

Ignacio de la Rasilla del Moral, "In the General Interest of Peace" – British International Lawyers and the Spanish Civil War 17 *Journal of the History of International Law* (2015, Forthcoming) ©

# "In the General Interest of Peace" – British International Lawyers and the Spanish Civil War

Ignacio de la Rasilla del Moral 

"The whole course of our policy of non-intervention – which has effectively, as we know, worked in an entirely one-sided manner – has been putting a premium on Franco's victory"

*Sir Robert Vansittart, Chief Diplomatic Adviser to the Foreign Office  
PRO FO371724115, W973, memo by Sir Robert Vansittart, 16 January 1939*

## 1. Introduction

The humanitarian carnage of the Spanish Civil War, which left 500,000 to 600,000 dead, 300,000 to 500,000 exiled,<sup>1</sup> and hundreds of thousands more suffering repression in jails and forced labour,<sup>2</sup> did not take place in an international legal vacuum. Far from it, we remember the Spanish Civil War as a "*tertium genus*"<sup>3</sup> in the history of the relationship between international law and civil strife on account of an "anomalous"<sup>4</sup> international legal innovation: a collective non-intervention pact. This spawned a series of technical debates between those who underwrote its "international legality" and those who denounced it as a "legal monstrosity" that fatally impaired the right of a democratically elected government to respond to a military *putsch*. The secular and democratic Spanish Constitution of 1931<sup>5</sup> was the first of the many victims of a non-intervention agreement

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© Lecturer in Law, Brunel Law School (Brunel University London). The author served as Visiting Research Fellow at the Lauterpacht Research Centre for International Law of the University of Cambridge (spring, 2014) and at the Max Planck Institute for European Legal History (summer, 2014) as grantee of a British Academy/Leverhulme Small Research Grant R33002 and the Max Planck Society. The author is grateful to David F. Barnes for English editing. All translations from Spanish correspond to the author except if otherwise indicated. The usual caveat applies.

<sup>1</sup> See e.g. Henry Kamen, *The Disinherited. Exile and the Making of Spanish Culture (1492–1975)*, Harper Collins, New York (2007).

<sup>2</sup> See Paul Preston, *The politics of Revenge: Fascism and the Military in Twentieth-Century Spain*, Routledge, London (1990)

<sup>3</sup> Antonio Cassese, "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts" in Cassese, A. (ed.) *Current Problems of International Law. Essays on U.N. Law and on the Law of Armed Conflict*. Dott.A. Giuffrè editore, Milano (1975)

<sup>4</sup> See, among others, e.g. Herbert A. Smith "Some Problems of the Spanish Civil War" *British Yearbook International Law* 18 (1937) 17-31

<sup>5</sup> See e.g. Manley O. Hudson "The Spanish Constitution of 1931" 26 *American Journal of International Law* 3 (1932) pp. 579-582. See also Yolanda Gamarra, "Los lenguajes del Derecho internacional en la

that proved ineffectual in preventing a massively deleterious foreign military intervention in a beleaguered Spain between 1936 and 1939. The Republican Constitution was fully aligned to the spirit of pacifism and legal internationalism of the League of Nations.<sup>6</sup> Its demise was followed by several decades of intellectual involution to an imagery of anti-liberal, nationalist<sup>7</sup> and ultra-Catholic references in Spanish political and cultural life and, by extension, in Spanish international legal thought.<sup>8</sup>

Recent years have witnessed a new peak in scholarly attention to the legal-political evolution of the almost 40-year-long dictatorial regime of General Franco and of the Spanish Civil War.<sup>9</sup> This new wave of historical research<sup>10</sup> has been partly elicited by Judge B. Garzón's<sup>11</sup> attempt to bring to bear the imprescriptibility of "crimes against humanity"<sup>12</sup> against the letter of the pre-constitutional 1977 Amnesty Law.<sup>13</sup> In the wake

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Constitucion de 1931" in Gamarra, Y. & De la Rasilla, I. (eds.) *Historia del pensamiento internacionalista español del siglo XX*, Thompson Reuters Aranzadi, Madrid (2012) Article 6 of the Spanish Republican Constitution of 1931 stated in the wake of the Kellogg-Briand Pact, Spain's "renunciation to war as an instrument of national policy", and art. 7 established that "The Spanish state will obey the universal normal of international law incorporating them into its positive law".

<sup>6</sup> Article 77 of the Spanish Constitution of 1931 went "so far as to prohibit the President from signing a declaration of war "except subject to the conditions prescribed in the Covenant of the League of Nations" and after the exhaustion of all peaceful means of procedure", See Francis O. Wilcox, "The League of Nations and the Spanish Civil War", 198 *Annals of the American Academy of Political and Social Science*, (1938), pp. 65-72 at 65

<sup>7</sup> See Agustin José Menendez, "From Republicanism to Fascist Ideology under the Early Franquismo" in Joerges, Christian and Ghaleigh, Navraj Singh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, Hart Publishers, Oxford (2003) 337–360.

<sup>8</sup> See Ignacio de la Rasilla del Moral, "The Fascist Mimesis of Spanish International Law and its Vitorian Aftermath, 1939-1953", *The Journal of the History of International Law* 14 (2012) 207-236

<sup>9</sup> This was once known by liberals and those on the Left as the "last great cause". A term popularized by Stanley Weintraub, *The Last Great Cause. The Intellectuals and the Spanish Civil War*, Weybright and Yalley, New York (1968)

<sup>10</sup> See Julian Casanova, "Pasado y presente de la Guerra civil española", *Historia Social* 60 (2008) 113-127.

<sup>11</sup> Baltazar Garzón, an early champion of universal jurisdiction, was accused of gross judicial misconduct in his application of the Historical Memory, See Decision (Auto) of 16 October 2008.

<sup>12</sup> The Spanish 1977 Amnesty Law, which sealed off the reconciliation of "las dos Españas" ("the two Spains") from the haunting spectre of a past that lingered heavily freighted with emotional and political baggage after Franco's death, prevented, however, Spanish courts for investigating "mass killings and mass illegal detentions with disappearance" committed in the context of a systematic attack against civilians, which occurred in Spain between 17 July 1936 and 31 December 1951. See Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura. BOE-A-2007-22296. The Spanish Historical Memory Act has contributed to refashion the Spanish case as one of "late transitional justice". Josep M. Tamarit Sumalla, *Historical Memory and Criminal Justice in Spain. A Case of Late Transitional Justice*, Intersentia, Cambridge (2013)

<sup>13</sup> See Tamarit Sumalla, *op.cit.* 118-123.

of the historical Memory Act of late 2007, monumental volumes of new research have detailed the magnitude of what P. Preston baptized "*the Spanish Holocaust*."<sup>14</sup> Despite the importance of the Spanish Civil War in the history and legal memory of Spain, and as a dress rehearsal for the horrors of the Second World War, historians of international law remain latecomers to its study.<sup>15</sup> This dearth of attention<sup>16</sup> is even more paradoxical given that the Spanish Civil War marked the death knell of the system of international relations born with the Peace of Versailles. Despite the time that has elapsed since Franco's last war dispatch, the numerous international legal facets of this "European civil war in miniature"<sup>17</sup> may still provide insights for the international legal analysis of modern civil wars. While brief scattered references to the multiplicity of issues raised by the Spanish Civil War can be found in most disparate areas of international law, scholarship still tends to neglect the fact that that it "abounded in anomalous situations".<sup>18</sup>

The fundamental international legal event which sealed the dismal fate of the Second Spanish Republic and led to a variety of "anomalous" international legal situations took place at the very outset of the Spanish Civil War. Aware of the logistical support Nazi Germany and Fascist Italy had provided the anti-Republican forces with, in the summer of 1936 the British and French governments decided to champion a collective international non-intervention agreement. The key questions that arise from the Spanish Civil War concern the legality of such an international non-intervention agreement and

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<sup>14</sup> Paul Preston, *The Spanish Holocaust. Inquisition and Extermination in Twentieth Century Spain*, Harper Press, London (2012).

<sup>15</sup> See, in English, as one of the few substantial exceptions among international lawyers in the last twenty years, Nathaniel Berman "Between "Alliance" and "Localization": Nationalism and the New Oscillationism" 26 *New York University Journal of International Law and Politics*. 449 (1993-1994). For an earlier substantial analysis, Ann Van Wynen Thomas and A. J. Thomas, Jr. "International legal Aspects of the Civil War in Spain, 1936-39" in R Falk (ed.) *The International Law of Civil War* (1971) 111-178

<sup>16</sup> Berman points to the fact that "the legal historiography of the Spanish Civil War, perhaps even more than that of the League as a whole, has suffered due to the fact that the war and the international response to it came to be seen as merely the opening act of World War II". Berman op.cit. 485. One would add that the lack of serious historical work by Spanish international lawyers themselves might have much to do with the fact that, not just the Spanish Civil War, but also the study of the history of international law in Spain during the 19th and 20th centuries still remains almost in its infancy. See e.g. Ignacio de la Rasilla del Moral, "Beyond the Spanish Classics - The Ephemeral Awakening of the History of International Law in Pre-Democratic Spain", 7 *Monde(s) Histoires, Relations*(2015) pp. 137-157

<sup>17</sup> Enrique Moradiellos, "El acuerdo inalcanzable: las potencias democráticas occidentales y la Unión Soviética ante la Guerra civil Española" S. Balfour & P. Preston, *España y las grandes potencias en el siglo XX*, Editorial Crítica, Barcelona (2002) 70-97, at 70.

<sup>18</sup> See Lawrence Preuss "State Immunity and the Requisition of Ships during the Spanish Civil War: I. Before the British Courts" *The American Journal of International Law*, 35. 2 (1941), 263-281, 281

its accompanying arms embargo.<sup>19</sup> The state of customary international law and treaty law regarding the duties of third states on the occurrence of civil wars justified the expectation of the Spanish government that it could maintain its commercial relations unchanged. The international doctrine of recognition of belligerency was also affected by the establishment of the anomalous pact of "*de facto*" collective neutrality that cunningly neutralized the League's system of collective security. Nevertheless, the non-intervention agreement, which aimed to localise the Spanish Civil War, triggered other related international legal problems that caused much ink to flow. These included the uncertain international legal effects of *de iure* and/or *de facto* recognition by third states of the insurgent government – a question which had repercussions for matters of jurisdictional immunity arising before the courts of third states. Meanwhile, Britain had domestic legal deterrents designed to prevent national volunteers from enlisting in foreign civil conflicts – an issue that still evokes contemporary controversies between neutral official policies and acts of transnational solidarity in foreign civil strife.<sup>20</sup>

The Spanish Civil War is the 20th century event which is most often cited as having single-handedly prompted more historical research. However, the study of the particular contribution of interwar British international lawyers to the Spanish Civil War remains a neglected area of study for historians and international lawyers alike.<sup>21</sup> This is perplexing, given that the exact concordance of the *Realpolitik* concerns of the British Foreign Office

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<sup>19</sup> See e.g. Normal P. Padelford, "The International Non-Intervention Agreement and the Spanish Civil War" *American Journal of International Law* 31 (1937) 578-603

<sup>20</sup> . The object of this study is to throw further light on the role interwar British international lawyers played in the debates surrounding to the Spanish civil War. Beyond the scope of this work are left a number of other aspects of possible historical international legal interest emerged from the Spanish Civil War which are common to other civil wars. For an analysis of a number of other issues including e.g. the study of the means of diplomatic dispute settlement that were attempted in order to end the conflict; the international legal regime that was applied to asylum seekers and refugees or concern; the principles and rules of international humanitarian law by then in vigour were applied or what peace-keeping role specialized organisms such as the international Red Cross played in the conflict: or, after the war, what legal regime was applied to the government in exile, what treatment did the United Nations retrospectively apply to the Spanish Civil War or to what developments of the international legal order – such as, for instance, reparations for crimes against humanity or responsibility for historical violations of human rights by foreign intervening powers - may the Spanish civil war be seen to have contributed se e.g. in Spanish, but only very recently, Carlos Fernandez Liesa, *La Guerra civil española y el orden jurídico internacional*, Thompson Reuters Aranzadi, Madrid, (2014)

<sup>21</sup> New research in the history of international law may, indeed, benefit from taking S. Neff's remark seriously: "The role of international lawyers in the various wars of history is another of the many subjects that still awaits a detailed treatment". See Stephen Neff, *Justice Among Nations. A History of International Law*, Harvard University Press, (2014) 339.

and the strategic goals of the Franco nationalist camp still puzzles historians.<sup>22</sup> Much has slipped unnoticed by international law historians as a result of a "tendency to view the official British response to the contending sides in the civil war as almost exclusively determined by a semi-disinterested diplomatic balancing act designed to protect the fragile peace".<sup>23</sup> However, it is historically untenable to identify the single dominant factor behind the British-led policy of localization of the Spanish Civil War as being the preservation of European peace against the danger of escalation of the Spanish Civil War into a full-scale European war. Instead, contemporary historians tend to agree with S. P. Mackenzie that "the long-suspected true nature of Britain's non-intervention policy has been confirmed in the detailed studies that have emerged since the relevant government files were first opened in the 1970s".<sup>24</sup> Many international lawyers, in their turn, have not hesitated to describe this early milestone in the British policy of appeasement against the irredentism of fascist powers as one that "insofar as traditional international law is concerned was a bastard thing with *Alice in Wonderland* overtones".<sup>25</sup>

The first section of this study examines the establishment of the international non-intervention agreement and of the London Committee and their combined neutralizing effect on the League of Nations in the light of a series of underlying factors, including the European powers' leaning towards neutrality in the late interwar period. The second section reviews the core issues and different doctrinal positions present in the international legal debates triggered by the Spanish Civil War. It pays particular attention to the contributions of the first two British judges at the International Court of Justice, A. D. McNair (1946-1955) and H. Lauterpacht (1955-1960) to these debates. Their writings can be seen as respectively representative of the two stages through which British international lawyers went in the international legal debates on the Spanish Civil War. Up

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<sup>22</sup> See e.g. Tom Buchanan, *Britain and the Spanish Civil War*, Cambridge University Press, Cambridge, (1997).

<sup>23</sup> Helen Graham, "Spain and Europe: the View from the Periphery" *The Historical Journal*, (1992) 969-983, 971. According to this social historian, this traditional tendency was a consequence of the legacy of "Western cold war ideology" which had "the capacity to impair historical understanding because it presents social realities as if they were static phenomena - to be read backwards in the light of the political status quo". *Ibid.*, 978

<sup>24</sup> S. P. Mackenzie, "The Foreign Enlistment Act and the Spanish Civil War, 1936-1939" *Twentieth Century British History* 10 (1999) 52-66, 53

<sup>25</sup> A Van Wynen Thomas and A J Thomas, Jr., "Non Intervention and the Spanish Civil War" *American Society of International Law Proceedings* (1967), 1-6, 5.

to early 1938, British International lawyers adopted a characteristically apologetic approach to the policy undertaken by the British Government on the advice of the British Foreign Office. The second stage, from early 1938 to the end of the Spanish Civil War in March 1939, was in turn informed by a "practitioner's approach" to the analysis of the domestic cases brought before the British courts as a result of the hostilities. The article concludes with a brief analysis of the case for British "benevolent neutrality to the Nationalists"<sup>26</sup> in the Spanish Civil War, reviewing the underlying motives which historians have highlighted as lurking behind the British-led non-intervention policy in the Spanish Civil War.

## 1 Setting the Stage for the Localization of the Spanish Civil War and the Turn to Neutrality

For almost 40 years, the Spanish Phalange's propaganda celebrated July 18<sup>th</sup> 1936 as the day of the "*glorioso alzamiento nacional*" ("glorious national uprising"). On that day, Francisco Franco, the youngest European general of his day, who had already distinguished himself as a bold and cold-blooded officer in the Spanish colonial campaigns in North Africa,<sup>27</sup> joined a military uprising against the Second Spanish Republic. On 15<sup>th</sup> August 1936, less than a month after Franco launched his anti-Republican "national crusade in defence of the Western Christian civilization and against Communist barbarism", Britain and France instituted with an exchange of notes an international agreement of non-intervention in Spain.<sup>28</sup> The French *Front Populaire* government, led by Leon Blum, had responded favourably to the Spanish Republic's requests for importation of war material on 21<sup>st</sup> July, but it provisionally halted exports on 27<sup>th</sup> July.<sup>29</sup> The non-intervention agreement of 15<sup>th</sup> August 1936 enshrined a French neutralist readjustment under the influence of both domestic political factors and British diplomatic

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<sup>26</sup> Enrique Moradiellos, *Neutralidad benevola*. Ed. Pentalfa, Oviedo (1990)

<sup>27</sup> On General Francisco Franco, see e.g. P. Preston, *Franco. A Bibliography*, Harper Press, London (1995)

<sup>28</sup> See e.g. Fernando Schwartz, F., *La internacionalización de la guerra civil española*, Ariel, Barcelona (1971)

<sup>29</sup> The literature on the French "change of mind" is very extensive e.g. M. D. Gallagher, "Leon Blum and the Spanish Civil War" *Journal of Contemporary History*, Vol. 6, No. 3 (1971), pp. 56-64.

pressure.<sup>30</sup> It was a hard blow for the besieged Spanish Republic. Despite the logistical aid the insurgents had received from Hitler's Germany on 26<sup>th</sup> July<sup>31</sup> and Mussolini's Italy<sup>32</sup> soon afterwards, the military insurrection had fallen short of meeting its objectives.

The Franco-British exchange of notes made "both countries' declarations contingent upon the adherence of the other government plus the governments of Germany, Italy, the Soviet Union and Portugal".<sup>33</sup> Twenty-seven other governments soon jumped on the Anglo-French bandwagon and made similar declarations to those contained in the agreement's preamble, whereby the original parties declared their resolution to "abstain rigorously from all interference" (*de toute ingérence*, direct or indirect) in the internal affairs of Spain.<sup>34</sup> The parties also subscribed to the agreement's "three declarations of policy", aiming at the immediate implementation of a collective embargo on the sale of weapons to Spain, which extended to contracts that were already in course of execution with the Republican government. Despite the vaunted use of the term "international agreement", J. Edwards has recalled that "no agreement was legally binding on all"<sup>35</sup> the state parties. Indeed, several state parties did not sign the preamble of the non-intervention agreement and some of them appended interpretations, qualifications, or reservations to its provisions. In view of this, already back in 1937 N.P. Padelford remarked that the non-intervention agreement was "merely a concert of policy" whose "fulfilment depended entirely upon the initiative of each state".<sup>36</sup>

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<sup>30</sup> See W.N. Medlicott and D. Dakin (Eds.) *Documents on British Foreign Policy, 1919-1939 Second Series Volume XVII, Western Pact Negotiations: Outbreak of Spanish Civil War June 1936 – January 1937* (1979)

<sup>31</sup> For an account see e.g. M. Jean-François Berdah, "L'Allemagne et le Royaume-Uni face à la question espagnole: reconnaissance de facto ou reconnaissance de jure? (1936- 1939)" *Mélanges de la Casa de Velázquez* 29 (1993) 203-241. See also extended historical archival references in Enrique Moradiellos, "El mundo ante el avispero español: intervención y no intervención extranjera en la Guerra Civil" in Santos Julia (coord.) *República y Guerra en España (1931-1939)*, Espasa Calpe, 2006, pp. 305-310

<sup>32</sup> On the decisive role played by the early intervention of Germany, see e.g. Jose Luis Neila, *España y el Mediterraneo en el siglo XX*, Silex, Madrid (2011) 220.

<sup>33</sup> See Padelford, *op.cit.* 580.

<sup>34</sup> *International Committee for the Application of the Agreement regarding Non-Intervention in Spain, The Legislative and Other Measures Taken by the Participating Governments to Give Effect to the Agreement Regarding Non-intervention in Spain, and by the Swiss Government to Prohibit the Export of Arms and War Material from Switzerland to Spain*, HM Stationery Office, London (1936)

<sup>35</sup> Jill Edwards, *The British Government and the Spanish Civil War*, MacMillan Press, London (1979) 41

<sup>36</sup> See Padelford, *op.cit.* 580.

The Non-Intervention Committee, which was composed of diplomatic representatives of the *non-intervening* powers, was formed under the aegis of the British Foreign Office in London on 9th September 1936. Approved on the 12<sup>th</sup> November 1936, the first control plan of the London Committee established a system to control the entry of weapons and war materials into Spain. It was extended in mid-January 1937 to cover recruitment in, transit through, and departure from the territory of the signatories of persons of non-Spanish nationality intending to proceed to Spain for the purpose of taking part in the war. This supplementary measure was included at the request of the British government, which under a revived Foreign Enlistment Act of 1870 had made it illegal to recruit or volunteer for the armed forces of either side upon liability "on conviction to imprisonment up to two years, or to a fine or to both a fine and imprisonment".<sup>37</sup> The second control plan of the London Committee was approved on 8<sup>th</sup> March and entered in force on 20<sup>th</sup> April 1937. This provided for control of the land borders and a maritime control with neutral observers posted to Spanish ports and borders and the assignation of patrol zones to the United Kingdom, France, Germany and Italy. Its application led to grave maritime incidents and, eventually, to the withdrawal of Italy and Germany from the non-intervention agreement. Despite the Committee being seen as "a mutually consented institutionalized farce"<sup>38</sup> throughout 1937, British diplomacy used its influence to convince both countries to return to it in order to safeguard the formal maintenance of the agreement. Indeed, the control plans had become toothless in terms of both policing and enforcement.<sup>39</sup> New measures, such as the setting up of an observation scheme and a series of bodies and further measures to manage it, were added to them in late 1937.<sup>40</sup> These measures were included in the "Nyon Agreement"<sup>41</sup> signed off at a conference of Mediterranean and Black Sea states which had been convened to set up a system of vigilance of the commercial shipping routes in the Mediterranean Sea in order to minimize the effects of Italian submarine warfare.

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<sup>37</sup> See PRO, FO 371/21319, W906/7/41) Foreign Enlistment Act (1870), Bill (228) II. 61, Bill to Prevent Enlisting or Engagement of H.M. Subjects to Serve in Foreign Service, 1870)

<sup>38</sup> Moradiellos op.cit., 90

<sup>39</sup> Padeldorf, op.cit. 587

<sup>40</sup> Id., 591-592.

<sup>41</sup> Signatories were the countries of Bulgaria, Egypt, France, Greece, Romania, Turkey, the United Kingdom, the USSR and Yugoslavia. A second Agreement was signed on 17 September 1937 in Geneva. It extended the rules governing submarine warfare to surface vessels, and had the same signatories



Between the creation of the London Committee and the end of the Spanish Civil War on 1<sup>st</sup> April 1939, "[t]here would be 30 meetings of the plenary committee and 93 of the Chairman's subcommittee, and seven further subcommittees dealt with technical problems as they arose".<sup>42</sup> However, the ineffectual character of the non-intervention system was obvious to its contemporaries.<sup>43</sup> This has largely been corroborated by historical data, leaving no doubt as to the failure of the strategy of international "localization" of the long drawn-out Spanish Civil War.<sup>44</sup> It is estimated that more than 150,000 foreign troops, German and – especially – Italian Blackshirt militiamen served in the Rebel-Nationalist Army. Moreover, Germany and Italy supplied Franco's camp with some 10,000 technicians, military officials for training camps and a total of \$505 million worth of war materials. Franco's *crusade* also benefited from the logistical and diplomatic support of Salazar's *Estado Novo*.<sup>45</sup> On the other hand, the Republican Army included 50,000 foreign troops – 40,000 of which were in the "international brigades", which comprised anti-fascist volunteers from over fifty countries,<sup>46</sup> while an estimated 10,000 volunteers fought directly with the Loyalist Army. Furthermore, the Soviet Union supplied up to 2000 technicians and \$100 million worth of arms and weapons to the Spanish Republic. Comintern's aid to the loyalists – mainly in the form of war materials – has been estimated at \$200 million, while other foreign military aid received has been estimated at \$50 million.<sup>47</sup> This massive foreign intervention was possible despite the parallel application of domestic legal deterrents in "non-intervening" countries such as Britain. According to H. Graham, these included the "devastating efficacy of other initiatives instigated by the British which worked consistently and exclusively against the Republic, for example the effects of the merchant shipping act (carriage of munitions to Spain) passed in December 1936 (which made it illegal for British ships to carry war material from any port, including foreign ports, to any Spanish port – a trade which it was

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<sup>42</sup> Edwards, *op.cit.* 45

<sup>43</sup> D.Graham Hutton, "British Policy Towards Spain" *Foreign Affairs* 15 (1936-1937) 661.

<sup>44</sup> See among others e.g. Preston (2012), *op.cit.*

<sup>45</sup> See e.g. Jose C. Jiménez Redondo "La política del bloque ibérico: las relaciones hispano-portuguesas (1936-1949)" *Mélanges de la Casa de Velázquez* 29 (1993) 175-201.

<sup>46</sup> Hugh Thomas, *The Spanish Civil War*, Penguin Books, London (2<sup>nd</sup> ed., 1977) pp. 980-984

<sup>47</sup> See e.g. Van Wynen Thomas & Thomas, "Non Intervention and the Spanish Civil War" *American Society of International Law Proceedings* (1967) 1, 2.

previously lawful for them to engage in), and the repeated blocking of the Republic's sterling export account by the British authorities".<sup>48</sup> In 1937, S. Baldwin's conservative government revived the *Foreign Enlistment Act 1870* – a particular example of a domestic legal deterrent addressed at limiting the role of the many British activists who, even to the detriment of other parallel causes<sup>49</sup> in China, were convinced that "for Europe Republicans Spain was both a front and a frontier"<sup>50</sup> against the international rise of authoritarianism and fascism. The revival of the 1870 Act was an extension of the London Committee's first control plan. This had been approved soon after the signature on 2 January 1937, at the height of Italian intervention in Spain, of an Anglo-Italian Gentleman's Agreement by which Britain and Italy vowed to respect each other's rights in the Mediterranean Sea. However, the re-enactment of the Foreign Enlistment Act proved to be relatively ineffective<sup>51</sup> in deterring circa 2,500 volunteers and their associated medical units from fleeing the British Isles to serve in the International Brigades.<sup>52</sup> The relative ineffectiveness of the Act, which became saddled with problems of legal applicability and enforcement, was related to the anomalous character of the international regime of non-intervention. From a legal perspective, the wording of the 1870 Act required that "(a) Britain be at peace with both sides, and (b) that each contender be a *de facto* foreign state – defined as 'any foreign country, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, or province or part of any province or people'.<sup>53</sup> Thus, discussions arose as to whether the application of the 1870 Act was tantamount to a British formal recognition of Franco's regime. Another related question which also created uncertainty within the British Foreign office was whether the "Act was applicable without a formal declaration of neutrality to

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<sup>48</sup> Graham, op.cit., 972

<sup>49</sup> See e.g. Tom Buchanan "Shanghai-Madrid Axis'? Comparing British Responses to the Conflicts in Spain and China, 1936–39" *Contemporary European History* 21 (2012) 533 - 552

<sup>50</sup> Graham, op. cit. 971

<sup>51</sup> S. P. Mackenzie, "The Foreign Enlistment Act and the Spanish Civil War, 1936-1939" *Twentieth Century British History* 10 (1999) 52-66

<sup>52</sup> Bibliography is also extensive for the British volunteers, see e.g. James K. Hopkins, *Into the Heart of the Fire: The British in the Spanish Civil War* (Stanford University Press, Stanford 1998) and Richard Baxell, *British Volunteers in the Spanish Civil War: The British Battalion in the International Brigades, 1936–1939* (Routledge, London(2004).

<sup>53</sup> Mackenzie, op.cit. 65

establish clearly that Britain was 'at peace' with both sides".<sup>54</sup> Despite its relative ineffectiveness, the *Foreign Enlistment Act*, which remains a precedent for the disjuncture between official policies and acts of transnational solidarity in foreign civil strife, played an important symbolic function in the Spanish Civil War.

The "localization" stance which many states adopted under British leadership in relation to the Spanish Civil War was undertaken outside the institutional framework of the League of Nations. Despite the support that Germany and Italy had provided Franco's troops with, the Spanish Republic could have successfully fought Franco's rebellion in September 1936. At this time the Spanish Minister of Foreign Affairs, Alvarez del Vayo, addressed the Assembly of the League to denounce that the so-called non-intervention agreement instead amounted to foreign intervention in Spain:

*The legal monstrosity of the formula of non-intervention is manifest. That formula...places on the same footing the lawful Government of my country and the rebels, whom any Government worthy of the name is not only entitled but bound to suppress and punish. From the juridical point of view, non-intervention, as applied to Spain, represents an innovation in the traditional rules of international law, for it means withholding means of action from a lawful Government.*<sup>55</sup>

The Spanish government also claimed that the foreign aid provided to the *coup d'état* was incompatible with the "prescription of open, just and honourable relations between nations" included in the Preamble of the Covenant of the League of Nations. However, on 24<sup>th</sup> September the League of Nations decided to declare its incompetence to deal with the Spanish Civil War under the pretext that it lacked competence on questions of internal order. To its declaration of incompetence, the League added delegation for the management of the Spanish conflict to the London Committee, which it categorized as a sort of specialized agency.<sup>56</sup> Desperate claims to the League of Nations by the Spanish

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<sup>54</sup> *Id.*

<sup>55</sup> League of Nations, Official Journal, Special Supplement no. 155, Records of the XVIIth Ordinary Session of the Assembly, Plenary Meetings, Geneva (1936) 49.

<sup>56</sup> Schwartz, *op. cit.*, 154-157

Republic's government, which was excluded from participation in the London Committee, continued after Italy and Germany recognised General Franco's government as the *de iure* government of Spain on 18<sup>th</sup> November 1936. This recognition took place barely a few days before Germany and Japan signed the *Anti-Comintern Pact* – the cradle of the Second World War's Axis Powers, which Italy joined on 6<sup>th</sup> November 1937. On 27<sup>th</sup> November 1936, the Republican government "appealed to the Council to consider the 'armed intervention' of Germany and Italy in Spain and the circumstances threatening to disturb international peace under the terms of Article 11 of the Covenant".<sup>57</sup> International lawyers such as Philip C. Jessup did not hesitate to term it an "illegal intervention"<sup>58</sup> and even British international lawyers such A.D. McNair deemed it "an act of war against Spain."<sup>59</sup> However, on 12<sup>th</sup> December the Council adopted a resolution that did not condemn the action of any state and once again gave moral support to the non-intervention plan by referring the matter to the London committee. Throughout 1937 and 1938, the *status quo* remained unchanged. With the documental support of a White Book containing 101 original documents, the Spanish government denounced the massive Italian intervention on the basis of Articles 10 and 16 as a case of "external aggression against ... [its] territorial integrity and existing political independence" in September 1937. However, once again, "the Council merely applauded the work of the Non-Intervention Committee, approved the international supervision of Spain, and urged the speedy withdrawal of volunteers".<sup>60</sup> The League again examined the Spanish case in May and September 1938 but "its resolutions went largely unheeded".<sup>61</sup>

Manuel Azaña, the President of the Second Spanish Republic, summarized the position of the Spanish government in a speech delivered in the summer of 1937. According to Azaña, the London Committee "is not established in the arena of international law, in the

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<sup>57</sup> Alfred de Zayas, "Spanish Civil War", *Max Planck Encyclopedia of Public International Law* (updated 2013)

<sup>58</sup> See in more detail section II. Philip C. Jessup, "The Spanish rebellion and International Law", *Foreign Affairs* 15 (1936-1937) 260-279, 270

<sup>59</sup> See in more detail section II. Arnold D McNair, "The Law Relating to the Civil War in Spain" *Law Quarterly Review* 53 (1937) 471 – 500, 497

<sup>60</sup> See Francis O. Wilcox, "The League of Nations and the Spanish Civil War", 198 *Annals of the American Academy of Political and Social Science*, (1938), pp. 65-72 at 68

<sup>61</sup> De Zayas, *op.cit.*

juridical arena, but in the political and governmental one"<sup>62</sup> and it thus "examines the Spanish conflict not in the light of law and of international treaties, but as a factual question".<sup>63</sup> Consequently, Azaña concluded that the London Committee "does not replace the League of Nations but only narcotizes it".<sup>64</sup> Indeed, the Spanish Civil War sounded the death knell of the system of collective security established by the Versailles' Treaty. Retracing the non-intervention agreement back to a previous turn towards 'neutrality' among the European democratic powers can help us explain the rapid acceptance of the *status quo* regarding the Spanish Civil War. The path towards neutrality had been paved by a series of symbolic events throughout the 1930s.<sup>65</sup> These included the Japanese invasion of Manchuria in 1931 and the abandonment of the League of Nations by Nazi Germany, which was accompanied by the parallel introduction of an intense programme of rearmament in 1933. The Abyssinian Crisis in 1935-36 and the British and French military passivity in March 1936 in the face of Hitler's remilitarization of the Rhineland in breach of the Versailles Treaty were subsequent milestones in the slow crumbling of the interwar system, despite some successes such as the imposition of sanctions against Italy. The "unfulfilled promise of the League" in the area of collective security along with the policy of appeasement adopted by the British and French entente of satisfying Italo-German pretensions "without engendering vital British interests"<sup>66</sup> triggered, moreover, a "tendency for states" such as Belgium and Switzerland and other small democracies "that had previously been neutral to reassert that status".<sup>67</sup>

This turn to neutrality took place against the background of the rise of what K. Loewenstein in 1937 termed a "Fascist International in the making", understood as "a

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<sup>62</sup> Manuel Azaña, "Discurso en la Universidad de Valencia". Manuel Azaña, *Los españoles en Guerra*. Editorial Crítica, Barcelona (1999) 58 quoted in Fernandez Liesa op.cit., 60.

<sup>63</sup> Id., 60.

<sup>64</sup> Id., 60.

<sup>65</sup> Although an opposite tendency may be identified in the wake of the rise of the Stimson doctrine in 1934 and in the International Law Association's attempt to provide an upgraded interpretation of the Pact of Paris by which states keep the right of non-recognition plus the dispensation of neutral states from the formal duty of impartiality in cases of aggressive war.

<sup>66</sup> Enrique Moradiellos, "The Allies and the Spanish Civil War" in S. Balfour and P. Preston (Eds.) *Spain and the Great Powers in the Twentieth Century* (1999) 96-126, 100

<sup>67</sup> Stephen Neff, *Justice Among Nations, A History of International Law*, Harvard University Press, Cambridge (2014) 390

closer transnational alignment or bloc of fascist nations".<sup>68</sup> This Fascist International was "transcending national borders and cutting across historical diversities of traditionally disjointed nationalisms"<sup>69</sup> and supported a "pattern of a specific technique of fascist penetration and conquest"<sup>70</sup> throughout the European continent. The turn to neutrality also engulfed the foreign policy of the Second Spanish Republic – a middle democratic power – during the years preceding the Spanish Civil War. The Spanish Republican foreign policy was originally founded on the post-1931 revolutionary democratic conviction that Spanish national interests entailed making the core of Spanish foreign policy "nothing other than an outward projection of the democratic principles that inspired domestic policy".<sup>71</sup> From this followed a Republican alignment with the principles of the League of Nations, which "was perceived as the equivalent on the international level of what the Republic represented on the domestic level".<sup>72</sup> This position, which was enshrined in The Spanish Constitution of 1931,<sup>73</sup> was also embodied by the man who represented Spain in Geneva for most of this period, Salvador de Madariaga (1886-1978), whom John Simon, the chief British delegate to the Council of the League, used to call "half ironically, half seriously, the conscience of the League of Nations."<sup>74</sup> A practical example of this policy was Spain's leadership in *The Conference for the Reduction and Limitation of Armaments* between 1932 and 1934. However, although Republican "Spain had been among the League's firmest supporters",<sup>75</sup> the Spanish general election of 1934 opened a two-year period of the political spectrum in Spain swinging to the right. The heightening of domestic tensions, which was illustrated by the severe repression suffered by the Asturian miners' uprising in 1934, and the international climate brought about by the eruption of the Abyssinian crisis, led Spanish foreign policy to lean towards neutrality. This policy of renewed isolationism and neutrality in the application of a generalized

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<sup>68</sup> Karl Loewenstein, "Militant Democracy and Fundamental Rights, I" 31 *The American Political Science Review* 3 (1937), 417-432, at 419

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Ismael Saz, "The Second Republic in the International Arena" in S. Balfour and P. Preston (Eds) *Spain and the Great Powers in the Twentieth Century* (1999) 73-95, 75

<sup>72</sup> *Ibid.*, 76

<sup>73</sup> See *supra*, Hudson, *op.cit.*

<sup>74</sup> René Wadlow, "Salvador De Madariaga: Conscience of the League of Nations" XII *The Federalist Debate* 1 (2009) 38-40

<sup>75</sup> See *supra* Wilcox, *op.cit.* at 65

policy of cautious appeasement of the irredentist and hegemonic policies of European totalitarian regimes once again became more inclusively geared within the framework of the League after the election of the *Popular Front* government in February 1936. However, this late realignment could not prevent the Second Spanish Republic from being the "first European victim" of the turn to neutrality.<sup>76</sup> This drift toward neutrality provides the context for the quick subscription by many European powers to the "international non-intervention agreement" in the Spanish Civil War under the leadership of Britain and France. Authors like N. Berman have attempted to discover the intellectual sources of this drive towards neutrality by identifying a series of "theoretical precursors of the justifiers of the "non-intervention" system" in the writings of interwar international lawyers. The existence of these precursors suggests to Berman that the non-intervention "system cannot be simply dismissed as part of the general political collapse of the Versailles system."<sup>77</sup> Rather, he argues, despite "the utter hypocrisy and cynicism with which it (the non-intervention system) was implemented at the time,"<sup>78</sup> it emerged "in the context of a series of reform proposals"<sup>79</sup> of the system of collective security. It is true that debates over the need to reform the League in the light of the eruption of conflicts and the ineffectiveness of sanctions were held in 1936 within the framework of the League itself.<sup>80</sup> However, the quick acceptance of the non-intervention agreement outside the framework of the League of Nations suggests looking elsewhere.

A British geo-strategic concern over the existing balance in the Mediterranean was behind the non-intervention policy and the gradual crumbling of the League's system of collective security. The anti-Republican uprising took place barely a month after Britain had decided to unilaterally urge the abandonment of sanctions against Italy over Abyssinia.<sup>81</sup> The Western Mediterranean had a long history of heightening tensions among European imperial powers. The Algeciras conference of 1906<sup>82</sup> and the crisis of

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<sup>76</sup> Ibid., 92

<sup>77</sup> Op.cit. 468

<sup>78</sup> Op.cit. 468

<sup>79</sup> Berman op.cit. 464-466

<sup>80</sup> See Neila, op.cit. 220 ff.

<sup>81</sup> See Graham Hutton op.cit., 661

<sup>82</sup> Carlos Jiménez Piernas and Millán Requena Casanova, "Spain's Part in the 1906 Algeciras Conference: Internationalisation of the Moroccan Question and the Interests of Spain" *Spanish Yearbook of International Law*, Volume XII, 2008 pp. 1-18 at 4

Agadir during the second Moroccan crisis<sup>83</sup> of 1911 were recent proofs of this. Britain chose a strategy of rapprochement and conciliation toward Italy, which, as we shall see, continued throughout the Spanish Civil War.<sup>84</sup> Novel social aspects of the war also played a critical role in fostering the non-intervention agreement at a time when new transnational social factors began to inform new perspectives on intervention. C.G. Fenwick, writing for the *American Journal of International Law* in 1938, approached the question of whether civil wars could be brought under the control of international law, and remarked:

[What] we have been witnessing in Spain for the last two years is in a broad way a reversal of the earlier revolt of liberalism against monarchical legitimacy. For this time it is the conservative groups that are the rebels; it is the army and the propertied interests that are questioning the authority of the *de iure* government; and in their challenge to the constitutional regime they are receiving the support of the clerics, who have normally been on the side of the established order.<sup>85</sup>

Fenwick was also aware that answers to foreign intervention in domestic conflicts had ebbed and flowed since the principle of legitimacy had supported foreign intervention on behalf of absolute monarchs against liberal revolts<sup>86</sup> in the aftermath of the Napoleonic Empire. He hinted at a sort of international federal solution against the background of the "failure of international law to develop any general rule expressing the right of the community of nations to intervene between the parties to a civil war"<sup>87</sup> and the consequent "assertion on the part of individual states of a right to take the law into their

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<sup>83</sup> The partition of Morocco took place. after the Second Moroccan Crisis, or the Agadir Crisis of 1911 spurred again by imperial competition by Germany which bargained its earlier position as defender of the sovereignty of the Sultan and of territorial independence of Morocco for territorial concessions in West Central Africa. See Neila op.cit. at.123

<sup>84</sup> See e.g. "Memorandum on Italian Foreign Policy in the Spanish Civil War" drawn up by the Foreign Office and circulated to the Foreign Policy Committee of the Cabinet. Included in "Note by Mr, Eden (W9885/9549/41) August, 19, 1936, W.N. Medlicott and D. Dakin (Eds) *Documents on British Foreign Policy, 1919-1939 Second Series Volume XVII, Western Pact Negotiations: Outbreak of Spanish Civil War June 1936 – January 1937* (1979) 136

<sup>85</sup> See interestingly C.G. Fenwick "Can Civil Wars be brought under the Control of International Law?" *American Journal of International Law* 32 (1938) 538-542, 540

<sup>86</sup> In Spain itself, for instance, the intervention of the so-called "one hundred thousand sons of Saint Louis", accorded in the Congress of Verona in 1822, put an end to the "liberal triennium" of 1820-1823 during which the official study of "natural law and the law of nations" had been briefly restored in Spain. See further, Ignacio de la Rasilla del Moral, "El estudio de la historia del Derecho internacional en el corto siglo XIX español", 23 *Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* (2013) pp.48-65

<sup>87</sup> *Id.* p.539



own hands"<sup>88</sup> throughout the long nineteenth century. Fenwick was aware that although "the method by which the United States has met the problem within the scope of its federal constitution"<sup>89</sup> was suggestive in domestic terms, it was not "sufficiently parallel to the international problem to permit inferences to be drawn from it."<sup>90</sup> Although the letter of the non-intervention agreement cannot in itself be seen as an indication of the emergence of a perception according to which intervention on the side of the legitimate government<sup>91</sup> was permissible in civil wars, it may, however, perhaps, be seen as an occasion that triggered intellectual reflections in this respect.<sup>92</sup>

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<sup>88</sup> *Id.* p.539

<sup>89</sup> p.541. This In accordance with Section 4 of Article IV of the Constitution, the United States (using the plural) "shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

<sup>90</sup> *Id.* p.541

<sup>91</sup> See e.g., Joseph Barthelemy, *La solidarité de gouvernements légitimes*, 20 *Revue Droit International* (RDI) 13-28 (1937).

<sup>92</sup> The main object of this study is to throw further light on the role interwar British international lawyers played in the debates surrounding the Spanish Civil War (See *supra* note 20). While it should be stressed that the Republican government did not formally request military intervention by a foreign power in Spain, it might be tempting to try to retrospectively – that is, after the horrors of the Second World War – identify the abject failure of non-intervention in the Spanish civil war as the starting point for a change of perspective regarding the legality of intervention upon invitation of a lawful government. However, the letter of the non-intervention agreement in the Spanish Civil War seems a wrong starting point. Although N.P. Padelford already remarked back in 1937 that the non-intervention agreement was "merely a concert of policy" whose "fulfilment depended entirely upon the initiative of each state" (See Padelford, *op.cit.* at 580), this generic statement cannot be read as one putting into question the binding character of the full terms of a non-intervention agreement (*pacta sunt servanda*) for the states that signed it. It would be wrong to take this remark as something that could run against the fact that, albeit to different degrees, all the states that signed the non-intervention agreement should have felt bound by the terms to which they subscribed. It would therefore be contradictory to interpret that because the non-intervention agreement contained declarations and reservations – that is, because the non-intervention agreement was not legally binding in absolute terms for every signing state in all its composite elements – this meant the starting point of a shift of perception in the sense referred to above. This perspective appears corroborated by G. Nolte who indicates that "State practice from the Holy Alliance (1815) to the Spanish Civil War (1936–39) is inconclusive as to whether governments had the right to invite foreign troops to help dealing with internal unrest. Thus, until the coming into force of the United Nations Charter no clear pertinent rule of customary international law existed, despite a tendency in favour." See further Georg Nolte "Intervention by Invitation", *Max Planck Encyclopaedia of Public International Law* (2010) 1-9 at 1. It should, on the other hand, be remembered that not until 1986 did The International Court of Justice (ICJ) declare in a general dictum in the *Military and Paramilitary Activities in and against Nicaragua* case (*Nicaragua v United States of America*) that 'it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition' (*Nicaragua* case, para. 246). In 2002, The ICJ again noted intervention is 'allowable at the request of the government' in the *Armed Activities on the Territory of the*

Also inherently linked to the historical causes behind the British decision to foster the quick alignment of neutral attitudes towards the Spanish Civil War was the fear of Bolshevism. In 1937, Loewenstein also lucidly analysed how "the hatred of communism and its kin, Marxism and socialism" was essential among "the programmatic and ideological ingredients of the widely ramified movement of international fascism".<sup>93</sup> Moreover, in Spain, anti-communism allied itself with a religious fervour which borrowed from the crusade-like ultra-Catholic credentials of the Spanish imperial Christianising and Counter-Reformation past. The portrayal of Franco as the "sentinel of Western civilization" was supported by a number of Spanish international lawyers, who went as far as to argumentatively justify Franco's "glorious national uprising" with reference to the works of the so-called Spanish founders of international law<sup>94</sup> and the Spanish *Secunda Scholastica*. The status in international circles of Francisco de Vitoria had risen exponentially, partly due to championing of him in the early 1930s by J. Brown Scott, a founder of the American Society of International law.<sup>95</sup> Supporters of Franco's *coup d'état* included noted Spanish international lawyers such as J. Yanguas Messia, the co-founder of the Association Francisco de Vitoria in 1926,<sup>96</sup> who drafted the *Junta* decree of 29 September 1936 that proclaimed General Franco chief of the government of the Spanish State. Another reputed Spanish international lawyer, J. M. Trias de Bes, who was also an active supporter of the Association Francisco de Vitoria, was a member of the committee of 22 jurists who drafted the "Advisory Opinion on the Illegitimacy of the Acting Powers on the 18<sup>th</sup> of July 1936".<sup>97</sup> The vaunted ultra-Catholic and anti-communist credentials of the nationalists arguable played a role in F.D. Roosevelt's decision to follow the British lead against the letter of its own traditional policy of aiding a legally recognised democratic government. However, as we shall see, the legal impossibility encountered

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*Congo case (Democratic Republic of the Congo v Uganda)* (at paras 42–53; *Armed Activities on the Territory of the Congo case*).

<sup>93</sup> Loewenstein op.cit. at 421

<sup>94</sup> Ignacio Forcada Barona, "La influencia de la religión católica en la doctrina internacionalista española del período de entreguerras (1918-1939)" In Gamarra, Y. & De la Rasilla, I. (eds.) *Historia del pensamiento internacionalista español del siglo XX*, Thompson Reuters Aranzadi, Pamplona (2012)

<sup>95</sup> James Brown Scott, *The Spanish Origins of International Law. Francisco de Vitoria and his Law of Nations* (1932). James Brown Scott, *The Catholic Conception of International Law. Francisco de Vitoria, Founder of the Modern Law of Nations, Francisco Suarez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations* (1934)

<sup>96</sup> James Brown Scott, "Asociación Francisco de Vitoria", 22 *AJIL* 1, (1928) 136.

<sup>97</sup> "Dictamen sobre la ilegitimidad de los poderes actuantes el 18 de julio de 1936"

by the US State Department of enforcing its "moral embargo"<sup>98</sup> against private domestic parties forced the US Congress to enact an Amended Neutrality Act in May 1937.

### 3. International Legal Aspects of the Spanish Civil War

International lawyers have traditionally understood the "non-intervention" system in the Spanish Civil War in terms of "its conformity with, or divergence from, the traditional rules"<sup>99</sup> regulating intervention in foreign wars at the time. A number of contemporary authors considered the non-intervention system to greatly diverge from traditional rules and criticized it as a mask for intervention. A second group supported the position that the "non-intervention" system was in "conformity with the traditional rules" regulating intervention in foreign wars, but highlighted its *sui generis* character.<sup>100</sup> Recognition of the anomalous character of the non-intervention pact was pervasive in all cases. British international lawyers in particular were, as we shall see, at pains to fit the non-intervention policy into traditional categories of international law. Their analysis of the international legal aspects raised by the Spanish Civil War can be divided into two main stages. Between 1937 and early 1938, they mainly focused their attention on the legal justification of the policy of non-intervention and the management of its anomalous international legal framework. From early 1938 to the end of the Spanish Civil War, analysis by the British courts of cases arising from the conflict came to the fore. The apologetic stage aimed to tame the anomalies of the course of action adopted by the British Conservative government into technically debatable international legal categories; the second stage was presided over by a "practitioner's approach".

Many international lawyers agreed with the Spanish government that non-intervention was simply a mask for intervention on Franco's side. They concurred that the Spanish Republic's characterization of it as a "legal monstrosity" was a fair portrayal of the non-intervention agreement. By depriving the lawful (and democratically legitimate) government of Spain of its customary entitlements under international law, the non-intervention agreement forced the Republic "to seek arms in the murky world of the

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<sup>98</sup> Michael E. Chapman, *Arguing Americanism. Franco Lobbyists, Roosevelt's Foreign Policy and the Spanish Civil War* (Kent State University Press, 2011) See also e.g. A. Bosch, *Miedo a la democracia. Estados Unidos ante la Segunda República y la guerra civil española*, Editorial Crítica, Barcelona, 2012

<sup>99</sup> Berman op.cit. 461

<sup>100</sup> Ibid., 45

private market"<sup>101</sup> at astronomical prices. For Georges Scelle, who decried the inaction of the League of Nations, the non-intervention system meant the illegal withholding from a member State of the League of Nations of the "free and complete exercise of the normal competences which it derives from international law".<sup>102</sup> Philip C. Jessup, who denounced the anomaly of an intervention pact for which there were no precedents,<sup>103</sup> also stressed the customary status of the Spanish Republic's right to maintain its normal commercial relations unchanged. Jessup highlighted that the Pan American Convention on the Duties and Rights of States in the Event of Civil Strife,<sup>104</sup> signed in Havana in 1928, had codified this entitlement in the Americas and pointed out that "the Arms Traffic Convention of 1925, if it had come into force, would have served somewhat the same purpose".<sup>105</sup> The Resolution of the *Institut de droit International* on '*Duties of Foreign Powers toward the Government which is fighting the Insurrection*' had already made it plain in 1900 that 'every third Power, at peace with an independent nation, is bound' (...) "not to furnish to the insurgents either arms, munitions, military goods, or financial aid" and "not to interfere with the measures which this nation takes for the re-establishing of internal peace".<sup>106</sup> The fact that the US State Department could not enforce its policy of "moral embargo" towards the Republican government against private parties in 1936 further illustrates the fact that the Republican government's consuetudinary expectations were anomalously quashed in the summer of 1936.

Another group of authors, which included the cream of British international lawyers, attempted, by contrast, to carve out the view that the non-intervention system was in accordance with traditional rules or, as Charles Rousseau noted, that "it is neither legal nor illegal, since it develops in a zone of competence which remains, in many respects, a

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<sup>101</sup> Sebastian Balfour, "Spain from 1931 to the Present" in Raymond Carr (Ed.) *Spain. A History* (2001) pp. 243-283 at 264

<sup>102</sup> Georges Scelle, "La guerre civile espagnole et le Droit des gens", *Revue Generale de Droit International Public* 45 (1938) 265 and Georges Scelle, "La guerre civile espagnole et le Droit des gens" *Revue Generale de Droit International Public* 46 (1939) 197-228

<sup>103</sup> The only one, albeit only indirectly, took place during the Third Carlist War (1872-76).

<sup>104</sup> Jessup op.cit. 266.

<sup>105</sup> Jessup, at 266.

<sup>106</sup> Institut de droit International *Duties of Foreign Powers towards the Government which is fighting the Insurrection*. Article 2. -Section 1. Every third Power, at peace with an independent nation, is bound not to interfere with the measures which this nation takes for the re-establishing of internal peace. Section 2. It is bound not to furnish to the insurgents either arms, munitions, military goods, or financial aid. Section 3. It is especially forbidden for any third Power to allow a hostile military expedition against an established and recognized government to be organized within its domain.

sort of legal no man's land."<sup>107</sup> For British international lawyers, in particular, the non-intervention in Spain was but a collective application of a rigorous version of the traditional doctrine of neutrality. Indeed, this was the departure point of H.A. Smith's contribution to the *British Yearbook of International Law* in 1937.<sup>108</sup> Smith, who was a professor of International law at the London School of Economics, assimilated the non-intervention agreement to a "collective declaration of neutrality, although presented in an unusual form".<sup>109</sup> However, Smith took issue, as will be examined, with the technical deviations from the resulting international legal scheme that the subsequent British policy of non-recognition of belligerent rights to the parties brought with it. This technical deviation alone impelled him to cast a shadow over the justificatory enterprise: "my hope is that future lawyers will be able to regard the policy pursued in this war as an anomaly. My fear is that future politicians will regard it as a precedent".<sup>110</sup> H.A. Smith also far-sightedly invoked the figure of the "historian of the future", noting that he "will be better able than we are to appreciate the value of the causes which have led to a departure from these rules (the accepted rules which govern the attitude of foreign powers in the event of a civil war) in the case of the Spanish Civil War".<sup>111</sup> In 1975, after almost forty years of Franco's dictatorship in Spain, a young A. Cassesse agreed with the common point of departure of the British justificatory perspective by noting that "the behaviour of the States parties to the non-intervention agreements was impeccable from a legal point of view".<sup>112</sup> According to Cassesse: "customary international law merely confers a right on States to help the lawful Government. States are therefore at liberty to waive this right by mutual agreement. Moreover, by agreeing not to help the rebels, they merely confirmed an obligation deriving from customary law".<sup>113</sup> Needless to say, by the time of the signature of this legally "impeccable" non-intervention agreement, respect for the customary legal obligation to not help the rebels was already being blatantly breached by Germany and Italy. The German and Italian foreign military intervention

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<sup>107</sup> Charles Rousseau, "La Non-intervention en Espagne", 19 *Revue de droit international et legislation comparée* 19 (1938) 217, 228

<sup>108</sup> Herbert A Smith "Some Problems of the Spanish Civil War" *British Yearbook of International Law* 18 (1937) 17-31, 28

<sup>109</sup> *Ibid.*, 28

<sup>110</sup> H.A. Smith *op.cit.* 30

<sup>111</sup> *Ibid.*, at 31.

<sup>112</sup> Cassesse, *op.cit.*,131

<sup>113</sup> *Ibid.*,

continued to escalate throughout the war. If there was a line to be drawn between the right of some states to promote a collective arms embargo outside the framework of the League of Nations against the Spanish Republic in defiance of the obligation that "every third power, at peace with an independent nation" had to not interfere "with the measures which this nation takes for the re-establishing of internal peace",<sup>114</sup> such a line appeared completely blurred in the apologetic contribution penned in 1937 by the first British Judge and President of the International Court of Justice (1946-1955), Arnold D. McNair.<sup>115</sup> Writing for the *Law Quarterly Review* in 1937, at the time of his transition from the Whewell Professorship of International Law at Cambridge to the post of Vice-Chancellor of Liverpool University, McNair instead presented an unflinching defence of the strategic course of action adopted by the British government regarding the Spanish Civil War. McNair, who focused his contribution "on the law applying between each of the contending parties and foreign States",<sup>116</sup> began his article by providing arguments to justify the British policy of denying any assistance to the Spanish Republican government in dealing with General Franco's uprising. McNair considered that the duty of the United Kingdom as a foreign power in peace with Spain "to not interfere with the measures which this nation takes for the re-establishing of internal peace" was equivalent to the guiding principle that "the conduct of foreign States towards their unhappy neighbour suffering from civil strife is merely a continuance of the normal duty of non-interference in the domestic affairs of another State."<sup>117</sup> Moreover, he argued that he was "not aware of any rule of customary international law which imposes any duty upon the United Kingdom to sell implements of warfare to the Spanish Government to enable it to suppress an insurrection or to permit British or foreign traders in the United Kingdom to do so".<sup>118</sup> Having discarded any customary basis "for any active duty to assist" the democratic Republican government, McNair then went on to review the treaty law in vigour between Spain and Great Britain, in particular the British-Spanish Commercial Treaty of 31 October 1922 and the Exchange of Notes dated 4 and 5 April 1927. He put

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<sup>114</sup> The Resolution of the Institut de droit International on 'Duties of Foreign Powers toward the Government which is fighting the Insurrection' had enshrined this perspective back in 1900.

<sup>115</sup> Arnold D McNair, "The Law Relating to the Civil War in Spain" *Law Quarterly Review* 53 (1937) 471 – 500, 497

<sup>116</sup> *Id.*, at 472

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*, 472

stress on the bilateral agreements in order to argue against the view expressed "in some quarters, that we have broken them by not allowing implements of war to be sold to the Spanish Government, or at any rate that we have evaded them by improperly resorting to an exception contained in them".<sup>119</sup> McNair reaffirmed the exception the British government used to evade the applicability of the Commercial Treaty (including "weapons, ammunition and war material and, under exceptional circumstances, also in respect of other materials needed in war") in vigour between Spain and the United Kingdom "to protect itself from being depleted of war materials." McNair, who maintained that "there cannot be any doubt that the United Kingdom was and is legally justified in prohibiting the export to Spain of these materials, as it did as from August 19 1936, either because we could not spare these materials *or for any other reason*"<sup>120</sup> and went even further. He invoked the "maintenance of the peace in Europe" as a legal ground "by virtue of a condition to *be implied* in the treaty to issue such a prohibition".

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However, the persuasive attempt by McNair – who later became the First President of the European Court of Human Rights (1956-1965) – to justify the international legal "impeccability" of the British policy in the event of the military *coup d'état* in the summer of 1936 in a member state of the League of Nations with a secular multi-party democratic system based on equal rights for all citizens, with provisions for regional autonomy and with the right to universal – including, for the first time in Spanish history, female – suffrage,<sup>122</sup> had to confront a number of further technical difficulties. The first of these had to do with the use of the term neutrality, and the second one with the question of the implicit triggering of belligerent rights to the contending parties by the non-intervention agreement as well as with the consequences of the early recognition by Germany and Italy of Franco's government as the *de iure* government of Spain. Third, the British *de facto* recognition of the fact of insurgency also triggered further legal difficulties.

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<sup>119</sup> *Id.*, 473

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, 474

<sup>122</sup> Universal female suffrage was not restored until the Spanish Constitution of 1978 in Spain.

Indeed, as Berman notes, the first difficulty for McNair had to do with the "misuse" of the term "neutrality", or at the very least the anomalous enlargement to which it had to be subjected at the time for it to be able to indicate that the non-intervention system could (then) be seen as the application of a stringent version of the duties of neutrals."<sup>123</sup> The issue of neutrality considerably coloured the American contributors' approach to the first stage of the international legal debate on the Spanish Civil War. P.C. Jessup remarked on the US Acting Secretary of State's reticence to use neutrality terminology in a circular instruction of August 7 1936 that "it is clear that our Neutrality Law with respect to embargo of arms, ammunition and implements of war has no application in the present situation, since that applies only in the event of war between or among nations".<sup>124</sup> Another US scholar, N.P. Padelford, also highlighted that "neutrality and non-intervention in times of unrecognized insurgency and in times of international warfare involve very different propositions. To apply to unrecognized and irresponsible rebels the same principles that are applicable to sovereign states and established governments is to encourage rebellion and disorder and to weaken public law and authority. The law cannot long afford to do this".<sup>125</sup>

The legitimate expectations of the Republican government to be able to arm itself to curb an internal insurrection are further illustrated by the fact that in December 1936 at the request of a US private exporter the US Department of State issued two licenses<sup>126</sup> for the "exportation of a shipment of airplanes and engines to the port of Bilbao in Spain, which is the principal port of entry held by the forces of the Spanish Government."<sup>127</sup> The US government sent a telegram to a series of European governments to justify its legal obligation in view of the fact that this private party had not "patriotically refrained from requesting licenses for such shipments upon receiving an explanation of this Government's attitude and policy of scrupulous non-intervention in the Spanish

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<sup>123</sup> Berman op.cit., 461

<sup>124</sup> Jessup op.cit. 263

<sup>125</sup> Norman J. Padelford "Remarks", *Proceedings of the 31<sup>st</sup> Meeting American Society of International Law* (1937) 154.

<sup>126</sup> Subsequently on Jan. 5 the US State Department made also known that it was obliged to grant licenses to another exporter to ship war supplies valued at \$4,500,000 to the port of Valencia,

<sup>127</sup> State Dept. Press Release, Dec. 30, 1936 quoted in George A. Finch, "The United States and the Spanish Civil War" *American Journal of International Law* 31 (1937) 74-81, 75



situation".<sup>128</sup> The private exporter instead, insisted "upon his legal right" to have such licences granted because, as the telegram from the US government readily admitted, the US Neutrality Law "providing for an embargo against the shipment of arms, ammunition and implements of war to "belligerent countries" does not apply to the present civil strife in Spain as it is applicable to wars between nations".<sup>129</sup>

Many authors engaged with a second, related, difficulty of the justificatory scheme. This resulted from the fact that the non-intervention agreement implicitly recognized the existence of a war between the parties, and it therefore implicitly entailed the recognition of belligerent rights to the rebels.<sup>130</sup> Writing in 1937, G. Balladore Pallieri,<sup>131</sup> also a later President of the European Human Rights Commission (1974 - 1980), highlighted that "if one did not interpret the states participating in the non-intervention system as having implicitly recognized a state of belligerency, the system would be illegal because it would have disabled "a State at peace seeking to vanquish a revolt."<sup>132</sup> A. Smith too, who, as we saw, initially assimilated the non-intervention agreement to a "collective declaration of neutrality, although presented in an unusual form,"<sup>133</sup> made the recognition of belligerence a post-facto pre-condition of the international legality of the non-intervention agreement itself: "if the powers concerned did not recognize the existence of a war, then the Non-Intervention Agreement was singularly misnamed. If the rebellion was no more than an internal disorder, then the agreement was a grave act of intervention in the internal affairs of Spain, for it was an attempt to prevent the Spanish Government from obtaining the supplies which it needed for the restoration of order in its own dominions".<sup>134</sup>

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<sup>128</sup> Ibid.

<sup>129</sup> On January 8, 1937, after a by the US President to Congress of "an addition to the existing Neutrality Act to cover specific points raised by the unfortunate civil strife in Spain' the Congress approved the Pittman Resolution. For an immediate criticism that the Pittman Spanish Civil War Resolution reversed the legal order "by placing unrecognized rebels and the constituent government in Spain on the same footing" see E. Borchard "Neutrality" and Civil Wars, the *American Journal of International Law* 31 (1937) 304-306.

<sup>130</sup> And that, it should be highlighted, barely a month after Franco's "glorious national uprising" against the Spanish Republic..

<sup>131</sup> Ballideri served as President of the ECtHR between 1974 and 1980

<sup>132</sup> G. Balladore Pallieri « Quelques aspects juridiques de la non-intervention en Espagne » *Revue de droit international et de legislation comparee* 18 (1937) 285, 293.

<sup>133</sup> Smith, *op.cit.*, 18

<sup>134</sup> Ibid., 28

Remarkably enough in this context, however, the British Foreign Office, which had orchestrated the non-intervention agreement, decided to have it both ways by resisting the recognition of belligerent rights to the contending parties.<sup>135</sup> Against this background, H.A. Smith's position was, therefore, that of a plea for international legal coherence with familiar established categories by recognising belligerence and belligerent rights.<sup>136</sup> As early as 1937, H.A. Smith stressed the double standards of the British Foreign Office, which had "recognized the authority of the insurgent government throughout the territories which the latter controls", and highlighted that "belligerent recognition is a matter of conduct and not of words".<sup>137</sup>

The nominal British policy of non-recognition of a belligerent status of the parties, and on the bandwagon of this the non-recognition of belligerence by other states led A. Cassese to retrospectively consider that the Spanish Civil War "was, rather, regarded as a conflict belonging to a *tertium genus*, intermediate between mere 'civil wars' and those civil wars where the contending parties are recognized as belligerents".<sup>138</sup> However, Cassese's retrospective perspective, which he reached on the basis that "the behaviour of third States towards the contending parties in Spain never amounted to a recognition of belligerency"<sup>139</sup> must, however, be qualified in the light of the fact the several states went far beyond recognizing the belligerent status of Franco's camp during the Spanish Civil War. Indeed, as early as November 18 1936, barely two months after the establishment under the aegis of the British Foreign Office of the Non-Intervention Committee in London, Mussolini's Italy and Hitler's Germany already granted *de iure* official recognition to Franco's government as the established government of Spain. In doing so, Germany and Italy were completely reversing the international legal status of the leaders of the forces who in orchestrating a military *coup d'état* had committed a crime of rebellion against the high organs of the Spanish nation and the democratically elected Republican government. The Republican government reacted to this *recognition de iure* of the anti-

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<sup>135</sup> Berdah op.cit, 221

<sup>136</sup> Ibid.,

<sup>137</sup> H.A. Smith op.cit.,28

<sup>138</sup> Cassese, op.cit.,130.

<sup>139</sup> Ibid., 132

Republican forces by denouncing a "foreign intervention" under article 11 before the League of Nations in November 1936.

Jessup agreed with the position of the Republican government, highlighting that "international law does brand as an illegal intervention in the domestic affairs of another state a recognition prematurely accorded to an insurrectionary group with a view to aiding that group in ousting the established government".<sup>140</sup> Moreover, on the 8th of June 1937, the insurgents' camp issued a diplomatic note claiming that Franco's Salamanca government had already been recognized by six countries: Guatemala, El Salvador, Nicaragua, Albania, Germany and Italy. These were followed in 1937 by both Japan and the Holy See, and by many others in 1938 either *de iure* (such as Portugal, Turkey, Austria and Hungary) or *de facto* (such as Belgium, Denmark, Norway, Sweden and Finland)<sup>141</sup> through the establishment of diplomatic relationships in the last months of 1938. The recognition by Germany and Italy in 1936 of the nationalist army, "not provisionally as belligerents, but as the permanent and legitimate government of Spain"<sup>142</sup> is reflected in the writings of British international lawyers. McNair, whose legal analysis appears, as we have seen, to strikingly coincide with the course of the policy decisions adopted by the British Foreign Office regarding the Spanish Civil War, devoted considerable attention to the question of whether there was what he termed "a *tertium quid* between a state of peace and Recognition of Belligerency."<sup>143</sup> McNair agreed with Jessup's view about the illegality of the German and Italian recognition of Franco's camp: "there is no doubt that recognition of legitimacy at that stage of the conflict constituted an illegal intervention and an international wrong upon Spain"<sup>144</sup> However, Mc Nair went further by highlighting that the *de iure* recognition of Franco's government by Italy and Germany in November 1936 amounted to an implicit recognition of belligerence and that, therefore, Italian and German military interventions, in breach of the law of neutrality, "against the Spanish Government amounted to acts of war against Spain".<sup>145</sup> This derived from Article 7 of the Resolution of the *Institut de Droit International* on "the

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<sup>140</sup> Jessup op.cit., 279.

<sup>141</sup> See Fernandez Liesa, op.cit., 84.

<sup>142</sup> Smith op.cit., 29

<sup>143</sup> McNair op.cit., 484

<sup>144</sup> Ibid., 497

<sup>145</sup> Ibid.

Consequences of the Grant of Recognition of Belligerency by another State", according to which, as echoed by McNair, "recognition entails all the usual consequences of neutrality", or in other words, "it automatically brings into force as between each belligerent party and the recognizing State the corpus of the law of neutrality".<sup>146</sup>

However, the admission that Germany and Italy had engaged in a war of aggression against Spain, as the Republican government declared before the League of Nations in late 1936, did not (paradoxically enough) lead Mc Nair to conclude that the anomalous international non-intervention agreement heralded by the United Kingdom and France, to which Germany and Italy were parties, was moot. Neither did it lead McNair to advise the recognition of belligerent rights to the contending parties. By contrast, McNair, whose decision not to engage with the work of other authors<sup>147</sup> – including that of Smith – reinforces the impression that he might acted as a shadow legal advisor to the British Foreign Office, denied that the UK actions should be interpreted as constituting a *de facto* recognition of belligerent rights of the contending parties. Instead, Mc Nair continued to focus on justifying the original British policy on the grounds that "I cannot see that there is any well-settled practice which fetters the discretion of the United Kingdom in deciding whether or not it is politic to grant or to deny recognition of belligerency".<sup>148</sup> Instead, he insisted on the stated practice according to which "our Ministers have frequently repeated that we have granted belligerent rights to neither side"<sup>149</sup> and decided to focus on how the non-recognition of belligerence specifically affected the UK "with special reference to a maritime power like ourselves".<sup>150</sup> McNair again showed again his ability to excel in the lawyer-like practice of argumentative reversion by highlighting the non-applicability of the rules of belligerence, and in particular those which may affect a maritime power like the UK, such as those that confer "upon both belligerent parties the right of visit and search of the merchant ships of the recognizing State, the right of

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<sup>146</sup> Ibid.

<sup>147</sup> McNair, at 500. "I do not wish to be thought to be lacking in courtesy because I have not dealt with the literature now growing up round the subject of this article, notably Professor Smith's article in the *British Year Book of International Law* of this year and articles and comments in the *American Journal of International Law*. I have only refrained because I wanted to state my own view upon the materials available to me, and my article is already long enough.

<sup>148</sup> Ibid., at 484.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid., at 476.

intercepting contraband, the right of establishing blockades, and the right of setting up Prize Courts and condemning merchant ships for carriage of contraband, breach of blockade, un-neutral service etc."<sup>151</sup>

McNair's contribution to study of the law relating to the civil war in Spain concludes with him characterizing the legal regime adopted by the UK as one in which "we were compelled by the exigencies of the situation to recognize the fact of insurgency in Spain and thus to embark upon the comparatively uncharted sea of a relationship to both parties of which the rules are ill-defined and still in course of development."<sup>152</sup> A number of states followed the UK into the "unchartered sea" and "adopted the intermediate legal institution of recognition of insurgency."<sup>153</sup> According to another leading British-assimilated international lawyer, H. Lauterpacht, "the condition of insurgency in international law is one of considerable elasticity. It is a factual relation in the meaning that legal rights and duties as between insurgents and third states exist only in so far as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interests"<sup>154</sup>

This is the legal position on the basis of which the British government developed greater ties with Franco's Salamanca government from the last third of 1937. This rapprochement, which included the signature of commercial agreements, led to the exchange of diplomatic agents – headed by the Duke of Alba in London from 16<sup>th</sup> November 1937.<sup>155</sup> This gradual rapprochement, which coincided with a parallel British rapprochement to Italy, led to a change in the British position. The "recognition of the government of General Franco as an insurgent government exercising de facto control over a considerable portion of Spain"<sup>156</sup> influenced the legal position adopted by the British courts in a number of cases in 1938 and 1939.

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<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*, at 498

<sup>153</sup> De Zayas, *op.cit.* 4

<sup>154</sup> Hersch Lauterpacht, "Recognition of Insurgents as a de Facto Government" *Modern Law Review* 3 (1939) pp. 1-19, 3

<sup>155</sup> See e.g. Berdah *op.cit.*, 228. See comparatively on the evolution of French foreign policy regarding recognition of Franco's camp in 1938, see e.g. Michel Catala, "L'attitude de la France face à la Guerre d'Espagne: l'échec des négociations pour la reconnaissance du gouvernement franquiste en 1938" *Mélanges de la Casa de Velázquez* 29 (1993) 243-262.

<sup>156</sup> Lauterpacht *op.cit.*, 8 quoting a communication from the British Foreign Office to the Court of Appeals in the case *Banco de Bilbao v Rey* (1938)

#### 4. H. Lauterpacht and the Practitioner's Approach to the Spanish Civil War

The literature on the Spanish Civil War, "which abounded in anomalous situations",<sup>157</sup> adopted a new character in 1938, the year Europe witnessed the *Anschluss* of Austria in March 1938 and the Munich Agreement, which in September 1938 permitted the German annexation of the Sudetenland from Czechoslovakia. Meanwhile, authors devoting their attention to the Spanish Civil War gradually abandoned the areas of non-intervention and the recognition of belligerency to give way to a focus on a number of other interrelated questions raised by the conduct of the hostilities. In the French language, Louis Le Fur, an ardent Catholic conservative and defender of natural law,<sup>158</sup> who heartily supported the legitimacy of Franco's cause and, by extension, the legality of the non-intervention agreement, was among those who had already included aspects related to maritime warfare in their analysis back in 1936 and 1937.<sup>159</sup> From early 1938, a number of contributions in the English language also began to tackle the legal anomalies arising from the non-application of the regime of maritime neutrality to issues of maritime warfare.<sup>160</sup> These legal peculiarities included discussions on matters such as the reconceptualization of the terminology of piracy in the light of blockade actions and submarine warfare<sup>161</sup> carried out principally by Italy. J.L. Brierly, who held the Chichele Professorship of International Law at Oxford at the time, briefly dealt with the debates surrounding the Spanish Civil War in a short intervention broadcast in 1938. Brierly was mainly worried by the bombing of British ships<sup>162</sup> in Spanish ports and puzzled over the effects of the absence of a formal recognition of belligerence on the jurisdiction of prize courts, the rights of the parties in conflict to conduct searches to identify contraband goods, and the right of seizure. He identified the danger of war in Europe as "the invisible

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<sup>157</sup> Lawrence Preuss, "State Immunity and the Requisition of Ships during the Spanish Civil War: I. Before the British Courts" *The American Journal of International Law* 35(1941), 263-281, 281

<sup>158</sup> Louis Le Fur. "La théorie du droit naturel depuis le XVIIIe siècle et la doctrine moderne", XVIII Courses of the Hague Academy (1928) pp. 259-442

<sup>159</sup> See e.g. Louis Le Fur, "La guerre civile d'Espagne et le droit international," *Revue politique et parlementaire* (1936) 385-598; and Raoul Genet, "La qualification de 'pirates' et le dilemme de la guerre civile," 3 *Revue internationale française du droit des gens* (1937) 13-25

<sup>160</sup> See e.g. N.J. Padelford, "Foreign Shipping during the Spanish Civil War" *American Journal of International Law* 32 (1938) 264

<sup>161</sup> Raoul Genet, "The Charge of Piracy in the Spanish Civil War" *American Journal of International Law* 32 (1938) 253-263

<sup>162</sup> J. L. Brierly, "Bombs and the Law. An English Viewpoint" Delivered June 20, 1938 over British Broadcasting System, *Vital Speeches of the Day* Vol. 4 Issue 19, 605 (7/15/ 1938)

part of the iceberg"<sup>163</sup> lurking beneath the anomalous *status quo* in Spain. Air strikes by officially non-intervening powers on the civil population also attracted wide doctrinal attention among international lawyers following the destruction of the town of Guernica by the German Condor Legion in April 1937 and the indiscriminate massive Italian bombardments of Barcelona on March 1938.<sup>164</sup>

The conduct of hostilities brought one case before the Permanent Court of International Justice and numerous other cases to the attention of different national courts.<sup>165</sup> Belgium's signing of the non-intervention agreement did not prevent it from invoking the international responsibility<sup>166</sup> of the Republican government after the death of the Belgian ambassador Baron Jaques de Borchgrave in Madrid. However, the PCIJ never rendered a judgement on the *Borchgrave* case because the proceedings were eventually discontinued at the request of the parties. The Spanish Republican government, stressing the exceptional circumstances of a Madrid under siege, presented its excuses, and the Belgian government recognised that, given the lack of proof of any engagement of a governmental agent in the act, the responsibility of the Spanish government had not been compromised.<sup>167</sup> As for domestic courts, British ones in particular focused on a series of cases involving "measures of expropriation and requisition enacted during the Spanish conflict by both the Republican and the Nationalist Governments".<sup>168</sup> These measures of requisition involved "fundamental questions relating to state immunity, the effect of the acts of foreign states and governments, and the consequences of *de facto* recognition by the British government<sup>169</sup> of Franco's "insurgence".

Hersch Lauterpacht, in his only direct contribution to the study of the Spanish Civil War, examined the matter of "the recognition of insurgents as a government" in the light of what he considered to be "perhaps the most significant case decided by English Courts

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<sup>163</sup> Id.

<sup>164</sup> See Carlos Fernandez Liesa, op. cit. 134-141.

<sup>165</sup> Including but not limited to the American courts, Lawrence Preuss "State Immunity and the Requisition of Ships during the Spanish Civil War: I. Before US Courts", *The American Journal of International Law* 36 (1942) 37-55

<sup>166</sup> Borchgrave case (Belgium v. Spain) (1937) P.C.I.J., Ser. A/B, Nos. 72.

<sup>167</sup> See Fernandez Liesa op.cit. 61- 62

<sup>168</sup> Preuss op.cit. (1941), 281

<sup>169</sup>De Zayas, op.cit., 4 "

during the Spanish Civil War, namely, *Arantzazu Mendi*".<sup>170</sup> The House of Lords, in the case of the *Government of Republic of Spain v SS Arantzazu Mendi and Others*, on 23<sup>rd</sup> February 1939 confirmed the decision of the Court of Appeal which had found that the insurgent nationalist government had the status of the government of a foreign sovereign state.<sup>171</sup> Against the background of this *de iure* judicial recognition of Franco's Burgos government (which was also the position of Hitler's Germany from 18<sup>th</sup> November 1936, and later that of Italy), H. Lauterpacht critically examined whether "the nature and degree of recognition stated in the (earlier) answer of the foreign office irresistibly led to the conclusion arrived at by the British courts".<sup>172</sup> Lauterpacht opposed this conclusion of the House of Lords on the basis of the need to differentiate between the right of a state to "recognize the insurgents as a government exercising *de facto* authority over the territory under its control", which, being the British position, was, in Lauterpacht's view, "not contrary to international law", and the fact, as he stressed, that "such recognition is limited in its effects and cannot properly be assimilated to recognition *de iure*".<sup>173</sup> For Lauterpacht, the distinction derived from what he considered "the established principle that so long as the civil war lasts the recognition of the insurgents, whether recognized as belligerents or not, as a *de iure* government is contrary to international law".<sup>174</sup> Until that moment arrived, Lauterpacht was of the view *contra* the interpretation adopted by the British courts (on the basis of their interpretation of the answer they received from the British Foreign Office) that recognition of the insurgent government "while obliging courts to acknowledge the validity of the legislation of the *de facto* insurgent authority within its territory, it does not transform the authority thus recognized into an independent government of a foreign sovereign state outside its territory to jurisdictional immunities, in particular as against the government recognized *de iure*, in respect of its property or its representatives".<sup>175</sup> The neglect of the study of the Spanish Civil War among historians of international law may account for the lack of attention by the

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<sup>170</sup> Lauterpacht (1939) op.cit., 3

<sup>171</sup> In a previous case, the *Banco de Bilbao v Sancha and Rey* Case, the British court held that the British government had granted the insurgent authorities recognition as an insurgent government exercising *de facto* control over a considerable part of Spain (at 257). *Banco de Bilbao v Rey* (Court of Appeal) (17 March 1938) [1938]

<sup>172</sup> Lauterpacht (1939) op.cit., 5

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*, 21



extensive number of commentators on H. Lauterpacht's opus<sup>176</sup> to the influence of Lauterpacht's doctrinal position in his *Recognition in International Law*.<sup>177</sup> This contrasts with the fact, as E. Lauterpacht briefly records in his biography of his father, that "although no direct trace has been found of H. Lauterpacht's views, a letter to him from Mr Pilcher QC, leading counsel for the Republican government, suggests that H Lauterpacht" (...) "has given him some assistance in the form of a note supportive of the view that the nationalist government did not constitute a state and was not entitled to immunity"<sup>178</sup> in the *Arantzazu Mendi* case in the English courts.

Lauterpacht's contribution to the study of the international legal questions raised by the Spanish Civil War remains within the strictest confines of doctrinal work. Lauterpacht is supportive of the right to remedy, which the Spanish Republican government as *de iure* government of Spain had been deprived of by the jurisdictional immunity granted by the British courts in the light of the judicially sanctioned assimilation of the insurgent *de facto* Franco government to the *de iure* government of Spain. However, the character of his contribution is in perfect consonance with what A. Carty has termed the "practitioner's approach",<sup>179</sup> characteristic of the "greats' of the discipline in the 1920s and 1930s, in particular ... Oppenheim, McNair, Brierly and even Lauterpacht".<sup>180</sup> This "practitioner's approach" coincides with what M. Koskenniemi considers to be the common programme that Mc Nair and Lauterpacht "shared: to bring international law out of its isolation as a branch of suspect moral or jurisprudential theory by presenting it as an object of legal technique no different from the domestic".<sup>181</sup> The assertion of the professional relevance of international law within the common law tradition appears almost programmatically present in a number of works penned by British international lawyers in the 1920s and

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<sup>176</sup> Since e.g. recently Patrick Capps, "Lauterpacht's Method", *British Yearbook of International Law* 82 (2012) 248-280

<sup>177</sup> According to Elihu Lauterpacht, "of all his writings this is the one that has given rise to most controversy" (...) "since its basic doctrine of the legal character of recognition has been largely abandoned in state practice over the half-century that has followed", Elihu Lauterpacht, "Sir Hersch Lauterpacht: 1897-1960" *European Journal of International Law* 8 (1998) 313-315

<sup>178</sup> Elihu Lauterpacht, *The Life of H. Lauterpacht*, Cambridge University Press, Cambridge (2012) 98

<sup>179</sup> Anthony Carty, 'Why Theory?—The Implications for International Law Teaching', in *British Institute of International Law* (ed.), *Theory and International Law: An Introduction* (1991), 75, 77.

<sup>180</sup> Crawford, *op.cit.* at 685

<sup>181</sup> Martti Koskenniemi, "Hersch Lauterpacht (1897–1960)" in Jack Beatson and Reinhard Zimmermann (eds.) *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain*. Oxford University Press, Oxford (2004) 602-662, 617

1930s. Writing in 1928, P. Higgins highlighted "the scarcely veiled contempt with which international law was viewed by practising members of the Bar and the legal profession in general". Higgins concluded that "it was extraordinary that, in a country with so many worldwide commitments, so few people were trained in international law" and that it was not even considered "an essential qualification" in the Foreign Office, the Diplomatic Service or the Service Departments.<sup>182</sup> A year later in 1929, partly thanks to the influence of H. Lauterpacht, by then a Lecturer in International Law at the London School of Economics under the mentorship of A.D. McNair, *The Annual Digest of Public International Law* began to publish a digest of cases in international tribunals, and in national tribunals on points of international law.

Independent academic study of international law in England benefited from the establishment of the League of Nations. This engendered a greater academic engagement with international law, or, as J.L. Brierly remarked, "a quickening of interest in the subject in this country and others".<sup>183</sup> In 1923, the *British Yearbook of International Law* added itself to the pre-war batch of new international law journals which "had broken the pattern (if it was such)"<sup>184</sup> of earlier nineteenth century journals on international law of "not pointing to any national and regional allegiance" in their title.<sup>185</sup> However, the academic appeal of international law in England in the early interwar period should be seen in relative terms: as of 1921, there were only 10 public teachers of international law in the United Kingdom.<sup>186</sup> Admittedly, this was no great force to academically manage what has retrospectively been called "the modern foundational period of contemporary international law".<sup>187</sup> In the aftermath of the First World War, the three most significant developments in international law in the first half of the 20<sup>th</sup>

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<sup>182</sup> A. Pearce Higgins "Remarks" *Law Quarterly Review* 39 (1928) 507, quoted in D. H. N. Johnson "The English Tradition of International Law" *International and Comparative Law Quarterly* 11 (1962) pp 416 - 445, 426

<sup>183</sup> Brierly, (1935, p. 34-35)

<sup>184</sup> Martti Koskenniemi, M., "The Case for Comparative International Law" 20 *Finnish Yearbook of International Law* 20, 2009 at 1

<sup>185</sup> This trend has been inaugurated by the Spanish *Revista de Derecho Internacional y Política Exterior* in 1905 and the *American Journal of International Law* in 1907. On the the foundation of the American Society of International Law and its journal, see e.g. Ignacio de la Rasilla del Moral " The Ambivalent Shadow of the Pre-Wilsonian Rise of International Law " 7 *Erasmus Law Review* 2 (Special issue on "The Great War and Law - The Lasting Effects of World War I on the Development of Law") (Forthcoming, 2014).

<sup>186</sup> Editorial note, (1921) 27 *LQR* 8.

<sup>187</sup> Andreas Paulus, "The International Legal System as a Constitution" in: J.L. Dunoff/J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, 2009, pp. 69-112

century began to establish themselves: "the move to international organization in the political and other spheres; the development of permanent international courts and of a recognizable international judicial technique; and the attempt to control the use of force as an instrument of policy in international relations."<sup>188</sup> According to Crawford, the reason for the lack of a university international law tradition can be found in the nineteenth century, when, although "international law was a developed study in the English-speaking world" (...) "in England this had relatively little to do with the universities, and it was based on no new theoretical underpinnings or insights". Instead, whereas "international law was a developed system of practice for dealing with certain classes of relations beyond the state", (...) its "local focus was the Foreign Office and the embassies and lawyers' chambers in London rather than the universities".<sup>189</sup>

Against this background, Lauterpacht's generational focus on the importance of judicial practice in international law is apparent in a series of his writings in the early 1930s. In 1931, for instance, he attempted to prove "that there is no substance in the doctrine of 'two schools of thought' ", an Anglo-American and Continental one, in international law by taking issue respectively with, first, "differences between the 'two schools of thought' on specific matters of international law"; second, the question of "Anglo-American and continental rules and doctrines of municipal law of possible relevance in international law"; and, third, the question of "general differences in legal approach and legal philosophy".<sup>190</sup> He concluded that contemporary statements on the alleged contrast between Anglo-American and Continental schools of thought in international law "did not find support in any of the above meanings of the term"<sup>191</sup> and that they should be discarded both on the ground of scientific accuracy (because "it is essentially no more

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<sup>188</sup> International law and international events (1908-1960) at 693

<sup>189</sup> See James Crawford "Public International Law in 20th Century England" in Jack Beatson and Reinhard Zimmermann (eds.) *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain*. Oxford University Press, Oxford (2004) 681-70, 691-692 See also, Michael Lobban *English Approaches to International Law in the Nineteenth Century, Time, History and International Law*, Edited by Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (M Nijhoff, 2007) pp.65-90 at 70

<sup>190</sup> Herscht Lauterpacht, "The so-called Anglo-American and Continental Schools of Thought in International Law" *British Yearbook of International Law* 12 (1931), 32

<sup>191</sup> Herscht Lauterpacht, "The so-called Anglo-American and Continental Schools of Thought in International Law" *British Yearbook of International Law* 12 (1931), 32

than a phrase"<sup>192</sup>) and because of "the ultimate uniformity of the sense of right and justice which is the foundation of the legal ordering of the relations between states".<sup>193</sup>

J.L. Brierly defended the same perspective in his overview of "International Law in England" in 1935, stressing that court decisions were "one of the sources of the raw materials out of which the international system is constructed".<sup>194</sup> Brierly principally focused on a series of areas (namely the law of prize) through which decisions of the English Courts had contributed to the development of international law. Like Lauterpacht, Brierly also considered British judicial practice "an important source, both because of the weight which the views of a great country properly carry in international affairs, and particularly because of the high prestige of our Courts".<sup>195</sup> However, despite acknowledging the progress that the study of international law in England had experienced during the interwar period, Brierly held that "international law would be stronger, and those who are especially concerned with its study would be encouraged, if the interest of English lawyers in it were more widespread than it yet is."<sup>196</sup> This common perception among the reduced group of interwar British international lawyers of a comparative professional irrelevance of international law in the highly court-ridden British legal system<sup>197</sup> also transpires from the rather gloomy picture that W.E. Beckett offered in 1939 of "the position in England of international law as a subject of scientific study and practice".<sup>198</sup> Beckett, who served as the "Second Legal Adviser" to the Legal Department of the Foreign Office, was involved in Spanish affairs during the conflict, along with Gerald Fitzmaurice, who by then was "Third Legal Adviser", and his former professor in Cambridge, A.D. McNair, also a future British judge at the International Court of Justice (1960-1973) and the European Court of Human Rights.<sup>199</sup> According to Beckett, who was also a member of the Advisory Committee of the Annual Digest of Public International Law Cases, the situation in England was still one of "little general interest

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<sup>192</sup> Ibid., 62

<sup>193</sup> Ibid.,

<sup>194</sup> J.L. Brierly, "International Law in England" *Law Quarterly Review* 51 (1935) 24

<sup>195</sup> Ibid., 25

<sup>196</sup> Ibid., 34-35

<sup>197</sup> See on this evolution James Crawford "Public International Law in 20th Century England" in Jack Beatson and Reinhard Zimmermann (eds.) *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain*. Oxford University Press, Oxford (2004) 681-701

<sup>198</sup> W.E. Beckett International law in England, 55 *Law Quarterly Review* (1939) 257, 258

<sup>199</sup> Edwards, op.cit. 44

in, and much general ignorance of, international law – public and private". Beckett noted that these "two factors, indifference and ignorance, operate in a vicious progression, one producing increased states of the other".<sup>200</sup>

In coherence with this doctrinal background, Lauterpacht's only contribution to the debate on the Spanish Civil War focused on the practice of domestic tribunals regarding the conflict. Lauterpacht, who in 1937 had replaced A.D. McNair as Whewell professor of International law at Cambridge, and would go on to replace him again as British judge on the bench of the International Court of Justice from 1955 to 1960, was solely interested in disputing the precedential "authority" of the *Arantzazu Mendi* case because of its finding that there is no distinction between *de facto* and *de iure* recognition before British Courts. The only deferential contextual reference to the horrifying events behind Lauterpacht's parochial technical dissection of the case – a legal dissection that never put into question either the legality or the opportuneness of the non-intervention in Spain agreement – was a sweeping reference to the Spanish Civil War as "a period when breaches of international law on a wide scale were committed by some states and tolerated by others in what was assumed to be the general interest of peace".<sup>201</sup>

## 5. Conclusion – The Secret Life of International Law

Contemporary historians cannot argue, as S.G. Payne did back in 1962, that "work on the Spanish Civil War has not yet reached any sort of climax, for serious investigation has just begun".<sup>202</sup> Greatly to the contrary, generations of historians, with British *hispanistas* at the forefront of the research, have felt a contagious fascination with the Spanish Civil War. It is to a considerable extent due to British historiography that, notably since the late 70s and early 80s<sup>203</sup> the British foreign policy regarding the Spanish Civil War has been presented "as cynical, callous and objectively pro-Franco"<sup>204</sup> in its enabling of what E. Moradiellos called an "asymmetrical structure of international support and

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<sup>200</sup> Beckett, op.cit. 258

<sup>201</sup> Lauterpacht (1939) op.cit.,1.

<sup>202</sup> Stanley G. Payne, "Recent Studies on the Spanish Civil War" *The Journal of Modern History* 34, No. 3 (1962), 312, 312.

<sup>203</sup> Seminally on the basis of those archives, Jill Edwards, *The British Government and the Spanish Civil War, 1936-1939*, MacMillan Press, London (1979)

<sup>204</sup> Tom Buchanan, "Edge of Darkness: British 'Front-Line' Diplomacy in the Spanish Civil War, 1936-1937" *Contemporary European History* 12 (2003) 279-303, 279

inhibition"<sup>205</sup> favourable to the insurgents. Today, the case for British Macchiavellism regarding the Spanish Civil War dominates the perspective of those historians of the "future" once invoked by H. A. Smith.

The conclusions of modern historical research on the Spanish Civil War do not contradict the view that the British-led policy of localization of the conflict through non-intervention and an arms embargo was indeed seen by many contemporaries as a remedy to avoid the extension of the war to the rest of Europe in the summer of 1936. This danger of escalation was surely present in Leon Blum's change of mind from 21 July 1936 – when he was determined to send support to the Republicans in Spain – 27 July – when, after a two-day trip to London, he provisionally halted the decision to send arms to Spain – to 8 August 1936 – when France proposed the Non-Intervention Pact.<sup>206</sup> Although early commentators such as N. Padeldorf made it plain that "it has never been and it cannot be successfully demonstrated that there would have been general European intervention in Spain had there been no accord",<sup>207</sup> it is indisputable that the danger of escalation was a major argument in the decisions of many European countries and the United States to stick to the anomalous non-intervention agreement sponsored by Britain and France and to a series of international legal positions which, according to N. Berman, "could be viewed as the "nadir" of the traditional rules".<sup>208</sup> Neither is it disputed that what lay behind these anomalous international legal positions was a British foreign policy of appeasement under the conservative governments of S. Baldwin (June 1935 to May 1937) and N. Chamberlain (May 1937 to May 1940). This was a policy that a successor of A.D. McNair at the Presidency of the International Court of Justice, Judge S.M. Schwebel, later decried as "legally infirm (in the context of the obligations of the Covenant of the League of Nations) as it was politically cynical and craven".<sup>209</sup>

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<sup>205</sup> Moradiellos (1999) op.cit, 107

<sup>206</sup> M.D. Gallagher, 'Leon Blum and the Spanish Civil War', *Journal of Contemporary History*, 6, 1 (January 1971), 58. As a journalist, contemporary of Blum, noted: 'Leon Blum is doing reluctantly but loyally what he judges to be best for peace. But history teaches us that it is always dangerous to turn one's back on justice, even with the best of intentions.' See Louis Martin-Chauffier: Editorial in *Vendredi*, 11 September 1936 quoted Gallagher at 64.

<sup>207</sup> (p. 587-588).

<sup>208</sup> Berman op.cit., 460.

<sup>209</sup> Stephen M. Schwebel, "Review of Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office by Anthony Carty and Richard A. Smith" *The American Journal of International Law* 97 (2003) 992-994, 994

The present interdisciplinary study has, however, made it sufficiently clear that an early version of N. Chamberlain's "peace for our time" speech<sup>210</sup>, at the price of the sacrifice of Spain, was not the only – or even the main – factor behind British foreign policy-making regarding non-intervention in the Spanish Civil War. In other words, this study has shown is that what lay behind the British policy of appeasement of Germany and Italy was not only – to borrow from Lauterpacht's laconic remark – "the general interest of peace".<sup>211</sup> In fact, to geostrategic concerns – including the protection of the Mediterranean "imperial route" through the Strait of Gibraltar – and British long-term economic interests<sup>212</sup> (40% of foreign investment in Spain was British in 1936),<sup>213</sup> one should add religious concerns and the anti-Bolshevism<sup>214</sup> of the British establishment elite.<sup>215</sup> The anti-communist element of British policy, which was fuelled by early reports to the Foreign Office from pro-Franco British diplomats in Spain,<sup>216</sup> remained an important factor in Britain's determination to prevent "France by hook or by crook from going 'Bolshevik' under the influence of the Spanish Civil War".<sup>217</sup> This class-background motivation was stressed by D. Little, who noted that "Britain quickly adopted a 'better Franco than Stalin' approach, which probably helped shape the strategy of appeasement over the following two years. Given disturbing signs from Madrid to Athens of a new wave of Soviet subversion in early 1936, by August Whitehall clearly believed that Republican

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<sup>210</sup> Peace in our Time Speech given in Defence of the Munich Agreement, 1938 Neville Chamberlain Great Britain, Parliamentary Debates, Commons, Vol. 339 (October 3, 1938)

<sup>211</sup> Lauterpacht (1939) op.cit.,1.

<sup>212</sup> For an analysis of the Economic aspects of British Policy, see, Edwards op.cit., 64-100

<sup>213</sup> Ibid., at 65.

<sup>214</sup> See e.g. Douglas Little, 'Red Scare 1936: Anti-Bolshevism and the Origins of British Non-intervention in the Spanish Civil War', *Journal of Contemporary History*, 28 (1988), 291-311, 291 (suggesting that "Whitehall imposed an arms embargo on the Spanish Republic primarily to prevent the emergence of a communist Spain, and more broadly, to check the spread of Bolshevism in western and southern Europe")

<sup>215</sup> This was acute in figures such as W. Churchill, See e.g. Dorothy Boyd Rush, "Winston Churchill and the Spanish Civil War" *Social Science*, 54, (1979)86

<sup>216</sup> Such as the British ambassador in Madrid informing Eden on 18 August "Spanish Government has not authority and law and order is in reality inexistent. Anarchists and communists and advanced socialist elements are in de facto charge of the situation". See Mr Ogilvie- Forbes to Mr. Eden (received August 18, 9.30 am) No. 9 Telegraphic (W 8973/62/41) in W.N. Medlicott and D. Dakin (Eds) Documents on British Foreign Policy, 1919-1939 Second Series Volume XVII, Western Pact Negotiations: Outbreak of Spanish Civil War June 1936 – January 1937 1979, at 107. For recent research on the role of British diplomats in Spain, see Tom Buchanan, "Edge of Darkness: British 'Front-Line' Diplomacy in the Spanish Civil War, 1936-1937" *Contemporary European History* 12(2003), 279-303, 279

<sup>217</sup> See signed on August 12, 1936 "Minute by Mr Sargent on the danger of a creation of rival ideological blocs in Europe (W 9331/62/41) in Medlicott and D. Dakin (Eds) op.cit., 91.

Spain was better dead than red".<sup>218</sup> As Graham noted, this background demonstrates that the Spanish Civil War "held up a mirror to class tensions and imperialist rivalries in Europe",<sup>219</sup> and lends credibility to the "basic coincidence between the objectives of British foreign policy and the diplomatic aims of the rebel authorities".<sup>220</sup>

Historical research in the archives of the British Foreign Office has amply demonstrated that the Non-Intervention Agreement and the establishment of a supervisory committee in London served the principal British diplomatic objectives in the conflict well as it entailed "restriction of the war to Spain, restraining the intervention of her French ally, avoiding any alignment with the Soviet Union, and any confrontation with Italy and Germany over their support for the rebels".<sup>221</sup> The basic coincidence between these British foreign policy goals and the insurgents' strategy clearly appears from the archives of the Spanish Ministry of Foreign Affairs under Franco in 1939:

"Our principal and almost exclusive task had to be to localize the war in Spanish territory, avoiding in this way by all means an international war out of which we would have little to gain and much to lose. At the same time, however, we had to ensure that we would still be able to obtain the aid we needed from our foreign friends while ensuring at all costs that our enemy received no aid or at least that this aid was minimized".<sup>222</sup>

This coincidence of interests appears confirmed by (Sir) Robert Vansittart, Chief Diplomatic Adviser to the Foreign Office, for whom, writing in a memo in 1939 (but only made public in the 1970s) "the whole course of our policy of non-intervention – which has effectively, as we know, worked in an entirely one-sided manner – has been putting a premium on Franco's victory".<sup>223</sup>

The British government's covert pro-Francoism, expressed in a non-intervention strategy which some did not hesitate early on to term a policy of British "malevolent neutrality",<sup>224</sup>

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<sup>218</sup> Little op.cit, 307

<sup>219</sup> Graham op.cit, 689

<sup>220</sup> Moradiellos, (2002) op. cit. 45

<sup>221</sup> *Id.*

<sup>222</sup> AMAE R834/31, memo by Gines Vidal (Director of the European Section, Spanish Ministry of Foreign Affairs) 28 January 1939 (quoted in Moradiellos (2002) op.cit. 45- 46)

<sup>223</sup> *Sir Robert Vansittart, Chief Diplomatic Adviser to the Foreign Office PRO FO371724115, W973, memo by (Sir) Robert Vansittart, 16 January 1939*

<sup>224</sup> See Douglas Little, *Malevolent Neutrality: The United States, Great Britain and the Origins of the Spanish Civil War*, Cornell University Press, Ithaca (1985) indicating that the term 'malevolent neutrality' was coined



had the effect of tilting the balance against the Second Spanish Republic. Support for the non-intervention agreement *de facto* neutralized the role of the League of Nations *vis à vis* the early German and Italian interventions in the conflict, and amounted to the earlier imperial guardian of the system of collective security and preventing many third countries from legally assisting the incumbent Republican government. In this process, British international lawyers served as handmaidens to the strategic design of the British Foreign Office at a time when – according to Crawford – international law provided “part of the language in which international debates were conducted, the conduct of politicians criticized, proposals for settlement or change put forward and rejected or agreed”.<sup>225</sup> The non-intervention agreement marked the death knell of the system of collective security established by the League of Nations, and became the revolving door for Europe’s entry into the Second World War. The real lasting legacy of the Spanish Civil War for the history of international law and civil wars is that it provides a cautionary tale about the role of international lawyers, who work as a two-way bridge between international policymaking and international law,<sup>226</sup> under the “gravitational or other effects” of those “black holes”<sup>227</sup> to which the repercussions of the “secret life of international law” on the “visible life of international law”<sup>228</sup> have been aptly compared.

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by Lord Strabolgi, a Labour Peer, in an article critical of British policy in Spain which appeared in the Daily Herald, 10 August 1936.

<sup>225</sup> Crawford, *op.cit.* 693. However, Crawford notes “But one must be careful not to draw too much from this in terms of the influence of particular scholars, or even of international lawyers in general. To take an analogy, art critics may influence the development of painting in a variety of ways, but it would be misleading to write a history of art by reference to their work. For the most part the product of international law scholarship is a similarly secondary literature”. James Crawford, also a former Whewell professor of International Law at the University of Cambridge followed the footsteps of A.D. McNair and H. Lauterpacht and became judge of the International Court of Justice in 2014.

<sup>226</sup> Particularly acute in the international legal adviser, the duplicity of whom appears to be as old as the function. This duplicity is echoed by the very nick-name of “the first Legal Assistant appointed to the British Foreign office – in effect the post of Legal Adviser” in 1886, E. Davidson. This, according to J. Crawford, “was apparently known as “*Quoad*” Davidson for his habit of advising “*quoad* legal adviser” one thing, and “*quoad* Davidson” another Crawford *op.cit.*, 687

<sup>227</sup> Daniel Bethlehem, “The Secret Life of International Law”, *Cambridge Journal of International and Comparative Law* 1 (2012) 23-36

<sup>228</sup> *Ibid.*, at 36. Daniel Bethlehem held the position of principal Legal Adviser of the United Kingdom Foreign & Commonwealth Office between 2006-2011.

