when confronted with considerable neutral strength—as belligerents were so confronted at least in the initial stages of both World Wars—belligerents were nevertheless willing to risk neutral ill will, and even possible neutral intervention, in order to deny an enemy the means for conducting war.

the transcendent importance of the economic factor in modern, and total, war the outcome—a steady belligerent encroachment upon traditional neutral rights—was hardly unexpected.[5]

In large measure, however, the marked predominance of belligerent interests that has so clearly characterized hostilities at sea since 1914 is the result of developments against which neutral protests have been—from a strictly legal point of view—all too frequently devoid of solid foundation. The nineteenth century balance between neutral and belligerent was reflected not only in law but also in the extra-legal restraints that had characterized belligerent behavior. Indeed, the importance of the restraints hitherto accepted by belligerents, even though not demanded by law, can only be fully appreciated with the advantage of hindsight. During the 1914 and 1939 wars many of the most effective measures taken by the Allied Powers against neutral trade consisted of so-called "interferences by sovereign right." In theory, the essential purpose of the varied belligerent measures falling within this category was to cut off trade with the enemy by threatening to deprive neutral traders and shippers of certain advantages hitherto enjoyed if found—or suspected of—aiding the enemy's cause. In practice, these measures went far toward reducing neutral trade to a position of near subservience to belligerent controls.[6]

Despite strong neutral protests, there were no established rules expressly forbidding belligerents to subject neutral commerce to strict control through the threat of interference by sovereign right.[7] For the most part, it would

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[5] Though, of course, this is not to justify such belligerent encroachment upon traditional neutral rights. But it does go far in accounting for the persistence and intensity of belligerent efforts to restrain neutral commerce with an enemy. Of this, the history of American neutrality during World War I must provide the classic example.

[6] The continuation or withdrawal of these advantages depended almost entirely upon the discretion of the belligerent, hence the characterization of these belligerent measures as "interference by sovereign right." A survey of World War I practice in this respect has been made by Edgar Turlington (*The World Wa Period* (Vol. III, *Neutrality, Its History, Economics and Law* 1936) pp. 67–99), who observes that there was "no system of law which a neutral could invoke against the action of any or all of the belligerents in prohibiting the exportation of specified goods from their territory; in refusing bunker supplies or ship's stores to neutral vessels; in forbidding their nationals to have commercial or financial dealings with the enemy or with neutral nationals suspected of trading with the enemy; or in requisitioning, subject to compensation, ships within their ports. Against such action the neutrals had no defense except their economic and potential military strength" (p. 67). And Turlington has concluded that: "On the whole, it seems safe to say that belligerent interferences by sovereign right were far more prejudicial to the economic life of the neutrals in the World War than were all the other forms of belligerent interference" (p. 151). British practice in World War II, in which the experience of the previous conflict was utilized and developed still further, has been described in detail by W. N. Medlicott, *Civil History of The Second World War: The Economic Blockade* (1952), Vol. I. For further remarks on World War II practice, see pp. 280–2, 312–5.

[7] It may be contended—and neutrals occasionally have so contended—that belligerents are prohibited from interfering with legitimate neutral intercourse with an enemy even though the forms such interference might take are not expressly forbidden by law. Obviously this

appear, neutral protests failed to acknowledge that a significant area of neutral-belligerent relations depended upon the character of hostilities and the restraints belligerents would feel compelled to accept, not as a matter of strict law but for reasons of expediency. And this implied, in turn, that belligerent interferences with neutral trade by sovereign right could be contested on the political and economic levels though only with difficulty on a legal basis.

Admittedly quite different considerations were raised by belligerent measures that clearly could be interpreted as departures from the established law. Here, neutral protests against what were alleged to be belligerent violations of traditional neutral rights at sea required belligerent justification. In part, belligerents responded to neutral protests by maintaining that legally controverted measures taken against neutral trade merely represented a reasonable adaptation of the traditional law to the novel circumstances in which hostilities were being conducted. In part, belligerents sought to justify measures whose legality could not otherwise be seriously contended for by the claim that they formed legitimate measures of reprisal taken in response to the unlawful behavior of an enemy.

The belligerent contention that novel circumstances may serve to justify novel belligerent measures no doubt suffered from the obvious criticism that may always be made of this plea. Neutrals had little trouble, therefore, in pointing out to belligerents that once recognition is accorded to the plea of novel circumstances it may readily be used as an instrument for the subversion of all established law. Nor did the belligerents strengthen their position by claiming the right to invoke the doctrine of novel circumstances in their own case, and—from the neutral's point of view—for their own interests, though invariably rejecting the same plea when invoked by an enemy. Thus the unreserved British condemnation of the contention that allegedly novel circumstances could ever serve to release the submarine from any of the traditionally accepted rules was seldom viewed as hindering support for the contention that changed conditions justified the diversion of neutral vessels into port for visit and search.[8] Admittedly, cogent considerations could be—and were—offered after 1914 in support of the practice of diversion. Yet there is little doubt that this practice was not permitted by the law as it stood at the outbreak of hostilities in 1914.[9]

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argument is not a particularly strong one. When seriously pressed by neutrals it has only succeeded in raising the broad question of the nature of the trade that might yet be regarded as legitimate, given the conditions in which the two World Wars were fought.

[8] The controversy over diversion formed only one among many novel measures taken by Great Britain, largely under the plea of novel circumstances. In part, the entire structure of the British "long-distance" blockade of Germany rested upon the argument that changed conditions required—and justified—alteration of the traditional rules governing blockade (see pp. 305–14).

[9] For a discussion of diversion of neutral vessels for visit and search from the point of view of the present law, see pp. 338–43.

It may, of course, be contended that novel practices are justified—even though constituting departures from established rules—if such practices do not prove destructive of the basic purposes of the law, but merely seek to adapt the latter to changing conditions. This argument takes on added force when it is once recognized that although the conditions attending naval warfare do change—and did change during World War I [10]—states have nearly always shown a pronounced reluctance to amend the law through express agreement in order that the rules defining the character and scope of belligerent restraints upon neutral commerce will bear a reasonable relation to altered conditions. Change, if it is to come at all, must come through what will necessarily appear as departures from established law. These departures are to be condemned—so the argument runs—only if they strike at the basic purposes of the law, as did the resort to unrestricted submarine warfare against neutral shipping. On the other hand, departures are not necessarily to be condemned if they conserve these basic purposes, as did the practice of requiring deviation for visit and search.

Even if it is assumed that this argument is well founded it remains true that the standard for judging belligerent behavior is no longer rigidly restricted to the rules of the positive law. Instead, belligerent behavior is to be judged—at least in part—by the degree to which it conforms to the law's essential purposes (to the "spirit of the law"). Unfortunately, however, whereas it may prove possible to reach a reasonably clear statement of the former it has always been next to impossible to state the latter with any degree of clarity. The traditional law regulating neutral-belligerent relations at sea can probably be understood only as the product of conflicting interests, informed—at best—by the spirit of compromise. And even if it were the case that the traditional law reflected some measure of identity of purpose as between neutral and belligerent, this was largely dissipated once hostilities broke out in 1914.[11]

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[10] Though this view has not always been accepted by writers. In one of his best known essays, John Bassett Moore endeavored to dispel the "illusion of novelty" put forth by belligerents during the war of 1914–18. *International Law and Some Current Illusions* (1924), pp. 1–39 (the essay is of the same title). A similar theme was taken up some years later by Professor Jessup, and applied to belligerent attempts during World War I to justify encroachment upon neutral rights. *Op. cit.*, pp. 59–85. Professor Jessup, in emphasizing the marked similarity between belligerent arguments in the Napoleonic Wars and in World War I, observed that the contention of "novel circumstances" has always formed the stock-in-trade of belligerents anxious to provide a justification for unlawful measures taken against neutral commerce.—No doubt it is true that belligerents are often tempted to use the plea of novel conditions in order to rid themselves of irksome restraints. But this does not prove that the plea is necessarily a belligerent hoax. The fact is that the conditions attending World War I did represent many elements of novelty when contrasted with the preceding wars of the nineteenth century.

[11] In reviewing the difficulties confronting Great Britain in 1939, of reconciling her plans for the conduct of "economic warfare" with the traditional law, W. N. Medlicott (*op. cit.*, pp. 4–5) has declared that "legal definition lagged behind economic circumstance." Neverthe-

There is a further difficulty to note at this point. The immediately preceding remarks have assumed that the controverted measures taken by belligerents—apart from reprisals—were readily acknowledged to be departures from the strict letter of the law. Normally, however, the novel measures resorted to by belligerents have been viewed by the latter as adaptations to changed conditions permitted by, and taken within, the established legal framework of neutral-belligerent relations. Here again the belligerent's claim could not always be dismissed as a patent subterfuge for the justification of unlawful action. In retrospect, it is all too easy to fall into the error of exaggerating the degree to which the maritime powers of the world had by 1914 settled upon the limits of the belligerent right to interfere with neutral trade. In fact, many points of controversy had remained unresolved throughout the preceding century. A case in point was the all important question of trade in contraband, a question that had long provided the controversial core of neutral-belligerent relations.[12]

In the years preceding the outbreak of World War I an attempt was made to resolve these various points of controversy. The 1909 Declaration of London had laid down a fairly definitive code governing neutral-belligerent relations at sea. But the Declaration was never subsequently ratified by any of the signatory Powers, and although most of the belligerents announced their initial willingness in 1914 to adhere to the provisions of that instrument, subject to certain reservations, it was not long before the

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less, he goes on to observe that: "The real difficulty lay in the fact that the 1914 war had created conditions for which the existing prize law was unprepared, and the point at issue between Great Britain and the neutrals was, or should have been, not whether the letter of the existing international law was being observed, but whether the new practices demanded by the changed conditions of economic warfare were in accordance with the spirit of international law as it concerned the relations of belligerents and neutrals. The inadequacy of the existing law becomes clear when it is remembered that in 1914, and indeed in 1939, there had been no generally ratified agreement [i. e., on the subject of neutral commerce] since the Declaration of Paris in 1856." But if Medlicott has reference to the nineteenth century "spirit of international law as it concerned the relations of belligerents and neutrals" it is very doubtful whether the "new practices demanded by the changed conditions of economic warfare" were in basic accord with this spirit. Of course, it may be argued instead that the decisive point was not the "spirit of international law" but rather the changed conditions which led belligerents to depart from this law—though the latter contention places the matter on a quite different basis. Medlicott has further observed that: "The whole approach to the problem of contraband at the Hague Conference was, indeed, governed by an assumption of fact which happened to be wrong, namely, that the control of contraband was powerless to accomplish its purpose and its only result was to harm neutral commerce." Yet, the "assumption of fact" referred to was based only in part upon technical considerations as to the capabilities of belligerents in interfering with neutral trade. In part, this "assumption of fact" had as its basis the expectation that for reasons of political expediency the traditional law would have to be observed—at least in broad outline.

[12] See pp. 263 ff.

Declaration was substantially abandoned by the belligerents.[13] During World War II the London Declaration ceased to have real significance as a standard for judging belligerent behavior.[14] In effect, then, many of the long-standing controversies over neutral rights at sea were never satisfactorily resolved. In both World Wars these controversies were to provide ample opportunity to belligerents for pursuing courses of action whose unlawful character could not be regarded as self-evident, despite neutral assertions to this effect.

To the difficulties resulting from the claim of changed conditions and the uncertainty characterizing a substantial portion of the traditional law must be added the seemingly insoluble problem of belligerent reprisals at sea. In the final analysis, a number of belligerent measures bearing upon neutral trade could scarcely be reconciled even with the most liberal interpretation of the traditional law. Belligerents therefore sought to justify these measures by the claim that they formed a necessary—and permitted—incidence of reprisal action taken in response to the unlawful behavior of an enemy. Elsewhere in this study the content of the belligerent reprisal measures during the two World Wars are reviewed and analyzed.[15] So also are the legal considerations—still largely obscure—raised by inter-bel-

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[13] The declaration was formally abandoned by the Allied Powers on July 7, 1916. In a memorandum addressed to neutral governments it was stated that the Declaration of London "could not stand the strain imposed by the test of rapidly changing conditions and tendencies which could not have been foreseen" and that the Allies would thereafter "confine themselves simply to applying the historic and admitted rules of the law of nations."

Long before this formal action was taken the several reservations made to the Declaration by the Allied Powers, plus the operation of reprisal orders, had reduced its force to a vanishing point.

[14] An English writer has recently noted that: "The most striking difference between 1914 and 1939 is the complete absence of the Declaration as a factor of any importance in modern prize law. . . ." S. W. D. Rowson, "Prize Law During the Second World War," p. 170. This is perhaps something of an overstatement. The German Prize Law Code of September 1939 substantially followed the Declaration, and the prize codes of a number of other states also followed it in part. The attitude of the United States—as a neutral—with respect to the Declaration had certainly changed, however. Whereas in 1914 this country had urged all of the belligerents to accept the Declaration of London as an authoritative code of conduct, a similar request was not forwarded to belligerents in 1939. And whereas during the period 1914–17 the United States depended very largely in its controversies with belligerents upon the provisions of the Declaration, hardly a reference was made to this instrument in American notes addressed to belligerents during the 1939 war. Nevertheless, the 1909 Declaration of London continues to be of some importance in an inquiry into the law regulating belligerent interference with neutral commerce, if only for the reason that it is the best indication of what the major naval powers were prepared to accept in the period preceding World War I. And even though the claim made in the preamble of the Declaration—that the rules contained therein "correspond in substance with the generally recognized principles of international law"—was not altogether justified, it is true that in most respects the instrument was in accord with previous practice and custom.

[15] See pp. 296–315.

ligerent reprisals which adversely affect neutral rights.[16] Here, it is sufficient to sketch in broad outline the controversy thus raised between belligerent and neutral and to observe that whatever the strictly legal merits of this controversy the overall effect in practice of belligerent reprisal measures has been to subvert the traditional rules regulating the scope of the measures permitted to belligerents as against neutral commerce.

The right of a belligerent to take reprisal measures against an enemy that persists in unlawful behavior is unquestioned. However, in naval warfare the problem of reprisals is almost always complicated by the presence of neutrals. As might be expected, the position of neutral states consistently has been one of denying that reprisals between belligerents can serve to justify any infringement of neutral rights. Such infringement, it has been contended, can follow only from a failure on the part of the neutral state to fulfill its duties. Belligerents, while not denying that reprisals taken in response to an enemy's misconduct should avoid—as far as possible—affecting neutral rights, have nevertheless refused to concede that consideration for neutral rights constitutes an absolute restriction upon belligerent measures of retaliation. This conflict of opinion between neutral and belligerent has been complicated further by the fact that normally the unlawful acts imputed to a belligerent by an enemy have adversely affected neutral rights as well. In this situation the injured belligerent has contended that if a neutral state will not or cannot take the necessary steps to compel the lawbreaker to observe neutral rights it may not complain if the other belligerent, in the course of retaliating upon an enemy, resorts to similar restrictions upon neutral rights. And here again the reply of the neutral has been to reject the belligerent's contention that the latter's obligation to respect neutral rights is dependent upon the effectiveness of the measures taken by the neutral to secure belligerent respect for these rights.

It will be readily apparent that if the belligerent's point of view is accepted the practical effect is to charge the neutral with the task of insuring that belligerents behave in conformity with the established law. In a major war the burden that is thereby imposed upon neutrals will usually

[16] See pp. 252–8. In these later comments the attempt will be made to show that—contrary to the contentions of belligerents and the opinions of numerous writers—it is a misnomer to categorize many of the belligerent measures in question as reprisals. This follows, in part, for the reason that the mere inability of the neutral to resist effectively the unlawful acts by one belligerent against its trade—a frequent cause for so-called belligerent "reprisal" orders—is not a violation of a neutral's duties. Hence, even if the other belligerent is permitted—in principle—to restrict neutral trade in a similar manner, such measures are not to be interpreted as reprisals directed against the neutral. But neither may they be interpreted as reprisals against the enemy that has initially resorted to unlawful measures against neutral trade, since in taking these measures the enemy has violated no legal *right* of the other belligerent. For convenience, however, these—and other—considerations may be neglected here, and the usual terminology may be followed.

prove out of all proportion to their resources, a conclusion clearly borne out by the experience of the two World Wars. Add to this the consideration that belligerents have been in frequent disagreement in their understanding of the rules regulating the scope of belligerent obligations, both with respect to the enemy as well as to the neutral. Given the first opportunity, therefore, it has proven relatively easy for one belligerent to charge an enemy with the violation of neutral rights at sea and, in the absence of an immediate cessation of the allegedly unlawful action through vigorous neutral response, to consider itself entitled to take appropriate measures of its own against neutral trade. The neutral, caught up in the belligerents' controversy, has generally been made the common victim of the belligerent difference of opinion.[17]

Nor can the essential function served by belligerent "reprisals" be overlooked. Clearly, this function has not been to preserve the traditional rights of neutrals. On the contrary, the evident intent of the belligerents has been to use reprisals as an instrument for changing this aspect of the traditional law of neutrality, and it was primarily for this reason that reprisal measures became a permanent feature of naval hostilities in the 1914 and 1939 wars.[18] Where belligerents have differed has not been in their resolve to use reprisals as a means for shutting off all neutral trade with an enemy but rather in the distinctive methods they have followed in pursuing this aim; and it is no less an error to refuse to recognize the effects this common belligerent goal has had upon the rules regulating neutral trade than it is to dismiss as without legal significance the varying methods belligerents have pursued in attempting the economic isolation of an enemy.[19]

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[17] It is equally evident, however, that if the neutral's position is endorsed the law-abiding belligerent is placed at a grave disadvantage. Nor can this disadvantage be characterized merely as one which would deprive the belligerent of striking at an offending enemy "through the side" of the neutral. It has already been noted that in many situations the unlawful acts of an enemy—affecting belligerent and neutral alike—can only be effectively countered by acts which equally bear upon both the offender and the neutral. Apart from strictly legal considerations, there is much to be said for both the positions of belligerents and neutral. And it is largely for this reason that the entire problem of reprisals at sea has appeared to many as an insoluble dilemma.

[18] It is this consideration, above all others, that has rendered belligerent reprisal measures subject to severe criticisms. The rapidity with which belligerents resorted to reprisal orders of indefinite duration allowed hardly any conclusion other than that they welcomed an enemy's violation—or alleged violation—of law in order to resort to reprisal measures. A revealing discussion of the function served by reprisals has been presented by Medlicott (*op. cit.*, pp. 112 ff.) in tracing the origins of the British Reprisals Order in Council of November 27, 1939, the purpose of which was to shut off all enemy exports (see p. 312).

[19] For those observers who insist upon viewing the experience of World Wars I and II as little more than one long demonstration of "belligerent lawlessness" at sea, the significance of the various means by which belligerents sought to alter traditional neutral rights is bound to prove very limited. Thus, Thomas Baty (*International Law in Twilight* (1954), p. 105) can

## B. THE ABANDONMENT OF TRADITIONAL NEUTRALITY BY NON-PARTICIPANTS: THE EMERGENCE OF "NON-BELLIGERENCY"

The decline of neutrality cannot be attributed simply to the fact of belligerent encroachment upon traditional neutral rights. The neutral states as well have played an important role in effecting this decline. It is a commonplace that the neutrality of the nineteenth century was based very largely upon an attitude of indifference on the part of non-participants to the final outcome of a given conflict.[20] Yet, the conclusion frequently drawn today from this former indifference of non-participants—that the traditional institution of neutrality reflected the absence of solidarity and "community feeling" [21]—would appear to be almost the reverse of the

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dismiss the question of belligerent methods by declaring that at present neutrals are "ground between the millstones of the navally strong and weak belligerents—between the perverted jurisprudence of the former and the explosives of the latter." Yet it is disturbing to find that writers who do not share this evaluation of the two World Wars nevertheless manifest on occasion a similar lack of sensitivity to the significance of—and differences between—belligerent methods.—No doubt it is true that the British "long-distance blockade" resembled the German unrestricted submarine warfare in the resolve to isolate the enemy economically. It is equally true that both systems represented departures, though in varying degree, from the letter of the traditional law. But the British system clearly did not resemble the German system in the methods pursued against neutral trade, and the differences in this respect as between the two systems must receive prominent emphasis. The law of neutrality at sea is, after all, largely a matter of method. Nor is it enough to say that had Germany possessed adequate surface naval power she would have pursued, in all probability, the same methods as Great Britain. This may well be granted, though the admission does not—and cannot—diminish the importance of the fact that different methods were in fact followed.

[20] It should perhaps be made clear that this attitude of indifference on the part of non-participants constituted a *political fact*, and ought not to be considered as descriptive of a *legal obligation* imposed upon neutrals by the traditional law. It has never been required of neutral states that they be "indifferent" to the outcome of a war. In later pages it will be noted that the duty to observe a strict impartiality toward the belligerents is not to be understood as obligating neutral states to entertain an attitude of indifference toward the participants and toward the ultimate outcome of hostilities (see pp. 204–5). At the same time, it would be futile to deny that—certain exceptional cases apart—an attitude of indifference on the part of non-participants did form an important part of the political sub-stratum upon which the traditional legal institution of neutrality—marked by the principle of strict impartiality—could develop and flourish. In this sense it is true that the traditional or classic neutrality of the nineteenth century was based upon an attitude of indifference on the part of non-participants, and that with the disappearance of this political fact in the twentieth century the traditional legal institution of neutrality has become increasingly difficult to maintain.

[21] See, for example, Quincy Wright, "The Present Status of Neutrality," *A. J. I. L.*, 34 (1940), pp. 407–15 and "Repeal of the Neutrality Act," *A. J. I. L.*, 36 (1942), pp. 15–24. And Lalive (*op. cit.*, p. 73) points out that neutrality is increasingly viewed as "an obstacle to solidarity, to international organization, and to the formation of a society founded on respect for, and enforcement of, law." Nevertheless, these views form a clear reversal of the convictions of an earlier period. Thomas Baty (*op. cit.*, pp. 107, 124) has noted that: "One of the most deeply seated convictions of the Victorian age was that belligerents must not be allowed to make their

truth. If anything, the strength of neutrality during the nineteenth century may be taken as an indication of solidarity, not its absence. Neutrality, it has been rightly observed, "is possible only when there is sufficient community of interest between the belligerents and between the belligerents and the neutrals to cause the latter not to care too greatly which side wins. Neutrality therefore depends upon the existence of enough community to make the outcome of a war not a matter of alarming concern to the way of life of non-participating States. Where the community schism runs deep, neutrality becomes more and more difficult to maintain."[22]

It is at least clear that given the circumstances in which the two World Wars were fought non-participants have been increasingly drawn to the pursuit of discriminatory policies and to the abandonment of the strict impartiality demanded by the traditional law.[23] Thus one of the marked developments of the second World War was the emergence of so-called "non-belligerency," a term used to indicate the position of states that refrained from active participation in hostilities while at the same time abandoning the duties heretofore imposed upon non-participants.[24] When judged by the standards established for non-participants by the traditional law of neutrality, the legal significance of "non-belligerency" does not permit of much doubt; insofar as it implied the abandonment by non-participants of the strict impartiality demanded by the traditional law it served to give rise to the belligerent right of reprisal.[25] When judged from a still broader

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private quarrels an excuse for disturbing the rest of the world. War might not be obsolete, but the belligerent must not make himself a nuisance. . . . The outstanding feature of our day is that whilst in the nineteenth century belligerents were considered a public nuisance, it is now the neutral who is the nuisance." Certainly, the well-known opinion of John Westlake, written in the pre-World War I period, that "neutrality is not morally justifiable unless intervention in the war is unlikely to promote justice, or could do so only at a ruinous cost to the neutral" (*International Law*, Vol. II, p. 162) may hardly be said to have commanded widespread agreement.

[22] *U. S. Naval War College, International Law Situations, 1939*, p. 54.

[23] The short-lived policy of "renunciatory" neutrality pursued by the United States for a period preceding and following the outbreak of war in 1939 forms an exception which—in view of later events—only seems to throw in bolder relief the strength of the forces that have operated in the contrary direction. From a policy in which traditional neutral rights at sea were renounced in favor of a self-imposed isolation that went far beyond the requirements of existing law, the United States rapidly moved in 1940 to a policy of discrimination and to an open abandonment of neutral duties that finds few parallels in the modern history of neutrality. Elsewhere in this study the principal features of United States' neutrality legislation during this period are briefly reviewed (see, in particular, p. 210(n)).

[24] For a discussion of the legal issues raised by "non-belligerency" in World War II, see pp. 197–9.

[25] Unless, of course, such departure from impartiality had as its basis a treaty permitting the taking of discriminatory measures against a state unlawfully resorting to war (see pp. 166 ff.).

perspective, however, so-called "non-belligerency" must be seen as a further manifestation of the recent decline of neutrality.[26]

## C. CONCLUSIONS

In view of the experience of the two World Wars the suggestion has been made that in evaluating the prospects for observance of the traditional law regulating neutral-belligerent relations in future conflicts, it may be useful—as a practical measure—to distinguish between great and small wars.[27] In great wars, involving most of the major states and fought with the intensity that characterized the two World Wars, the expectation that belligerents will closely adhere to the traditional law in their behavior toward non-participants necessarily must prove remote. Nor is it to be expected that the non-participants in such wars will prove either able or willing to maintain a strict impartiality toward the belligerents. In a limited war, however, it is considered altogether possible that the belligerents may be required, of necessity, to refrain from subjecting non-participants to what has often resembled discretionary treatment. In turn, the non-participants may consider it in their interests to pursue a policy of strict impartiality.[28]

The evident merit of this suggestion is to be found in the clear recognition it accords to the importance of the relative strength of belligerents and neutrals in estimating the future effectiveness of a legal regime that has served to regulate neutral-belligerent relations on the basis of an approximate equality of rights. But even if the assumption of a return to limited war is granted it is by no means certain that many of the rules that have heretofore made up the traditional system will be given effective application. Although the contemporary decline of the traditional institution of neutrality must be attributed in large measure to an imbalance in the relative power of belligerents and neutrals it would surely be a serious error to

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[26] Thus it is from this broader perspective that Julius Stone (*op. cit.*, p. 405) writes: "Can this American (as well as the Italian non-belligerency on the other side) be reduced merely to violation of the traditional rules of neutrality, which Germany and the Allies respectively were not prepared to treat as a *casus belli?* Only history can finally show whether these events can be dismissed as a series of mere neutral infractions of neutrality, tolerated by the injured belligerents."

[27] "It now seems reasonable to expect that practice in future may draw a distinction between great wars and small, or at least between general wars involving the greater part of the world and limited wars in which only two or not more than a few states are engaged. There are indeed some signs that this distinction is already beginning to be drawn." H. A. Smith, *op. cit.*, p. 75.

[28] It is, from this latter point of view, difficult to envisage two or three of the smaller states engaged in war successfully imposing "rationing" policies upon Great Britain (or, for that matter, upon any of the major powers). If anything, recent experience would appear to indicate that the principal difficulty would be to obtain the endorsement of a policy of strict impartiality on the part of the major non-participants.

neglect the importance of other factors which have contributed to the present situation. Perhaps the most significant among these other factors has been the gradual invalidation of an assumption fundamental to almost the whole of the traditional law of neutrality—that a clear distinction could be drawn between the public and private spheres and that the neutral state would not enter into economic activities long considered outside its proper functions. It is difficult to discern what possible effect—if indeed there would be any effect—limited wars could have upon this growing obsolescence of rules dependent for their operation upon the possibility of preserving a clear distinction between neutral state and neutral trader.[29]

In any event, it must be observed that whatever the merit of the above suggestion it can have only a limited relevance to an inquiry into the present status of the traditional law governing neutral-belligerent relations. An analysis that is to constitute something more than speculation over future possibilities must concentrate instead upon an evaluation of the actual materials at hand, that is upon an examination of the recent behavior of states in applying—or failing to apply—once valid rules. In a word, attention must be directed to the experience of the two World Wars, however difficult it may be to assess this experience in terms of its effect upon the traditional law.

In performing this task, considerations raised earlier concerning the relationship between the validity and the effectiveness of rules may be considered applicable.[30] Where, for example, belligerents have effectively asserted new forms of control over neutral trade on the high seas, and neutrals have acquiesced in such measures, the traditional law may well be regarded as modified. Less certain are those belligerent measures which, though perhaps effectively exercised, drew repeated protests from neutral states and which were largely justified by the belligerent claim to the right of reprisal against allegedly unlawful acts of an enemy. In these latter circumstances—and they formed the more numerous and more important

[29] See pp. 209–18 for a more detailed consideration of the present status of the distinction between neutral state and neutral trader, and the effect the dimming of this distinction has had upon the traditional law. It is only right to add that in making the suggestion that future practice may distinguish between great and small wars Smith draws careful attention to the profound changes that have occurred in the activities undertaken by the modern state and the impact of these changes upon the traditional law. Indeed, most recent writers have shown an acute awareness of the problem and of the difficulties it poses.

[30] See pp. 28–32.

controversies between neutral and belligerent—any conclusions drawn from recent conflicts must necessarily prove tentative.[31]

[31] It is only to be expected that in performing this task the opinions of writers will vary—at times considerably. For example, one well-qualified observer has recently stated: "It is now clear that in view of the events of the two World Wars, the Hague Conventions which regulate sea warfare have actually shared the fate of the Declaration of London. This is due as much to abuse on the part of the belligerents—particularly Germany—as to the inherent and inevitable weakness of a series of conventions whose intention was to protect the rights of neutrals rather than those of belligerents." S. W. D. Rowson, *op. cit.*, p. 170. While recognizing the necessary relationship that must obtain between the effectiveness and the binding quality of law this opinion is regarded as extreme. It hardly seems warranted to state that Hague XIII, Concerning the Rights and Duties of Neutral Powers in Maritime War, "has shared the fate of the Declaration of London." The Declaration of London, which sought to regulate the problem of neutral trade, was never ratified by the signatory states, formed from the start the object of endless controversy, and was openly abandoned by many of the belligerents in the opening stages of the first World War. With limited exceptions, the provisions of Hague XIII received, in both wars, the adherence of both neutrals and belligerents. It may also be noted that at the time of their conclusion the Hague Conventions regulating sea warfare—insofar as they departed from nineteenth century practice—were more commonly regarded as a concession to belligerent—rather than to neutral—pretensions.