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NEUTRALITY AND THE EUROPEAN WAR 1939–1940

Josef L. Kunz *

OBVIOUSLY it is still impossible and will be impossible for some time to make a definitive legal research into the problem of neutrality during the present European war. Most important facts and documents are still unpublished, inaccessible or shrouded in the fog of contradictions and propaganda. The duration and the outcome of the war are still uncertain and nobody can foresee what type of world will emerge from this war and what the future of neutrality in this type of world will be.

And yet it seems worthwhile to survey the neutrality problem in the present war from a strictly legal point of view, because of a widespread confusion, to be found not only among laymen, but even among experts. There are the emotionally shaken defeatists who proclaim that there is no more international law.[1] Then there are the wishful thinkers who tried to convince us for years that there is no more neutrality. There are, further, the amateurs, with their sometimes grotesque ideas as to what neutrality is and as to what the legal norms on neutrality are. There are, finally, the politicians—often, consciously or unconsciously, also among men who want to be considered as scholars —who have always so conveniently two international laws, two laws of neutrality on hand, one for one's own nation and those we like, the other against the nations we do not like.

Under such circumstances it is not superfluous to survey the problem objectively and legally. The first condition in order to understand the present problem is the insight into the development of neutrality from the outbreak of the World War to the outbreak of the present European war.

I

NEUTRALITY 1914-1939

1. *The World War 1914-1918*

As the outcome of a development through centuries there was in force, on August 1, 1914, a recognized general law of neutrality. It

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[1] For a very timely article against them, see Jessup, "The Reality of International Law," 18 FOREIGN AFFAIRS 244 (1940); Jessup, "In Support of International Law," 34 AM. J. INT. L. 505 (1940).

has become customary in postwar times to speak of this law as the "traditional" or "classic" neutrality. As in the Napoleonic wars, this law of neutrality was subject during the World War to an enormous strain. The permanent neutrality of Luxemburg and of Belgium, as well as the neutrality of Greece, was violated for strategic reasons. In the realm of maritime warfare the rights of neutrals were violated by both belligerent groups, either on the basis of alleged rights as belligerents or through so-called "interference by sovereign right," or by the way of reprisals.[2] The small neutral states protested, but lacked the power to enforce their rights; the United States differentiated in her protests to Great Britain and Germany and applied, after her entry into the World War, the same methods against which she had protested as a neutral.

2. *The "Crisis of Neutrality" 1920-1931*

The "crisis" of neutrality dates from the World War. But it meant, apart from a critique of the attitude of the belligerents, a new ideology: that neutrality is only a consequence of international anarchy, no longer fit for a world of international solidarity. Unfortunately, this ideology—by no means new—came from the Allies as a political means of winning the war. As they claimed that all the righteousness was on their side, they looked on neutrality as being immoral. And what the Versailles treaty, article 231, had formulated *in concreto* and *pro praeterito* against Germany, article XVI of the Covenant of the League of Nations formulated *in abstracto* and *pro futuro* against the "aggressor."

With the establishment of the League of Nations, neutrality entered into a new phase.[3] Prior to 1931 it was sometimes asserted that there is in general no more neutrality. But this assertion was always legally untenable. The general international law of neutrality had in no way been changed by the Covenant, as the Covenant could not bind nonmembers. But even as far as League members are concerned, the

[2] Cf. KUNZ, KRIEGSRECHT AND NEUTRALITÄTSRECHT (1935).

[3] The literature is enormous. Cf., e.g., Kunz, op. cit. supra, 302-319; Kunz, "The Covenant of the League of Nations and Neutrality," 29 AM. SOC. INT. L. PROC. 36 (1935); Whitton, "La Neutralité et la Société des Nations," [1927] 2 RECUEIL DES COURS 453; MICHAILIDÈS, LA NEUTRALITÉ ET LA SOCIÉTÉ DES NATIONS (1933); POLITIS, LA NEUTRALITÉ ET LA PAIX (1935); DE NOVA, LA NEUTRALITÀ NEL SISTEMA DELLA SOCIETÀ DELLE NAZIONI (1935); "Neutralité," 10 ACADÉMIÉ DIPLOMATIQUE INTERNATIONALE 41-56 (1936); Leresche, "L'Evolution de la neutralité depuis la Guerre mondiale," 2 REVUE INTERNATIONALE FRANÇAISE DU DROIT DES GENS 19, 131 (1936); COHN, NEO-NEUTRALITET (1937) (English translation: Neo-Neutrality, 1939).

Covenant left ample room for neutrality, with regard to the attitude of members toward wars between nonmembers or between members and nonmembers, and even toward legal wars between members. The Wimbledon decision, the neutrality declared and maintained by League members toward the Polish-Russian and Greco-Turkish wars, the neutrality treaties of France and of the Soviet Union, neutrality provisions in many postwar treaties, the Pan-American Convention on Maritime Neutrality of 1928, testify to the continuance of "classic" neutrality in law and in the practice of states.

On the other hand, as far as League members and illegal wars between members are concerned, articles X, XI and XVI of the Covenant brought, by particular international law, if not an abolition, at least a far-reaching modification of "classic" neutrality. For economic sanctions and the duty of granting passage to League troops—and both duties are obligatory under the Covenant—are, of course, incompatible with neutrality. But the legal situations which may arise under this regime of the Covenant were ill-defined and hardly regulated by positive rules of international law.

This situation was confused by writers who, in a legally untenable way, interpreted this special regime, binding under certain conditions on League members, as an abolition of neutrality in general international law. The confusion became greater by the fact that writers tried to show that the Pact of Paris of 1928 had abolished war and neutrality. However, war had not been abolished, but only "renounced," with the retention of wars of self-defense—and every nation is the judge whether a certain war is a war of self-defense—and the regime of neutrality had in no way been touched by the Pact of Paris.

The attempt to conciliate the Covenant and neutrality through the new and untenable theory, invented by Switzerland[4] which had been granted a special position in the League[5]—that neutrality is primarily a military notion and that there is, in consequence, a distinction between "military neutrality" and "economic partiality" was doomed to failure, as such distinction had no basis in positive general international law.

In consequence, in the case of economic, but not military sanctions, there was a rather dubious twilight-zone between neutrality and bel-

[4] Cf. Botschaft des Bundesrates of August 4, 1919, [1919] SCHWEIZER BUNDESBLATT 541, and Zusatzbotschaft des Bundesrates of February 17, 1920, [1920] id. 343.

[5] Resolution of League of Nations Council of February 13, 1920, 1 L. OF N. OFFICIAL JOURNAL 57 (1920). Cf. Morel, La neutralité de la Suisse et la Société des Nations: Deux conceptions de la paix (1931).

ligerency. On the other hand, the Covenant and the Pact of Paris did not speak of "recourse to force," but only of "recourse to war." Now, the dividing line between war and nonwar ("hostilities," armed reprisals) was dubious even prior to 1914. But article XVI of the Covenant and the Pact of Paris induced more and more states, which at once had seen these lacunae, no longer to "resort to war," in order to avoid a flagrant breach of treaty obligations, but to begin military operations on the greatest scale under the guise of reprisals, "punitive expeditions," "measures of self-help" and so on. To the twilight zone between neutrality and belligerency was, therefore, added a twilight zone between war and nonwar, not an advance, but the contrary of it. The creation of these twilight zones constitutes today one of the principal and most unhappy inheritances. Even the League members sometimes welcomed this twilight zone between war and nonwar, as it made it possible for them not to apply sanctions without openly breaking their obligations under the Covenant.

The erroneous supposition that there is no more neutrality in general international law led further to the unhappy consequence that the neutrality problem was to a very great extent wholly neglected by the doctrine and practice of states. Not only was nothing done legally to clarify situations brought about by the Covenant, but there was no attempt even to solve basic differences as to the law of "classic" neutrality.[6] Nor was anything done for the reform of the law of neutrality, notwithstanding the fact that the World War had clearly demonstrated the urgent need for such reform.

3. *The "Revival of Neutrality" 1931-1939*[7]

Even prior to 1931, the system of "collective security" established by the Covenant had, according to a word of Prime Minister Baldwin, never been a reality. Already in this period and from the very beginning there was an open tendency in the League to retain a substantial part of neutrality. This trend, shown by "interpretative resolutions" to

[6] Cf., e.g., art. I/3 of the British-American Executive Agreement of May 19, 1927, 21 AM. J. INT. L. 542 (1927).

[7] Cf. Jessup, "The Birth, Death and Reincarnation of Neutrality," 26 AM. J. INT. L. 789 (1932); D'ASTORG, LA NEUTRALITÉ ET SON RÉVEIL DANS LA CRISE DE LA SOCIÉTÉ DES NATIONS (1938); GIHL, NOITRALITETS PROBLEM (1938); Ténékidès, "La neutralité et son êtat d'évolution actuelle," 66 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE (1939); Morgenthau, "The Resurrection of Neutrality in Europe," 33 AM. POL. SCI. REV. 473 (1939); Cassin, "Present et Avenir de la Neutralité," 14 ESPRIT INTERNATIONAL 48 (1940).

articles X and XVI, and by the handling of concrete cases—the Corfu affair as early as 1923—came from the small and "traditionally neutral" League members. On the other hand, the Great Powers showed no willingness to apply sanctions, unless what they considered their own vital interests were involved. Lack of universality was another obstacle. The whole system of "collective security" burdened the League with a task which only a universal and truly supra-national body could perhaps have handled; but the League was never universal and was based on the continued recognition of national sovereignty.

Further, even in its great period, the League never was, to quote a bitter word by George Scelle, an international but only a multinational body. The representatives of the members came to Geneva not so much for handling world affairs in a world spirit, as to use the machinery of the League for the benefit of their respective national policies. "Collective security" thus became quite naturally in the hands of France and her allies an instrument for perpetuating the status quo created by the Paris Peace Treaties. Equally naturally the revisionist states laid great emphasis on traditional neutrality. The whole struggle for and against "collective security," for and against neutrality, was, therefore, only a part of Europe's dominating postwar political problem: status quo versus revision. And the small states, which, to quote the phrase of a Scandinavian statesman, felt that "the system of collective security is uncomfortably similar to the pre-war alliances of power politics,"[7a] desired to be released from the obligations of this "collective security."

Prior to 1931, these uncertainties remained more academic. But beginning with Japan's invasion of Manchuria the illusion of "collective security" broke down in Asia, South America and Africa,[8] before it broke down in Europe. And after Germany's reoccupation of the demilitarized Rhineland Zone and the unilateral denunciation of the

[7a] Koht, "Neutrality and Peace; The View of a Small Power," 15 FOREIGN AFFAIRS 280 at 288 (1937).

[8] Cf. Sir John Simon's speech in the House of Commons, February 27, 1932, that "Under no circumstances will this Government authorize this country to be a party to the [Manchurian] conflict."

In the Leticia conflict of 1931-1932, Brazil took military measures for the protection of her neutrality. In the Chaco conflict a Pan-American "Commission of Neutrals" tried to bring about a peaceful settlement. In the Chaco War not only Brazil, but the League members Argentina, Chile, Peru and Uruguay proclaimed their neutrality. In the Ethiopian conflict economic sanctions were for the first time applied, but failed.

Locarno Treaty the "traditionally neutral" states of Europe hastened back to "classic neutrality": Luxemburg,[9] Belgium,[10] Switzerland.[11]

Switzerland had already applied the arms embargo against both Italy and Ethiopia; she now abandoned her untenable theory of a distinction between "military" and "economic neutrality" and applied to the League for the recognition of her full neutrality,[12] a recognition granted to her by the League.[13]

Although Switzerland had won her full neutrality by special grant from the League, she joined the other "neutrals" in their attack against the obligatory character of article XVI of the Covenant.[14] On July 1, 1936, the delegates of Sweden, Norway, Denmark, Finland, Holland, Switzerland and Spain made a joint declaration[15] in the League on their attitude toward article XVI. The Cranborne Report of September 8, 1937[16] discussed the proposals of a coercive versus a noncoercive League. A special committee of twenty-eight was set up to study the application of the principles of the Covenant: Switzerland and Sweden

[9] Cf. WEHRER, LE STATUT INTERNATIONAL DU GRAND-DUCHÉ DE LUXEMBOURG (1937).

[10] Speech of the King of the Belgians, October 14, 1936, NEW YORK HERALD TRIBUNE, Oct. 15, 1936, p. 2; Franco-British declarations of April 24, 1937, NEW YORK TIMES, April 25, 1937; German note of October 13, 1937, NEW YORK TIMES, Oct. 14, 1937, p. 18.

But the neutrality of Belgium remained dubious, in consequence of her League membership. Cf., e.g., La Pradelle, "La Belgique retourne à la neutralité," 18 REVUE DE DROIT INTERNATIONAL 538 (1936); Hyde, "Belgium and Neutrality," 31 AM. J. INT. L. 81 (1937); SIRUYE, LA POLITIQUE EXTÉRIEURE ET LE STATUT INTERNATIONAL DE LA BELGIQUE (1937); ROLIN, LA BELGIQUE NEUTRE? (1937).

[11] Cf. Schindler, "La Neutralité Suisse de 1920 à 1938," 19 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE 433 (1938); and Schindler, "Die schweizerische Neutralität," 8 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT AND VÖLKERRECHT 413 (1938); Keppler, "Die neue Neutralität der Schweiz," 18 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 505 (1938); Morgenthau, "The End of Switzerland's 'Differential' Neutrality," 32 AM. J. INT. L. 558 (1938).

[12] Swiss Memorandum to the League of April 29, 1938, L. OF N. Doc C.146.M.87.1938.V; 19 L. OF N. OFFICIAL JOURNAL 385 (1938).

[13] Report by Sandler (Sweden), L. OF N. Doc. C.191(1).M.103(1).1938.V; Resolution of the Council of the League of May 14, 1938, 19 L. OF N. OFFICIAL JOURNAL 368 (1938). In a note of May 20, 1938, Switzerland notified Germany and Italy of her resumption of unconditional neutrality and the German note of June 21, 1938, and a later Italian note pledged to respect her neutrality at all times.

[14] Cf. Kunz, "Observations on the De Facto Revision of the Covenant," 4 NEW COMMONWEALTH QUARTERLY 131 (1938).

[15] L. OF N. OFFICIAL JOURNAL, SPEC. SUPP. No. 154, p. 19 (1936); L. OF N. Doc. C.357.M.233.1936.VII.

[16] L. OF N. Doc. C. S. P. 20 (Report no. 1); L. OF N. Doc. C.367.M.249. 1937.VII.

asked that article XVI be made juridically optional, Holland and Belgium agreed that it was already practically optional.[17] At the nineteenth League of Nations Assembly in 1938, the representatives of Holland and Sweden gave notice of their unilateral repudiation of the League's obligatory coercive measures and the representative of Great Britain asked for the recognition of the fact that economic sanctions have become "provisionally optional" for all members.[18]

Even prior to that time the actions of statesmen of these "neutral" states had left no doubt that their policy would from now on be based on classic neutrality. The Resolution of the Oslo Powers, Copenhagen, April 23 and 24, 1938, reaffirmed that the system of sanctions had acquired, in consequence of the practice followed for the past years, a nonobligatory character. The Nordic States, following their practice of the World War, adopted a policy of interneutral cooperation and of the enactment of nearly identical neutrality rules.[19] In both respects their example was followed by the Baltic Republics.[20] Italy had preceded with a municipal codification of the laws of war and neutrality.[21] All these codifications are based on the "classic" neutrality of the Hague Conventions.

[17] Report of the Committee of 28, L. OF N. DOC. A.7.1938.VII.

[18] L. OF N. OFFICIAL JOURNAL, SPEC. SUPP. No. 183, p. 39, and No. 189, p. 37 (1938).

[19] Scandinavian Joint Declaration, Stockholm, May 27, 1938—2 DEÁK and JESSUP, A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES 1518-1519 (1939); Danish Neutrality Rules—1 id. 479-483; Finnish—1 id. 557-578; Icelandic—1 id. 701-702; Norwegian—2 id. 840-841; Swedish—2 id. 970-971. Cf. Genet, "L'Extension des Règles de la Neutralité dans le Droit Maritime du temps de guerre," 7 REVUE INTERNATIONALE FRANÇAISE DU DROIT DES GENS 140, 303 (1939); Padelford, "The New Scandinavian Neutrality Rules," 32 AM. J. INT. L. 789 (1938); Hambro, "Das Neutralitätsrecht der nordischen Staaten," 8 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 445 (1938); Verdross, "Das neue nordische Neutralitätsrecht," 19 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 44 (1939).

[20] Convention of Baltic States, Protocol of Riga, November 18, 1938—6 REVUE INTERNATIONALE FRANÇAISE DU DROIT DES GENS 274 (1938); Estonian (December 3, 1938), Latvian (December 21, 1938) and Lithuanian (January 25, 1939) Laws of Neutrality—texts in French, 7 id. 114 (1939).

[21] Atti della Commissione per le leggi di guerra e di neutralità (1937); text in 1 DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES 722-730 (1939). Cf. Genet, "La Nouvelle Réglementation Italienne des Lois de la Guerre et de la Neutralité," 4 REVUE INTERNATIONALE FRANÇAISE DU DROIT DES GENS 123 (1937); Steiner, "Italian War and Neutrality Legislation," 33 AM. J. INT. L. 151 (1939); Sandiford in 9 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 605 (1939); Verdross, "Das neue italienische Kriegs—und Neutralitätsrecht," 19 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 193 (1939).

The trend toward a return to classic neutrality is also shown by the debates of the 1938 meeting of the International Law Association.[22]

But this sketch would be incomplete if it did not touch two other developments of great importance. The first is the development with regard to neutrality in the United States in the postwar times, and particularly from 1935 to the outbreak of the present European War.[23] The triumph, for the time being, of the school of the "new," "isolationist" neutrality is shown by the American Neutrality Acts of 1935, 1936 and 1937;[24] the Neutrality Act of 1937, minus its "cash-and-carry" norm, which had expired by limitation on May 1, 1939, was in force at the time of the outbreak of the present European War.

The "new" neutrality is, as to substance, characterized by the insistence, not on neutral rights, but on neutral duties, by the voluntary and temporary renunciation, not of the rights of neutrals, but of the exercise of these rights: arms embargo, embargo on credits and loans, "cash-and-carry" provision, certain restrictions of American traveling and shipping; all those norms to be impartially applied to all belligerents. It contained also the germs of a "Pan-American neutrality." Generally speaking, the American Neutrality Acts are perfectly legal from the point of view of the superior international law of neutrality, as they regulate only problems the regulation of which, within the limits of certain superior norms, particularly the rule of impartiality, is left by international law to the discretion of the neutral states. They

[22] 40 INT. L. ASSN. REP. 87-124, 283-300 (1938).

[23] For a detailed discussion and a fairly complete bibliography from 1920 to the Neutrality Act of 1936, see Kunz, "Das Neutralitätsproblem in den Vereinigten Staaten," 17 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 85 (1937).

Of the enormous American literature on neutrality only a few books may be cited: SEYMOUR, AMERICAN NEUTRALITY, 1914-1917 (1935); MILLIS, ROAD TO WAR (1935); BORCHARD and LAGE, NEUTRALITY FOR THE UNITED STATES (1937) (2d ed. 1940); TANSILL, AMERICA GOES TO WAR (1938); MORRISEY, THE AMERICAN DEFENSE OF NEUTRAL RIGHTS 1914-1917 (1939); HERRING, AND SO TO WAR (1938); DULLES and ARMSTRONG, CAN AMERICA STAY NEUTRAL? (1939); BEARD, GIDDY MINDS AND FOREIGN QUARRELS (1939); GRATTAN, THE DEADLY PARALLEL (1939); PHILLIPS and GARLAND, THE AMERICAN NEUTRALITY PROBLEM (1939).

The enormous American neutrality debate produced also very valuable scientific works. See particularly: NEUTRALITY, ITS HISTORY, ECONOMICS AND LAW, ed. Jessup (1935, 1936) (4 vols.); DEÁK and JESSUP, A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES (1939) (2 vols.); Jessup (Reporter for Harvard Law School Research in International Law), "Draft Convention of Rights and Duties of Neutral States in Naval and Aerial War," 33 AM. J. INT. L. SUPP. 167-817 (1939) (hereafter cited as Jessup Report).

[24] S. J. Res. 173, 49 Stat. L. 1081 (1935); H. J. Res. 491, 49 Stat. L. 1152 (1936); S. J. Res. 51, 50 Stat. L. 121 (1937).

constitute only a change in the attitude of the municipal law of neutrality, not a change in the international law of neutrality.

But the illusionary faith in "keeping out of war" through preenacted municipal neutrality legislation, the confusion between the law of neutrality and the policy of "keeping out of war," the neglect of the international law of neutrality, the mistaken belief that the "new" neutrality will eliminate all frictions with the belligerents, the lack of the foresight that the whole "isolationist" neutrality may be brushed aside through its application by the Chief Executive or through Congressional amendment, if there is a strong popular sympathy for one of the belligerents, all that was bound to lead to disillusion.[25] On the other hand, although the "new" neutrality was internationally perfectly legal, the isolationist attitude by the most powerful of the prospective neutrals had necessarily international consequences, by weakening the position of the smaller neutrals, by further reducing the chances of interneutral cooperation, and by opening the way for far-reaching and illegal extension of alleged belligerent rights by powerful nations at war.

The second development of utmost importance was the international handling of the Spanish Civil War,[26] which not only was, as to the right of the legal government of Spain to buy arms, and as to the recognition of insurgents as a belligerent party, wholly in contradiction with the law and precedents, but was also instrumental in confusing the distinction between civil war and war in the sense of international law. The United States applied to the Spanish Civil War its "neutrality" law, although the legal condition for the coming into existence of the status of neutrality—war in the sense of international law or recognition of insurgents as a belligerent party—was entirely lacking. Europe handled the situation under the heading of "nonintervention" and seldom can an international body show a more pitiable record than the London "Nonintervention Committee." The whole handling was a perfect illustration of the sarcastic word of Talleyrand, that noninter-

[25] Cf. Deák, "The United States Neutrality Acts: Theory and Practice," INTERNATIONAL CONCILIATION, No. 358 (1940); FENWICK, AMERICAN NEUTRALITY, TRIAL AND FAILURE (1940).

[26] Of the great literature on the Spanish Civil War only the following studies may be cited here: LE FUR, LA GUERRE D'ESPAGNE ET LE DROIT (1938); Scelle, "La Guerre Civile Espagnole et le Droit des Gens," 45 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 265, 649 (1938), 46 id. 197 (1939); VEDOVATO, IL NON-INTERVENTO IN SPAGNA (1938); ROUSSEAU, LA NON-INTERVENTION EN ESPAGNE (1939); PADELFORD, INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE (1939).

vention means about the same thing as intervention. Russia, Germany, and particularly Italy intervened under the name of "nonintervention" and Italy's intervention on the greatest scale was absolutely decisive for the outcome of the Spanish Civil War—and the other powers acquiesced. The Spanish Civil War thus constituted, although the problem of neutrality was technically not involved, a far-reaching precedent for a new twilight zone between belligerency and neutrality. The other powers which had acquiesced in Italy's action felt that nowadays perhaps a "neutral" can give—as in the eighteenth century—all "aid short of war" to the favored belligerent and yet continue to claim to be neutral.

The twilight zone between belligerency and neutrality in consequence of article XVI of the Covenant disappeared because of the breakdown of the League. But not only did the twilight zone between war and nonwar—a political creation of postwar times—remain, but a new twilight zone was set up by the precedent furnished by the handling of the Spanish Civil War. And whereas, the first twilight zone was binding only on League members, but as such had a strictly legal basis in the particular international law of the Covenant, the new twilight zone has no basis whatsoever in general international law, but is exclusively a political creation of power politics.

II

NEUTRALITY AND THE EUROPEAN WAR 1939-1940[27]

1. *Traditional Neutrality Problems in the European War 1939-1940*

The postwar development of neutrality sketched in the first chapter led to the consequence that at the time of the outbreak of the present European War the whole world seemed to have returned to the classic pre-World-War neutrality of 1914, based on the Hague Conventions of 1899 and 1907. Nearly all the states acted on this basis, not only in their neutrality declarations, but also in handling, through their foreign offices, the daily neutrality problems brought up by the present European War.

But apart from reminiscences of article XVI of the Covenant and apart from entirely new tendencies, even within the sphere of tradi-

[27] Cf. Wright, "The Present Status of Neutrality," 34 AM. J. INT. L. 391 (1940); Friedmann, "International Law and the Present War," 3 MODERN L. REV. 177 (1940); Lalive, "Quelques nouvelles tendances de la neutralité," 40 FRIEDENSWARTE 46 (1940).

tional neutrality problems the situation was a difficult one. Like the World War, the present European War was from its beginning a great war with world-wide repercussions, and a bitter war, and so was bound to lead to violations of the law of neutrality. The situation was further aggravated by the enormous importance of the economic warfare, by the isolation of the United States under her "new" neutrality, by the lack of clarity, the insufficiencies, divergencies of interpretation and lacunae of the positive international law of neutrality, by the failure of a reform and clarification of the law of neutrality in the postwar period. Add to these difficulties the enormous rise in importance of aerial warfare—and the law of aerial warfare and neutrality entirely lacks a codification—further the "total" character of the war[28] and the totalitarian character of the national economies of the belligerents, especially of Germany.

(a) *Neutrality Declarations*

The declaration of war on Germany by Great Britain and France on September 3, 1939, created a legally clear situation as to the status of war and neutrality. Most states issued neutrality declarations.[29] Some states proclaimed their neutrality in declarations, others by decree, some by communication to the League of Nations. Some states mentioned only the European War in general terms, others mentioned the belligerents, including Poland; some, finally, made separate neutrality proclamations for the German-Polish War, followed by neutrality proclamations in the war of Great Britain and France with Germany. Many states made later separate neutrality proclamations as to Norway, the Netherlands and Belgium; most states made separate neutrality proclamations after Italy's entry into the war. Some neutrality proclamations simply proclaim neutrality; others invoke specifically the Hague Conventions,[30] others add specific municipal neutrality rules. Most states simply speak of neutrality, but others underline their "strict neutrality."

The United States issued on September 5, 1939, two neutrality

[28] On the conception of "total war," cf., e.g., DOUHET, IL DOMINIO DELL' ARIA (1921) (French translation: La guerre de l'air, 1932); LUDENDORFF, DER TOTALE KRIEG (1936); Gürke, "Der Begriff des totalen Krieges," 4 VÖLKERBUND UND VÖLKERRECHT 207 (1937).

[29] Texts in DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES (1939) (loose-leaf edition).

[30] E.g., Argentina, Luxemburg, Spain, Mexico, Venezuela.

proclamations.[31] The first was made under international law, following in its detailed descriptions not only earlier American neutrality proclamations, but also the Hague Conventions. The second neutrality proclamation is of a very different nature: it was made in virtue of the municipal Neutrality Act of 1937.[32] After the new American Neutrality Act of 1939,[33] new American neutrality proclamations were made.[34] They were followed by special neutrality proclamations concerning the war between Germany and Norway,[35] the war between Germany and, on the other hand, Belgium, Luxemburg and the Netherlands,[36] and finally concerning the war of Italy with France and Great Britain.[37]

A few special problems as to the status of neutrality arose:

(1) As to the "independent" state of *Slovakia*, it is, at the best, a protectorate of Germany, serving, in consequence of the German-Slovak Treaty of March 23, 1939,[38] as a military base and is, therefore, certainly a belligerent, not a neutral.

(2) As to the British and French *mandated territories*, special legal problems as to their status, if the mandatory power is at war, may arise, but in fact the mandated territories are at war. The armistice treaties of France with Germany and Italy of June 25, 1940, provide that French resistance must cease in the French-mandated areas.

(3) As to the *British Dominions*, it was supposed that even since the Westminster Statute of 1931 a declaration of war by Great Britain would automatically create a state of war for the Dominions, although the question of their *active* participation is left to the decision of the Dominion Parliaments. Therefore, the Dominions could not be legally neutral in a British war. Both Keith[39] and Lauterpacht,[40] were strongly of this opinion. But developments in the present war, acquiesced in by the mother country and recognized by foreign powers, have shown that

[31] Texts in 1 U. S. DEPT. ST. BULL. 201-227, 246-249 (1939).

[32] S. J. Res. 51, 50 Stat. L. 121 (1937).

[33] H. J. Res. 306, 54 Stat. L. 4 (1939). Cf. Jessup, "In Support of International Law," 34 AM. J. INT. L. 95 (1940); Dulles, "Cash and Carry Neutrality," 18 FOREIGN AFFAIRS 179 (1940).

[34] 1 U. S. DEPT. ST. BULL. 453-454 (1939).

[35] 2 id. 429-432.

[36] 2 id. 489-492.

[37] 2 id. 639-645.

[38] Text in NEW YORK TIMES 4:2 (Mar. 24, 1939).

[39] KEITH, THE DOMINIONS AS SOVEREIGN STATES 49-51, 53, 605-607 (1938).

[40] 2 OPPENHEIM, INTERNATIONAL LAW, 5th ed. (Lauterpacht), 198, note 3 (1935).

even with regard to war and neutrality the diplomatic unity of the British Empire is definitively a thing of the past.[41]

In the present war even Australia, New Zealand and Canada made separate declarations of war, Canada not until September 10, 1939. In the Union of South Africa[42] a motion by Prime Minister Hertzog in favor of neutrality was defeated[43] and South Africa under the new Prime Minister Smuts declared war on Germany on September 6, 1939. But South Africa would have been unable under international law to be neutral, as long as her pact with Great Britain to maintain Simonstown as a base for the British navy remained in force.[44]

But the legal situation of Eire was different, both in British[45] and international law. And Eire has declared her neutrality. Premier Eamon de Valera announced on September 1, 1939, the government's decision to adopt neutrality. This decision was approved by the Dail Eireánn on September 2, 1939; notice of the declaration of Irish neutrality was given to the Secretary General of the League of Nations. This neutrality was recognized by Great Britain, by other neutrals, and by Germany. Eire and Germany are at peace;[46] the Irish Minister in Berlin and the German Minister at Dublin have therefore remained at their posts. Eire is naturally bound by the general international law of neutrality. She has declared her firm intention to defend, if necessary by arms, her neutrality against both Germany and Great Britain.

(4) The Kingdom of *Iraq* is legally an independent state, but

[41] Cf. Clokie, "The British Dominions and Neutrality," 34 AM. POL. SCI. REV. 737 (1940).

[42] The 1934 Status of Union Act declared the Union of South Africa a "sovereign, independent" state. Cf. KENNEDY and SCHLOSSBERG, THE LAW AND CUSTOM OF THE SOUTH AFRICAN CONSTITUTION (1935); Ilsley, "The War Policy of South Africa," 34 AM. POL. SCI. REV. 1178 (1940).

[43] Union of South Africa, House of Assembly, Debates, 3d sess., 8th Parliament, Sept. 2-5, 1939, pp. 18-23. It seems, therefore, that Canada and South Africa were not at war between September 3 and September 10 and 8 respectively. The American Neutrality Proclamations were extended to these Dominions only from the day of their declaration of war.

[44] Cf. KEITH, THE DOMINIONS AS SOVEREIGN STATES 49-51 (1938); Clokie, "The British Dominions and Neutrality," 34 AM. POL. SCI. REV. 737 (1940). What Mr. Hertzog proposed was a pseudo-neutrality.

[45] Eire, Executive Authority (External Relations) Act, 1936, Irish Constitution 1937, art. 28, § 3: "War shall not be declared and the State shall not participate in any war save with the consent of the Dail Eireánn." Cf. Keith, "The Constitution of Eire," 49 JUR. REV. 256 (1937).

[46] Cf. Wilson, "Neutrality of Eire," 34 AM. J. INT. L. 125 (1940).

bound to Great Britain by a close alliance.[47] Iraq severed diplomatic relations with Germany on September 6, 1939, but did not declare war. Her position as ally of Great Britain does, by no means, make her automatically a belligerent under international law. But the particular obligations imposed upon her by the Treaty of Alliance—to furnish aid to Great Britain by granting her on Iraq territory all facilities and assistance in her power, including the use of railways, ports, aerodromes and means of communication, and to grant to Great Britain air bases and the right to maintain at these bases armed forces on Iraq territory—preclude her neutrality.

(5) *Egypt* is in an analogous situation: legally an independent state, but bound to Great Britain by a close alliance; and the Treaty of Alliance of August 26, 1936,[48] follows the lines of the Iraq Treaty. She severed diplomatic relations with Germany, and what has been said with regard to Iraq applies equally to her. After the Italian entry into the war on June 10, 1939, an Egyptian note notified Rome of the severance of diplomatic relations with Italy and of Egypt's maintenance of her alliance with Great Britain, but added that Egypt will not participate in the war unless she is attacked by Italy. But it is obvious that Egypt, from whose territory British military operations take off against Italy, on whose territory are British troops, land, air and naval bases, is unable under international law to claim the status of neutrality. Her political status is that of "nonbelligerency."

(6) It is clear that, notwithstanding Italy's entry into the war, the *Città del Vaticano* is a neutral state.[49]

(b) *Neutrality Incidents*

Nearly all the neutrality incidents of the present war come within the law of "classic" neutrality and were handled according to that law; many of them involve controversies similar to those which arose in the World War. Limitation of space allows only a brief reference to these incidents.

Few incidents arose with regard to *neutrality in land warfare.*[50]

[47] Treaty of Alliance of June 30, 1930, GREAT BRITAIN TREATY SERIES No. 15 (1931), 132 (I) STATE PAPERS 280 (1930); 24 MARTENS, NOUVEAU RECUEIL GÉNÉRAL DE TRAITÉS 333-345 (1935).

[48] GREAT BRITAIN TREATY SERIES No. 6 (1937); 31 AM. J. INT. L. SUPP. 77 (1937).

[49] So-called Lateran Treaty between Italy and the Holy See of February 11, 1929, art. 24, 21 MARTENS, NOUVEAU RECUEIL GÉNÉRAL DE TRAITÉS 18 et seq. (1929).

[50] Sweden, which had declared her neutrality in the German-Norwegian war, announced on July 5, 1940, NEW YORK TIMES 4:4 (July 6, 1940), that, from that

Neutrality in *aerial warfare* remains uncodified, but a customary rule had come into existence already in the World War, forbidding the belligerent military aircraft to enter or fly over neutral territory and obligating neutral states to prevent such violation of neutrality, if necessary, by arms.[51]

The greatest number of problems and incidents arose with regard to *maritime neutrality*:[52] admission of belligerent submarines,[53] and of armed merchant vessels of the belligerents[54] into neutral waters; the

time on, and in consequence of the end of the Norwegian war, German "soldiers on leave" and all types of supply would be permitted movement over Swedish railways to and from Norway, but that Sweden's policy of neutrality remains the same. But, as the Norwegian war had not come to an end in law, this permission is contrary to international law. Both Great Britain and Norway vigorously protested against this action as a "serious breach of neutrality."

[51] Cf. Hague Rules of Aerial Warfare, 1923, arts. 40, 42, 48, reprinted in 17 AM. J. INT. L. SUPP. 242 (1923); Convention on Maritime Neutrality, Havana, 1928, art. 14; Scandinavian Neutrality Rules, art. 8 (see supra, note 19); Italian Neutrality Law 1938, art. 29; Belgian Neutrality Proclamation 1939, arts. 2/4, 4/3; Swiss Neutrality Ordinance 1939, art. 6. The texts of all except the Hague Rules and the Italian Neutrality Law are reprinted in DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES (1939).

See, e.g., the protests of Norway to Great Britain and Germany, 2 LE NORD 541-543 (1939), of Denmark, 2 id. 496-497, and Swiss protests to Great Britain on account of the flying of British military aircraft, bent for Northern Italy, over Swiss territory.

The theory that belligerent aircraft is entitled to flights above a three-mile vertical limit over neutral territory has no foundation whatsoever in positive international law. Cf. Kuhn, "Aerial Flights Above a Three-Mile or Other Vertical Limit by Belligerents over Neutral Territory," 34 AM. J. INT. L. 104 (1940); Editorial, 66 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE 835 (1939).

[52] Cf. Warren, "Lawless Maritime Warfare," 18 FOREIGN AFFAIRS 424 (1940).

[53] Cf. 2 GARNER, INTERNATIONAL LAW AND THE WORLD WAR 430-438 (1920); Jessup Report, 33 AM. J. INT. L. SUPP. 167 at 432-435 (1939); Scandinavian Neutrality Rules, art 2/3 (supra, note 19); Belgian and Dutch Neutrality Proclamations 1939 (Supplements to loose-leaf edition of DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES); American Neutrality Act of 1937, § 8, 50 Stat. L. 127 and 1939 Act, § 11, 54 Stat. L. 9; American Presidential Proclamations of October 18, 1939, 1 U. S. DEPT. ST. BULL. 396-397 (1939), and of November 4, 1939, 1 id. 456-457.

[54] Cf. 1 GARNER, INTERNATIONAL LAW AND THE WORLD WAR 384-416 (1920); KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 115-118 (1935); Jessup Report, 33 AM. J. INT. L. SUPP. 167 at 435-446; VIDAUD, LES NAVIRES DE COMMERCE ARMÉS POUR LEUR DÉFENSE (1936); Borchard, "Armed Merchantmen," 34 AM. J. INT L. 107 (1940).

For the exclusion: Convention on Maritime Neutrality, Havana, 1928, art. 12/3 (with reservations of the United States and Cuba); Jessup Report, art. 28, 33 AM. J. INT. L. SUPP. 167 at 435 (1939). But cf. the Scandinavian Neutrality Rules 1938, art. 3/2 (supra, note 19), the Belgian Neutrality Declaration 1939, art. 3, and the Dutch Neutrality Proclamation 1939, art. 3 (supra, note 53). The American

problem of the mere passage of merchant vessels of belligerents through neutral territorial waters.[55] The *Altmark* affair[56] brought up the problem of the passage of a belligerent auxiliary vessel, carrying enemy prisoners on board, through neutral territorial waters, as well as the problem of belligerent action in neutral waters. This latter problem was also involved in the British mining of Norwegian territorial waters on April 8, 1940. The *City of Flint* case[57] involved the problem of a prize brought into a neutral port, to be kept there until further notice. The *Admiral Graf von Spee* incident[58] concerned the admission of a belligerent man-of-war into a neutral port, length of stay, permissibility of repairs and eventual internment, problems handled correctly by Uruguay in conformity with the thirteenth Hague Convention of 1907.

Other problems leading to incidents in the present war were those of the forcible removal of enemy civilians from neutral vessels on the

Neutrality Acts of 1937 and 1939, 50 Stat. L. 121, 54 Stat. L. 4, authorize the President to exclude armed merchant vessels at his discretion, but the President has made no use of this authority in the present war. The General Declaration of Neutrality of the American Republics, Panama, October 3, 1939, art. 3 (j), adopted, contrary to the Havana Convention of 1928, the rule "not to assimilate to warships belligerent armed merchant vessels if they do not carry more than four six-inch guns mounted on the stern, and their lateral decks are not reinforced." 2 DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES, looseleaf ed., 1519 (4) (Supp. 1940).

[55] Such passage is perfectly legal. The problem came up on account of the fact that German merchant vessels brought Swedish iron ore from Narvik to Germany, all along the Norwegian coast under the shelter of neutral Norwegian territorial waters. Cf. the British note to Norway of April 6, 1940, and the strong declarations of the Norwegian Foreign Minister, Halvdan Koht. NEW YORK TIMES, § I, p. 1:7, 8 (April 7, 1940).

[56] Cf. NEW YORK TIMES, § 1, p. 37 (Feb. 18, 1940); German protest to Norway, Feb. 27, 1940, 1 KEY TO CONTEMPORARY AFFAIRS (March, 1940); Statement of the Norwegian Government in 2 DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES, looseleaf ed., 861(13)-861(15) (Supp. 1940). For a legally correct analysis of the Altmark affair, see the letter by Jessup, NEW YORK HERALD TRIBUNE 26:5 (Feb. 22, 1940), and Borchard, "Was Norway Delinquent in the Case of the Altmark?" 34 AM. J. INT. L. 289 (1940).

[57] Cf. on this problem in general, KUNZ, KRIEGSRECHT AND NEUTRALITÄTSRECHT 253-254 (1935); and Jessup Report, 33 AM. J. INT. L. SUPP. 167 at 446-458 (1939). On this particular case, cf. Mirwart, "Admission de prises dans un port neutre," 66 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE 830 (1939); Hyde, "The City of Flint," 34 AM. J. INT L. 89 (1940).

[58] Cf. Mirwart, "Séjour d'un navire de guerre belligérant dans un port neutre," 66 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE 823 (1939); Uruguay Ministerio de Relationes exteriores, Antecedentes relativos al hundimiento del acorazado "Admiral Graf Spee" y a la internación del Carco mercante "Tacoma" (1940).

high seas,[59] of extended contraband lists, of the "Navicert system,"[60] of the diversion of merchant vessels into belligerent ports for visit and search,[61] of the removal of mail from neutral vessels, its detention and censoring,[62] the whole problem of the British "blockade" and the German "counter-blockade," and, in particular, of the British "export blockade,"[63] the problem of mines[64] and of the declaration of "war zones" on the high seas,[65] of the destruction of neutral merchant vessels without warning in submarine warfare.[66]

[59] Cf. in general Jessup Report, 33 AM. J. INT. L. SUPP. 167 at 601-618 (1939); Lauterpacht in 2 OPPENHEIM, INTERNATIONAL LAW, 5th ed., 703-704 (1935). On the Asama Maru affair, cf. Briggs, "Removal of Enemy Persons from Neutral Vessels on the High Seas," 34 AM. J. INT. L. 249 (1940).

[60] Cf. RITCHIE, THE "NAVICERT" SYSTEM DURING THE WORLD WAR (1938).

[61] Cf. in general, KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 294-295 (1935); Jessup Report, 33 AM. J. INT. L. SUPP. 167 at 577-601 (1939), and for present war, Editorial, 66 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE 814 (1939).

Cf. British notes of September 10 and November 9, 1939; American note of December 14, 1939, 2 U. S. DEPT. ST. BULL. 4-5 (1940); and American note of Jan. 22, 1940, protesting against interference with and discrimination against American shipping at Gibraltar, 2 id. 93-94. Cf. Jessup, "The Diversion of Merchantmen," 34 AM. J. INT. L. 312 (1940).

[62] Cf. KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 166 (1935); Jessup Report, art. 53, 33 AM. J. INT. L. SUPP. 167 at 535, 639-653 (1939); Eagleton, "Interference with American Mails," 34 AM. J. INT. L. 315 (1940); speech by Senator James M. Mead (New York), 86 CONG. REC. 548-551 (1940); American note of Jan. 2, 1940, 2 U. S. DEPT. ST. BULL. 3 (1940), and the British reply of Jan. 16, 1940, 2 id. 91-93. Cf. also Great Britain Foreign Office, Correspondence between H. M. Government and the Goverment of the United States regarding Censorship of Mails, December 1939-January 1940, U. S. No. 1, 1940, Cmd. 6156.

[63] Cf. KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 254-256 (1935); Jessup Report, 33 AM. J. INT. L. SUPP. 167 at 419-421 (1939); 1 U. S. DEPT. ST. BULL. 651-652 (1939). The American note correctly stressed the point: "Whatever may be said for or against measures directed by one belligerent against another, they may not rightfully be carried to the point of enlarging the rights of belligerents over neutral vessels or their nationals in connection with their legitimate activities." See also Soviet-Russian protest of December 10, 1940, and Italian protest in the note of March 4, 1940, NEW YORK TIMES 1:1 (Mar. 5, 1940).

[64] Particularly the German use of "magnetic mines" laid off the English coasts and ports.

[65] Cf. KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 126-129 (1935); Jessup Report, 33 AM. J. INT. L. SUPP. 167 at 694-708 (1939).

[66] Cf. Kunz, op. cit., supra, 129-135. Cf. the norm of the procès-verbal in Part IV of the Treaty of London of April 22, 1930—BRITISH TREATY SERIES No. 29 (1936); 31 AM. J. INT. L. SUPP. 137 (1937)—to which Germany adhered in her note to Great Britain of November 23, 1936, U. S. TREATY INFORMATION BULLETIN, No. 88, p. 9 (1937). Protests against illegal German torpedoing of neutral merchant vessels were often made by neutral states. Cf. the early Danish protest against the sink-

Unilaterally abandoning their duty to be bound by the optional clause of the statute of the Permanent Court of International Justice with regard to disputes arising out of events occurring during the present war, the Allies decided no longer to submit to the jurisdiction of the court conflicts arising between the Allies and neutrals on the application of the law of neutrality. The leading step was taken by the British note of September 7, 1939,[67] to the Secretary General of the League of Nations. Great Britain stated that, in accepting the compulsory jurisdiction of the court on February 3, 1930 for ten years, she did not except neutrality disputes, because at that time article XVI of the Covenant, excluding neutrality, was in force. The note further stated that not only had it now become evident that many of the League members no longer considered themselves bound by article XVI, but that in the present war many League members had declared their strict neutrality; "the Covenant has . . . completely broken down in practice [and] the whole machinery for the preservation of peace has collapsed"; therefore, the situation had become completely changed. The Allies consequently released themselves from an international obligation by the oft-condemned unilateral invocation of the *clausula rebus sic stantibus*. But this invocation cannot be admitted, because, according to article 36 of the statute, the court has to decide the question of its own competence, if this competence is challenged. This unilateral cancellation is, therefore, illegal and not binding upon the neutrals. In her note of September 25, 1939, Switzerland reserved her rights and her own point of view, followed in the same sense by many other neutrals.[68]

Even the problems of the neutrality of Denmark, Norway, Luxemburg, Holland, Belgium and Greece remain within the framework of traditional neutrality. Owing to the circumstance that many facts are yet either unknown, or extremely controversial, it is not yet possible to give an objective, scientific judgment on these problems. Limitations of space forbid a discussion in detail. But it is clear that any legal research into these problems must be made in the light of the cor-

ing of the S. S. Vendia as a "flagrant violation of international law." 2 LE NORD 502-503 (1939).

[67] 1 U. S. DEPT. ST. BULL. 353-354 (1939).

[68] The Swiss note in L. OF N. DOC. C.L.152.1939.V; the notes of Belgium, 2 U. S. DEPT. ST. BULL. 87 (1940), Holland (2 id. 87-88), Estonia (2 id. 272), Denmark (2 id. 332), Peru (2 id. 350), Haiti (2 id. 585-586). More explicit are the notes of Norway (2 id. 190) and Sweden (2 id. 190-191), which "make reservations as to the legal effect of the acts of denunciation" and draw attention to art. 36 of the Statute of the Court.

responding norms of positive international law. It may, therefore, be useful to state these norms briefly.

(1) Neutrality can come to an end—and the problem of the ending of neutrality must be carefully distinguished from the problem of violation of neutrality—by a declaration of war, either by a neutral against a belligerent, or by a belligerent against a neutral, as there is in general international law—i.e., apart from particular treaties—neither a duty nor a right to be or to remain neutral.[69] And while a declaration of war made contrary to a particular treaty in force constitutes a breach of treaty, neutrality has, nevertheless, come to an end in law.

(2) While even a grave violation of neutrality does not, in itself, bring about the end of neutrality, it is, as every violation of international law, under the sanction of reprisals and war. A belligerent or neutral may, therefore, declare war on the neutral or belligerent, on account of a grave violation of neutrality by the other side.[70]

(3) The neutral state is bound in law to fulfill the duties incumbent upon a neutral, including the duty of impartiality.[71] Such duties often consist in not tolerating violations of its neutrality by a belligerent, in exercising due care against violations of neutrality, in defending its neutrality, if necessary, by arms. But—and this is the problem—how far is a neutral bound to go?

(4) If a neutral is in *connivance* with illegal acts of a belligerent, it has, of course, committed a grave violation of neutrality.

(5) But, if a neutral protests against a violation of neutrality, has it fulfilled its duties, even if the protests remain, in fact, only on paper? Can it be accused of a violation of its neutrality on account of *acquiescence* in the violation of neutrality by a belligerent? In this respect, the

[69] Cf. KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 214-215, 221, 222-223 (1935). Cf. Falconbridge, "The Right of a Belligerent to Make War upon a Neutral," 4 TRANSACTIONS OF THE GROTIUS SOCIETY 204 (1919). "Nul n'est neutre plus longtemps que le voisin ne le veut." Hammarskjöld, "La neutralité en général," 3 BIBLIOTHECA VISSERIANA 53 at 59 (1924).

[70] So Germany's declaration of war on Portugal 1916.

[71] Cf. 2 OPPENHEIM, INTERNATIONAL LAW, 5th ed. (Lauterpacht), 614-616 (1935). "L'Etat [neutre] comme tel . . . ne doit temoigner ni sympathie, ni antipathie, à l'un des belligérants au détriment ou à l'avantage de l'autre." 2 FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL: GUERRE ET NEUTRALITÉ 643 (1921), quoting from 2 RIVIER, PRINCIPES DU DROIT DES GENS 385 (1896). "Le gouvernement neutre doit rigoureusement s'abstenir de tout acte propre à favoriser un des belligérants ou à lui faire tort. S'il manque à ce devoir, il s'espose aux justes réclamations de la partie lésée." Id. 657. "On est neutre ou l'on n'est pas." Hammarskjöld, "La Neutralité en général," 3 BIBLIOTHECA VISSERIANA 53 at 59 (1924). There is no such thing in positive law as "nonbelligerency."

rule of article 25 of the thirteenth Hague Convention prevails, which only binds the neutral to apply the *means at his disposal.*[72] If the neutral has, therefore, no adequate means at all at its disposal (Denmark, Luxemburg) it is not guilty of a violation of neutrality. If a neutral has adequate means at its disposal and makes no use at all of them, or an obviously inadequate or negligent use to prevent violations of its neutrality, it will itself be guilty of a violation of neutrality. It follows[73] that the application of reprisals or occupation of the territory of a neutral state cannot be legally based on its violation of neutrality, nor on the imputation of acquiesence in or connivance with the other belligerent, if the neutral is simply unable to resist.

(6) But, if the enemy has violated the neutrality or has occupied neutral territory and even if the neutral state, in consequence of the rule, discussed above, is not guilty itself of a violation of neutrality, the other belligerent has a right to regard the state in question as no longer neutral and to conduct military operations on the territory of the invaded or occupied neutral state.[74]

(7) Has a belligerent a right to occupy the territory of a neutral state which has not been guilty of a violation of neutrality, even if its territory has not yet been violated or occupied by the enemy, merely in order to prevent the other belligerent from making use of the neutral territory for its military operations, when the neutral's inability to prevent or resist such action, is obvious? It is believed that Lauterpacht's[75] answer to this question is correct: Occupation of neutral territory under these circumstances "would be excusable . . . since an extreme case of necessity in the interest of self-defence must be considered as an excuse," but only, "when the use of the [neutral] territory by the enemy is imminent," not if "a belligerent should merely fear that his enemy might perhaps attempt so to use it."

(c) *The Problem of Interneutral Cooperation*

The problem of interneutral cooperation[76] which for many writers constitutes the practical solution of the problem of neutrality, and

[72] Cf. KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 223 (1935); Jessup Report, 33 AM. J. INT. L. SUPP. 167 at 245-249, 256-263 (1939).

[73] Cf. Jessup Report, arts. 23, 24, 33 AM. J. INT. L. SUPP. 167 at 392-419, 420 (1939).

[74] Cf. Coenca Brothers v. Germany, (Greco-German Mixed Arbitral Tribunal, Dec. 1, 1927) [1927-1928] ANN. DIG. PUB. INT. L. CAS. 570.

[75] 2 OPPENHEIM, INTERNATIONAL LAW, 5th ed. (Lauterpacht), 562-563 (1935).

[76] Cf. Hyde, "International Co-operation for Neutrality," 85 UNIV. PA. L. REV. 344 (1937); Jessup, "Neutrality: Today and Tomorrow," 4 NEUTRALITY: ITS HIS-

which historically often found practical application, also in the World War, may mean either a cooperation for the purpose of helping each other to overcome difficulties brought upon neutrals in a great war without any violation of neutrality, or a common front of neutrals for defending their neutral rights against encroachments by the belligerents, or for preserving their neutrality and avoiding being drawn into war, or, finally a cooperation for the progressive development of the law of neutrality. Interneutral solidarity may mean protests against violations of neutrality by other neutrals not directly involved.[77] And interneutral cooperation may mean a common effort to bring the war to an end; for the neutral state has a positive right to act as a mediator.[78]

Instances of interneutral cooperation were not lacking in the present war, they had already begun before the outbreak of the war between prospective neutrals.[79] During the war the interneutral cooperation increased between Belgium and the Netherlands. The Balkan Entente did not only try to cooperate as neutrals, but to create in the Danube-Balkan regions a "bloc of neutrals."

But all this interneutral cooperation had no success. First, each one of these neutral states placed its own interests and the preservation of its own neutrality higher than the union with other neutrals. The Balkan States kept cool with regard to the increasing troubles of Rumania. The Scandinavian States held their neutrality higher than the cooperation with Finland in the Finnish-Russian war; and Sweden acted in the same way in the Norwegian war.

But, apart from that, the interneutral cooperation of these states

TORY, ECONOMICS AND LAW 160-206 (1936); Lalive, "Quelques nouvelles tendances de la neutralité," 40 FRIEDENS-WARTE 46 at 56-67 (1940).

[77] Cf. the Trent Case, 1861, 7 MOORE, A DIGEST OF INTERNATIONAL LAW 768 (1906). Cf. in the present war the Joint Declaration of the twenty-one American Republics protesting the German violation of the neutrality of Luxemburg, Belgium and Holland, of May 19, 1940, 2 U. S. DEPT. ST. BULL. 568 (1940).

[78] Ist Hague Convention 1907, art. 6; cf. in the present war the peace appeals by the Queen of the Netherlands and King of the Belgians, offering their good offices, of November 7, 1939.

[79] Meeting of the Oslo Powers at Brussels on August 23, 1939, for the preservation of their neutrality, should war break out, and for cooperation to obtain food and raw materials, in case of war. Cf. Elliott, "The Oslo States and the European War," 15 FOREIGN POLICY REP. 258 (1940); NEW YORK TIMES, Dec. 8, 1939, p. 13.

Meeting of the Foreign Ministers of Denmark, Sweden, Norway, and Finland at Oslo on August 30, 1939, 2 LE NORD 416-417 (1939); meeting of these states and Iceland at Copenhagen on Sept. 18 and 19, 1939, 2 id. 487-488. The heads of the states of Scandinavia and Finland met again at Stockholm on Oct. 18 and 19, 1939. 2 id. 558-560. There was a meeting of the foreign ministers of the three Scandinavian states at Oslo on Dec. 7, 1939.

could hardly have been successful, because even their combined power was much too little to keep the balance against the belligerents. And interneutral cooperation with the powerful neutrals—Italy, Russia and the United States—could not be had, although for very different reasons. The United States had already in the World War shown little inclination for interneutral cooperation and was indifferent to such proposals, coming from time to time from small European or even Latin-American neutrals. And in the present war, the "new" neutrality prevented more than ever American interneutral cooperation with European neutrals.[80] On the other hand, interneutral cooperation with the Latin-American Republics has gained extraordinary importance. But this is a vast problem of its own which cannot be discussed here.

2. *New Problems and New Tendencies Concerning Neutrality*

The present European war created also entirely new problems and tendencies.

(a) *State Control and Duties of Neutral States*

The present law of neutrality, actually in force, is binding only upon the neutral *states;* the so-called "neutral" individuals are never subjects of the international law of neutrality. The positive law of neutrality consists first of rules prescribing certain absolute duties for the neutral states; each breach of these rules constitutes a violation of neutrality. Another category of rules obligates the states to prohibit, prevent, sometimes to punish, certain actions of private individuals. A third category of rules provides expressly that a state is not internationally responsible for certain actions of private individuals. The duties and rights of neutral states are in positive law either regulated by rules *juris cogentis,* or by rules conferring discretion upon the neutral states to permit or not to permit certain things, but establishing binding rules in case it chooses to give permission;[81] or they are regulated by rules which only have a subsidiary character, in so far as the neutral state makes no use of the competence given to it by international law to create other norms;[82] or, finally they are regulated by rules giving to neutral states the right, but no duty, to do or not to do a

[80] But President Roosevelt sent a personal representative to the Pope "in order that our parallel endeavors for peace . . . may be assisted." Letter from the President to the Pope of Dec. 23, 1939, 1 U. S. DEPT. ST. BULL. 711-712 (1939). It was announced that "diplomatic conversations of an informal character have been commenced with neutral governments and will probably be continued with all neutral governments," conversations "in the nature of preliminary inquiries relating to a sound international economic system and . . . world-wide reduction of armaments." 2 id. 153 (1940).

[81] Cf. KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 218-220 (1935).

[82] E.g. Hague Land Warfare Convention 1899, arts. 57, 58; Vth Hague Convention 1907, arts. 11, 12.

certain thing, but imposing upon the neutral state the absolute duty of impartiality, whatever rule it may create.[83]

In consequence, there are in positive law many actions which a neutral *state* cannot legally take, whereas it may well allow these same actions to be done by its citizens. To give a few examples: The neutral state is absolutely bound to prevent any individuals within its territory, whether citizens or aliens, from forming combatant corps, or organizing recruiting offices, or preparing expeditions on or from its territory in favor of a belligerent.[84] The neutral state is absolutely bound to prevent the fitting out or arming within its territory of a vessel intended to cruise or to participate in hostile operations against a belligerent, and to prevent the departure of any such vessel from its territory which within its territory has been entirely or partly adapted for use in war.[85] On the other hand, while the neutral state is forbidden to furnish troops to a belligerent and to allow organized forces to depart from its territory to give assistance to a belligerent, it is not responsible if citizens singly pass its frontiers for the same purpose.[86] The neutral state is bound not to grant credits, loans or any financial assistance to any belligerent, but is not bound to forbid its citizens to do these things. The neutral state is bound not to furnish men-of-war, munitions or other materials of war to a belligerent,[87] but is not bound to prevent the transit or export of arms, munitions or anything which may be helpful for an army or navy for a belligerent by its citizens.[88]

There is no doubt that the positive law is based on the liberal-capitalistic ideology and practice of pre-World-War times, on the theoretical and practical distinction, then prevailing in the great majority of states, between activities of the state and activities of individuals, on a state of things when trade and industry were nearly entirely in private hands and states carried on but few economic activities.

But already in the World War the belligerents were forced, in consequence of the magnitude of the war and its, to a great extent, economic character to increase state control and supervision of private activities. The neutrals, on the other hand, showed an increasing tendency toward stricter neutrality, trying to keep out of war even at the economic sacrifice of neutral profits, and, therefore, tended to forbid private activities which, under international law, they were free to per-

[83] XIIIth Hague Convention 1907, arts. 12, 13, 15, 19/2.
[84] Vth Hague Convention 1907, art. 5.
[85] XIIIth Hague Convention 1907, art. 8.
[86] Vth Hague Convention 1907, arts. 4, 6.
[87] XIIIth Hague Convention 1907, art. 6.
[88] Vth Hague Convention 1907, art. 7; XIIIth Hague Convention 1907, art. 7.

mit; such prohibition led naturally also in the neutral states to greater control of private activities.

This tendency became dominant in the "new" neutrality of the United States, as evidenced by the American Neutrality Acts since 1935. While these Neutrality Acts are generally entirely unobjectionable from the point of view of international law, but only under the condition of impartiality in their texts, as well as in their application, they have a tendency to increase the duties of a neutral state. This aspect of the problem was first considered in a paper by Lawrence Preuss,[89] who stated that the system of governmental control over private trade and financial relations of private citizens with belligerents has extended the duties of impartiality and prevention and "imposes upon the government an international duty to use due diligence in the enforcement of the [law], and to see that it is impartially applied."

But apart from this extension of governmental control for purposes of neutrality, the problem is of much more far-reaching importance. For the period since 1914 is characterized by a trend, away from the extreme individualism of the pre-World-War epoch, to a more social and collectivistic conception. State control over economic life has assumed many forms[90] whereby activities of private individuals are either supervised or taken over by the state. Such development has its influence on many problems of international law,[91] and thus on the law of neutrality, which, codified mostly prior to 1914, did not take such a development into consideration.

This broader aspect of the problem, in so far as it concerns neutrality, was also first considered by Preuss who, although "with the utmost of diffidence," suggested the general rule of international law to be:

> "A neutral Government performs an unneutral act whenever it engages in commercial or financial intercourse with a belligerent which, if engaged in by a private individual, would legitimately

[89] Preuss, "Some Effects of Governmental Controls on Neutral Duties," 31 AM. SOC. INT. L. PROC. 108 (1937) (quotation from p. 110).

[90] Control of production, control of exports, state supervision of private production, nationalization of industry (e.g., arms industry in France, coal industry in Great Britain), state railways, state banks, control through licensing systems, public corporations as state instrumentalities, currency control, state subsidies, state monopolies, state-owned and operated vessels for the purposes of trade and so on.

[91] Cf. the problem of immunity of state-owned and operated vessels engaged exclusively in normal trade. E.g., The Ice King, (Dec. 10, 1921) 103 R. G. Z. 274; Berizzi Brothers Co. v. The Pesaro, 271 U. S. 562, 46 S. Ct. 611 (1926); Brussels Conventions, April 10, 1926, 3 HUDSON, INTERNATIONAL LEGISLATION 1837 (1937).

expose such individual to belligerent penalties for trade in contraband, carriage of contraband, breach of blockade or unneutral service." [92]

He draws the consequence that the neutral U.S.S.R. would be practically prevented from doing any trade with the belligerents, and foresees, in general, an enormous increase of the duties of neutral states.

A year later Friedmann,[93] in an important article, correctly stated that this tendency to increased state control and activity in economic matters is world-wide and largely independent of the particular form of government or ideology. But the problem is further complicated by the fact that this trend, although world-wide, has reached different degrees of intensity in different states. While it is clearly to be seen also in the democracies, it has reached greater proportions in the fascist states, and again much greater proportions in the U.S.S.R. The positive law, he states, will necessarily have to move either toward allowing neutral states to do what, under the present law, only citizens may do, or toward an automatic increase of the duties of neutral states as a consequence of increased state control. He admits that both solutions are unsatisfactory: the second as being impracticable, the first because of the difference in degrees of state control in the different states. Not only would it be difficult to ascertain whether and how far a state does actually exercise such control, but such rule would also break the unity of the law, and impose unequal duties upon different states, according to their different types of government. In spite of this admission and admitting further that no positive rule has been created, he believes, like Preuss, that the future law of neutrality will be one of "complete abstention from relations with belligerents."

The Jessup Report, in considering this problem with regard to neutral states and their instrumentalities, admits the existence of many borderline cases, but takes, in general, the same stand.[94]

[92] Preuss, "Some Effects of Governmental Controls on Neutral Duties," 31 AM. SOC. INT. L. PROC. 108 at 116 (1937).

[93] Friedmann, "The Growth of State Control over the Individual, and its Effect upon the Rules of International State Responsibility," 19 BRITISH YEAR BOOK OF INTERNATIONAL LAW 118 at 130-141 (1938).

[94] Jessup Report, 33 AM. J. INT. L. SUPP. 167 at 235-245 (1939). ". . . it would seem that the Soviet Government would be compelled as a neutral in time of war to give up all commercial and financial relations with the belligerents." Id. 238. ". . . as Governments extend their activities in fields of commerce, industry, transportation and communication, they necessarily enhance their neutral responsibilities." Id. 244.

But Lalive,[95] writing after the outbreak of the present war, while admitting the logics of the conclusion that "le développement de l'étatisme devait accroître la responsabilité de l'Etat," holds this conclusion to be impracticable. He sees a tendency to substitute the duty of governmental abstention by the right of trading with the belligerents under the obligation of equality of treatment and under the duty to submit to the rules of blockade, contraband and unneutral service.

In the present war the problem has presented itself, fully, but no certain state practice and no new rule of international law has come into existence. Totalitarian and "nonbelligerent" Italy was not required to abstain from commerce with the belligerents. And Britain did not object to Soviet trade with Germany, but demanded that the Soviets trade also with Britain and that British Empire imports to Russia must not reach Germany. On the other hand, she rejected the Russian contention that Soviet vessels as state ships cannot legally be subjected to the rules valid with regard to neutral ships. The Soviet Government, making this claim on the theory that in this case government control increases neutral rights, forgot that the very acceptance of this claim must, on the other hand, have an enormous increase of neutral duties as a consequence.

Whereas this problem is necessarily brought up by new developments, which, notwithstanding the different intensity of degree in different states, is world-wide in character, two other new tendencies concerning neutrality are purely political conceptions with no basis in general positive international law: "total neutrality," particularly stressed by National Socialist Germany and "nonbelligerency," an invention of Fascist Italy.

(b) *"Total Neutrality"*[96]

Whereas the increase of state control over the economic life is a world-wide phenomenon, the totalitarian states have strictly regimented

[95] Lalive, "Quelques nouvelles tendances de la neutralité," 40 FRIEDENS-WARTE 46 at 50-54 (1940).

[96] Cf. 40 INT. L. ASSN. REP. 113, 117, 118 (1938); Bockhoff, "Ganze oder halbe Neutralität," [1938] NATIONALSOZIALISTISCHE MONATSHEFTE 910 et seq.; Bockhoff, "Neutralität und Demokratie im XX. Jahrhundert," [1939] id. 46 et seq.; Schindler, "Neutralität und Presse," NEUE SCHWEIZER RUNDSCHAU (Jan. 1939); Hambro, "Ideological Neutrality," 10 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET (ACTA SCANDINAVICA JURIS GENTIUM) 107 (1939); Hambro, "Ideologische Neutralität," 19 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 502 (1939); Bockhoff, "Begriff und Wirklichkeit der Neutralität," id. 516; Lalive, "Quelques nouvelles tendances de la neutralité," 40 FRIEDENS-WARTE 46 at 55-56 (1940).

individual activity in all fields: speech, press, film, radio, private demonstrations, scientific or artistic activity, even private utterances, and so on. There exists, therefore, today a real cleavage, according to forms of regimes and ideology, between totalitarian states and the democracies, upholding individual liberty and freedom. The "dynamic" states, which in their postwar battle against the status quo, created by the Paris Peace Treaties and against the system of "collective security," favored, of course, a return to strict, traditional neutrality, began to look on neutral duties from the point of view of their own regimes: not satisfied with a "strict," they asked for a "total" neutrality. The problem was already thrown into the debates of the 1938 Conference of the International Law Association.[97] Bockhoff[98] became the theoretical protagonist of "total neutrality," binding the neutrals not only in time of war, but also in time of peace, and not only the neutral states or governments, but also any expression of sentiments and sympathy by the citizens of the neutral state, in whatever form. This new doctrine has been refuted from the point of view of international law by the Swiss Schindler[99] and by the Norwegian Hambro.[100]

Impartiality is, no doubt, a basic duty of the neutral state, its government and government officials.[101] But the positive law of neutrality, based on individual liberty and a clear distinction between state activities and private activities, contains no obligation of the neutral state to forbid or to restrict the expression of sympathy for one of the bellig-

[97] See citations note 96, supra. There Dr. Dieckhoff (Germany), starting from the proposition that the essence of neutrality is impartiality, asked how far neutrality implies the duty of refraining from hostile press comment on the actions of the belligerents. But Wyndham Bewes (Great Britain) stated that "the great majority of publicity agents throughout the world are free" and "there never has been yet any suggestion that newspaper comment can possibly be confined within the limits of what we consider neutrality."

[98] See citation, note 96, supra.

[99] See citation, note 96, supra.

[100] See citation, note 96, supra.

[101] The statement in 2 OPPENHEIM, INTERNATIONAL LAW, 5th ed. (Lauterpacht), 520-521 (1935), that even the neutral government itself or its organs may indulge in expressions of sympathy for or antipathy against a belligerent, seems not to be tenable in law. Cf. Theodore Roosevelt's Executive Order of March 10, 1904, [1904] U. S. FOREIGN RELATIONS 185; Circular of the Foreign Ministry of Ecuador of Feb. 3, 1916, 1 DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES 558-559 (1939); the so-called Cromwell incident in the present war, Stowell, "The Cromwell Incident," 34 AM. J. INT. L. 294 (1940). Cf. the remark by Joseph E. Davies, Special Assistant to the Secretary of State, in an address: "It would be manifestly improper for me . . . to take sides in this military conflict. Our Government is maintaining a strict neutrality." 2 U. S. DEPT. ST. BULL. 499 at 500 (1940).

erents by private persons.[102] Of course, while there is no international duty for neutral states to forbid or to curtail private expression of sympathy for one belligerent, the neutral state is entitled to do more than international law demands. And neutral states have done so often in various ways,[103] for political reasons, in order to safeguard their neutrality.[104]

But "total neutrality"[105] has no basis in positive international law. And the new creation of such rule would either force democratic states to adopt totalitarian systems or, if the rule were to be that totalitarian regimes bring about these increased duties of neutral states, result in an inequality of international obligations, depending upon the form of

[102] Cf., e.g., 3 ROLIN, LE DROIT MODERNE DE LA GUERRE 69 (1921); KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 237 (1935); 2 OPPENHEIM, INTERNATIONAL LAW, 5th ed. (Lauterpacht), 520-521 (1935). Cf. also, e.g., President Grant's Neutrality Proclamation of August 22, 1870, 16 Stat. L. 1132, which imposes upon all persons within the territory and jurisdiction of the United States the duty of an impartial neutrality, "without interfering with the free expression of opinion and sympathy." In the Boer War the press in most neutral countries was strongly in sympathy with the Boers and anti-British, in the Tripolitanian war anti-Italian.

[103] Appeal to the people to refrain from any expression of sympathy—e.g., President Wilson's speech of Aug. 18, 1914, quoted BORCHARD and LAGE, NEUTRALITY FOR THE UNITED STATES 20 (1937); Danish Proclamation of Aug. 1, 1914, 1 DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES 496-497 (1939); appeal of the Federal Council to the Swiss people of Oct. 1, 1914, asking the Swiss "to observe the greatest reserve," 2 id. 1053-1054. Laws or ordinances forbidding certain acts, introduction of a control over the press,—e.g., Spanish Law of July 7, 1918 (2 id. 929-930), Spanish Circular of July 26, 1918 (2 id. 946-947), Swiss Ordinance of July 2, 1915 (2 id. 1013-1014), Swiss Ordinances concerning the control of the press of July 27, 1915 and of January 22, 1918 (2 id. 1014-1016). For the practice of Holland during the World War, see Huart, "Nederlands Aandeel in de ontwikkeling van het onzijdigheidsrecht gedurende den wereldoorlog," 13 BIBLIOTHECA VISSERIANA 1 at 73-81 (1939). Particularly interesting is the Circular of the Colombian Minister of Foreign Relations to Editors of Periodical Publications of November 27, 1914. 1 DEÁK and JESSUP, op. cit., 431-434.

[104] This has been done also in the present war. Cf. the Argentinian Decree (Ordinance of the City of Buenos Aires of Oct. 24, 1939) against public demonstrations in favor of or against any belligerent. PAN-AMERICAN UNION, LAW AND TREATY SERIES No. 13, SUPP. 1, pp. 9-10 (1940). In neutral Chile, where there is no censorship, an American correspondent, wanting to cable a report on the fifth column activities in Chile, was not allowed to do so, on grounds "affecting Chilean neutrality." NEW YORK TIMES 3:5 (July 13, 1940). After Italy's entry into the war the authorities of the neutral Vatican City forbade even any discussion of the war and the *Osservatore Romano* has abandoned any political contents; but the contrary was true up to Italy's entry into the war.

[105] German warnings to small European or Latin-American neutrals, especially prior to the Haxana meeting of the foreign minister of the American Republics of July 21, 1940; Italian warnings to Switzerland, NEW YORK TIMES 4:7 (July 15, 1940).

regime. The claim of "total neutrality," although presented as a claim based on law, is a purely political creation. That that is so, is shown in the present war by the fact that the totalitarian regimes do not ask "total neutrality" for themselves nor for the states friendly to them, nor even for powerful neutrals openly opposed to them, but ask it only for small neutrals which for geographic, economic, military and political reasons can be brought under heavy pressure. "Total neutrality" is thus less a neutrality problem than a political postulate—Bockhoff tells us that "total neutrality" must also be asked in time of peace—arising out of the ideology of a "new order in Europe," based on "living space."[106]

(c) *"Nonbelligerency" versus Neutrality*[107]

The term "nonbelligerency" can mean either nothing but a synonymous word for neutrality, and in this case it involves a purely terminological question;[108] or it can mean something different from neutrality, an intermediary position between belligerency and neutrality. And here again, such intermediary position may be conceived from two different points of view, both going back to seventeenth and eighteenth century ideas, namely either discrimination against the wrongdoer[109]—article XVI of the Covenant[110]—or the "imperfect," "qualified," "benevolent" neutrality of former times.[111]

[106] See citation to Bockhoff in note 96, supra. Cf., e.g., SCHMITT, VÖLKERRECHTLICHE GROSSRAUMORDNUNG (1939).

[107] Cf. Lalive, "Quelques nouvelles tendances de la neutralité," 40 FRIEDENSWARTE 46 at 54-55 (1940).

[108] So 3 GROTIUS, DE JURE BELLI ET PACIS, c. 17 (1625) ("medii"), Bynkershoek ("non hostes") for philological reasons of classic Latin. Recently the Montreux Convention of July 20, 1936, regarding the regime of the Straits—31 AM. J. INT. L. SUPP. 1 et seq. (1937)—contrasts in arts. 4 and 5, and in arts. 19 and 20 the cases when Turkey is "belligerent" and when she is "nonbelligerent"; but this word was chosen only in deference to the Greek delegate Politis, who, as is well known, was a protagonist of the legally untenable theory that there is no more neutrality in positive law. "Nonbelligerent" is, therefore, here clearly nothing more than a synonymous word for "neutral."

[109] So still 3 GROTIUS, DE JURE BELLI ET PACIS, c. 17 (1625).

[110] Cf. the "revocations of neutrality" in 1917 by Brazil, Costa Rica, El Salvador, Guatemala, Peru and Uruguay in Jessup (Reporter for Harvard Law School Research in International Law), "Draft Convention of Rights and Duties of States in Case of Agression," 33 AM. J. INT. L. SUPP. 819 at 880-883 (1939). The Memorandum of the German Branch at the 1938 Conference of the International Law Association (40 REP. 300-301) distinguishes "neutrality" from "nonbelligerency" and applies this term to the attitude toward belligerents under art. XVI of the Covenant, an attitude that is not impartial.

[111] As to an attempt by the doctrine to create legal intermediate figures between belligerency and neutrality, cf. Cavaglieri, "Belligerenza, Neutralità e Posizioni

But in the positive law, actually in force, there are no intermediary positions between belligerency and neutrality. A state can either be neutral or belligerent. There is, in positive law, only a perfect, unqualified, "strict" neutrality. The "benevolent" neutrality is a purely political conception,[112] not a legal status. A state, "benevolently" neutral, is not allowed to neglect any duty of a neutral state without committing a violation of neutrality. The duty of impartiality[113] of the neutral is absolute.[114]

giuridiche intermedie," 13 RIVISTA DI DIBITTO INTERNAZIONALE 58 (1919), 328 (1920).

[112] Cf. KUNZ, KRIEGSRECHT UND NEUTRALITÄTSRECHT 215–216 (1935); 2 OPPENHEIM, INTERNATIONAL LAW, 5th ed. (Lauterpacht) 529–530 (1935). But there is room enough within the positive law for political benevolence or its contrary by a neutral, because the rights and duties imposed upon a neutral do not embrace all its activities and because the decision as to certain actions of a neutral is left by general international law to the neutral. In the present war, for example, the American decision not to admit belligerent submarines, but to admit armed merchant vessels of the belligerents was clearly politically taken as a benevolent step in favor of the Allies; but *legally* it remained within strict neutrality, as neutrals are free either to admit or not to admit and as the American decision in both cases impartially applied to all belligerents without discrimination. The term "benevolent neutrality" is to be found in the Anglo-French-Turkish Pact of Oct. 19, 1939. Text in NEW YORK TIMES 5:3 (Oct. 20, 1939); Great Britain Foreign Office, Turkey No. 2, 1939, Cmd. 6123.

[113] Of course impartiality in law, not as to the effect in fact. On the duty of impartiality, cf. also Jessup Report, 33 AM. J. INT. SUPP. 167 at 232–235 (1939). The neutral's general duty of impartiality is now also fully recognized by Wright, "Rights and Duties under International Law," 34 AM. J. INT. L. 238 at 241 (1940).

[114] Eagleton's observations on impartiality, 34 AM. J. INT. L. 99 (1940), are correct in so far as he says that what impartiality means in law must be answered by an analysis of the positive law actually in force. But his denial of the duty of impartiality of the neutral is legally entirely untenable. And this denial is based on legally untenable arguments. His first argument is that "there are no judicial precedents." But this argument proves nothing; there are many fields of international law where there are no judicial precedents, for the reason that in the primitive international order there are no compulsory courts. Truly amazing is his second argument: Even if a neutral definitely aids one belligerent, he has committed no illegality; he subjects himself only to the risk of attack, but has violated no law; he risks war, but no judicial condemnation. This argument is based on a misunderstanding of the nature of a primitive legal order such as international law is. *General* international law as a primitive law must rely on self-help as a sanction; the measures of self-help are reprisals and war. This is true for the *whole* international law of peace, war and neutrality. A neutral not acting impartially cannot be brought into court, but risks only war, says Eagleton. But if we accept this argument, then there are no duties at all in international law. If Mexico illegally confiscates the property of aliens, if a state breaks a treaty, or violates any other international duty, it never "risks anything but war." For Eagleton overlooks the fact that a state, for any violation whatsoever of international law, cannot be brought into court under *general* international law against its will, that it *never* risks "judicial condemnation," simply because there are no compulsory courts in general international law. If, on the other hand, a state is bound by *particular* international

The Covenant *did* create, by particular international law, an intermediate zone between belligerency and neutrality, but at the time of the outbreak of the present war these norms of the Covenant had become no longer binding in law and there was everywhere a return to the traditional law of neutrality. But whereas the revisionist powers had prior to the present war stood for strict neutrality, they began to develop a new and purely political twilight zone between belligerency and neutrality.

Not all the nonparticipant powers made declarations of neutrality in the present war, but this does not change their status of neutrality; for under general international law a neutral state is entitled to make a declaration of neutrality, but under no duty to do so.[115]

Japan[116] declared only her "policy of noninvolvement in the European war"; but she was neutral in the traditional sense, and her protests to the British export blockade, the Asama Maru affair and other things proved it.

Soviet Russia made no declaration of neutrality; but Molotov's letter of September 17, 1939, to all states accredited in Moscow,[117] at the time of Russia's invasion of Eastern Poland, stated that Soviet Russia is following a policy of neutrality, and she has never claimed any other status than that of neutrality. Any action by Russia incompatible with neutrality is, therefore, a violation of neutrality.

It was *Italy*, following the disastrous precedent created by her and others' "nonintervention" in Spain, which tried to create a true intermediate zone between belligerency and neutrality. At the time of the outbreak of the present war, Italy not only made no declaration of neu-

law to submit a conflict to an international court, this applies just as much to a neutrality conflict, to a breach of the duty of impartiality. That is why the Allies' unilateral repudiation of the Optional Clause is a grave affair from the point of view of the neutrals.

[115] Cf. particularly the fact that El Salvador always maintained neutrality, also in the World War, without ever making a neutrality proclamation. On the non-necessity of a neutrality proclamation, cf. El Salvador's note to the American Minister at Salvador of December 4, 1914. 1 DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES 569-570 (1939), and El Salvador's identical attitude in the present war, PAN-AMERICAN UNION, LAW AND TREATY SERIES, No. 12, p. 40 (1940). It is, therefore, legally untenable, if some authors quote the fact that certain states have made no declaration of neutrality as a proof "that they did not recognize a state of war or neutrality." In the Chaco War the neighboring South American Republics made declarations of neutrality, but the United States, which made no such declaration, was just as much neutral, as her attitude proves.

[116] Statement of Sept. 4, 1939, 1 DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES, looseleaf ed., 741 (1) (Supp. 1939).

[117] NEW YORK TIMES 1:7 (Sept. 18, 1939).

trality, but she had, up to her entry into the war on June 10, 1940, expressly denied that she was neutral and claimed for herself the new status of "nonbelligerency."

What does that mean? It may mean that she was merely "nonbelligerent," because of being the ally of Germany by the Alliance of May 22, 1939. But this has no legal significance. An ally is not automatically at war, if its ally is at war. A state may be bound not to remain neutral by a treaty of alliance, but if it remains nevertheless neutral, it may have violated the treaty of alliance, but its legal position is that of a neutral.[118]

It may mean that she is only temporarily neutral, and reserves her right—and announces it to the world—to enter the war later, as she did. But this again has no legal significance. For the rules of neutrality apply only, if and when and as long as a state is neutral, but contain no duty, except by treaty, either to be neutral or to remain neutral.

It may mean, finally, that the status of "nonbelligerency" creates special rights and exempts from duties, given to or imposed upon a neutral. But such status is unknown to positive international law. "Nonbelligerent" Italy was in law a neutral, bound by the duties of a neutral state, having no other rights but the rights of a neutral state, and any action by her incompatible with neutrality constituted a violation of neutrality. And the Allies treated "nonbelligerent" Italy as a neutral, submitting Italian ships to the British "blockade" and so on.

"Nonbelligerency" is, therefore, a term of no legal significance, nor any special status in international law, and is a purely political creation. But it has strongly added to the existing confusion which is so characteristic of the present war: a twilight zone between war and nonwar, between war and civil war, between belligerency and neutrality. For while "nonbelligerency" has not the slightest foundation in law, the new Italian invention, a sequel to the Spanish Civil War precedent, has made a great political career among states friendly to the Axis, among states friendly to the Allies and among neutrals. Already the aid given to Finland by Sweden was much less based on the Covenant than on "nonbelligerency," as the Swedes themselves admit. But in the Norwegian war the same Sweden was "strictly neutral."

Hungary, a member of the Anti-Comintern Pact, an ally of Italy,

[118] At the time of the outbreak of the World War, Italy, ally of Austria-Hungary and Germany, made on Aug. 3, 1914, a declaration of neutrality. 1 DEÁK and JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES 732 (1939). So did Rumania, ally of Austria-Hungary. Cf. Sforza, "Italian Neutrality, 1914 and 1939," 157 CONTEMPORARY REVIEW 404 (1940).

an adherent to the Tripartite Berlin-Rome-Tokyo Alliance, not only has made no declaration of neutrality, but considers herself, according to the Italian example, merely as "nonbelligerent." *Turkey*, on the other hand, insisted at the Conference of the Balkan States at Belgrade, February 2-4, 1940, that she is not neutral, but a "nonbelligerent ally of Great Britain and France." *Spain*, which had proclaimed on September 7, 1939, her "más estricta neutralidad," proclaimed, after Italy's entry into the war, her "nonbelligerency." And even the neutral United States had, it is true, discouraged[119] a suggestion by Argentina to change the neutrality of the American Republics into "nonbelligerency"; but her acts since June, 1940 are certainly incompatible with neutrality, and can be understood only in terms of the new, although not legal, but purely political conception, of "nonbelligerency."

CONCLUSION

To sum up:

The present international law of neutrality actually in force is the 1914 law, based on the Hague Conventions and on later treaties. The neutrality declarations, the diplomatic actions and correspondence, the handling of incidents by the Foreign Offices of all states, belligerents as well as neutrals, testify to that. Arguments between states are based on this general international law. The municipal neutrality laws and decrees, the resolutions of the Inter-American Conference of Foreign Ministers at Panama and Havana, prove it. Even if states, belligerents or neutrals, take actions whose legality, to say the least, is extremely doubtful, they try to justify them on the basis of the law of "classic" neutrality, as the German memorandums to Norway, Belgium and The Netherlands, the Italian ultimatum to Greece show. In other cases, actions, as, e.g., the British "export blockade," are being justified only as reprisals, which in itself is an admission that these acts are illegal, apart from their character as reprisals.

The "modified" neutrality, created by the particular international law of the Covenant of the League of Nations, has come to an end, not only in fact, but in law, by the absolute divorce between the law and its efficacy and by the agreement of the remaining members of the League.[120]

[119] NEW YORK TIMES 14:2 (May 14, 1940).

[120] Cf. the British note to the Secretary General of the League of Sept. 7, 1939, supra, note 67. Cf. particularly also the handling of the Finnish-Russian War, "Appeal of the Finnish Government to the League of Nations," 19 L. OF N. MONTHLY SUMMARY, SPEC. SUPP. December 63-65 (1939).

Frequent violations of this law of neutrality remain violations in law. While it is possible that out of acts which originally constituted violations new norms of law may grow, it is not the violation, but the consent of the majority of states which alone can bring into being new norms of general international law. No such consent has taken place. True, there were and are many lacunae in the positive law of neutrality, especially with regard to the neutrality duties of states in view of the growing supervision of or carrying on by states of economic activities; but even in this respect no positive rule of law has yet come into existence.

The so-called "total neutrality" is a purely political postulate with no foundation in law. Neither is there even from a sociological point of view a tendency toward such a rule of law, as this postulate has not been consented to, has been protested against and rejected by the great majority of states. It has, by the way, played only a minor role in the present war.

The most important development, from a political point of view, is the claim of a special status of "nonbelligerency." But this again is a purely political creation with no foundation in law. It is everywhere admitted that such legal status did not exist. In order to show that such a status exists now in law, it must be shown that a new rule of law of these contents has come into existence. A mere tendency toward a new law does not create a new law, an elementary truth which political scientists often ignore. The growing tendency, e.g., toward the abolition of the Eighteenth Amendment, did in no way abolish this amendment; it remained the law until the enactment of the Twenty-first Amendment. Therefore, a mere tendency toward the creation of a new legal status of "nonbelligerency" is not a proof of a rule of law of these contents. To create such new status in general international law, such rule of law must have been established by the consent of the great majority of states. This is certainly not the case.

All the different theories which try to justify "nonbelligerency" in law are, in consequence, necessarily untenable in law: Eagleton's theory that there is no duty of impartiality,[121] Quincy Wright's theory of the "supporting state,"[122] P. E. Corbett's politically more realistic theory

[121] See supra, note 114.

[122] Wright, "The Transfer of Destroyers to Great Britain," 34 AM. J. INT. L. 680 (1940). He, at least, admits that "nonbelligerency" is not neutrality, but it is amazing for a lawyer to see him invoke as a rule of law a private and controversial proposal *de lege ferenda* [cf. especially the unequivocal statement to this effect by Jessup in his introduction to the draft convention on rights and duties in case of

of a tendency toward the "helpful" neutrality of earlier ages.[123]

In law, there is only belligerency or neutrality.[124] But there is not even from a political or sociological point of view a tendency toward the creation of a new legal status of "nonbelligerency." For such a tendency it would be necessary that "nonbelligerency" be a legal status open to every sovereign state and that the consent of the majority of states be shown. Neither of these conditions is fulfilled. Only powerful states or states under certain conditions can afford to be "nonbelligerent." Can anyone imagine the President of Switzerland taking the attitude of "dynamic nonbelligerency?"

Nor is there any consent of the majority of states. Each state admits "nonbelligerency" only for itself or its friends, but not for its enemy or the enemy's friends. Italy claimed "nonbelligerency" for herself, but asked strictest neutrality from Switzerland, Greece, Yugoslavia. Germany liked Italy's "nonbelligerency," but asks strictest neutrality from Sweden, Switzerland, Yugoslavia. She likes it that "nonbelligerent" Hungary or Rumania gives her "all aid short of war," but resents and protests Turkey's "nonbelligerency." Germany and Italy are satisfied with Spain's "nonbelligerency," but resent the present "neutrality" of the United States. On the other hand, Great Britain is satisfied with her "nonbelligerent allies" Turkey and Egypt, and happy over the "neutrality" of the United States. But would she regard Eire's "giving all aid short of war" to Germany as the exercise of a legal right under international law? "Nonbelligerency"—it is clear—has no foundation in law, is exclusively a political creation. It appears in Protean forms: there are "nonbelligerents" who are practically neutral, and "neutrals" who are "nonbelligerent"; some states are "nonbelligerent" out of their own free will, others more or less by coercion. "Nonbelligerency" —the direct child of Spanish "nonintervention"—is born out of the desire to intervene under the name of nonintervention, to be in the war

aggression, 33 AM. J. INT. L. SUPP. 819 at 823-826 (1939)] and to bolster, as a proposition of law, this proposal *de lege ferenda* with another proposal *de lege ferenda*, the Budapest Resolutions of 1934.

[123] In a book review, 34 AM. J. INT. L. 753 (1940). But he, the theoretician, says only that a "distinct status of non-belligerency is now in process of establishing itself." The political character of his remarks can be shown if we ask whether Professor Corbett would speak of, e.g., Eire's giving all aid short of war to Germany as of a new, legal, "helpful," neutrality?

[124] For legally correct statements, cf. Woolsey, "Government Traffic in Contraband," 34 AM. J. INT. L. 498 (1940); Briggs, "Neglected Aspects of the Destroyer Deal," id. 569; Borchard, "The Attorney General's Opinion in the Exchange of Destroyers for Naval Bases," id. 690.

and yet not to be at war, "apparently designed to justify breaches of neutrality or acts of war, perhaps with the hope that they will not result in a state of war."[125] While the "nonbelligerent" is fully aware that the disfavored belligerent has a right in law to resort to reprisals or to a declaration of war, it is believed that from reasons of political expediency he will not do so. At the same time an attempt is made to bring "nonbelligerent" actions by some subtle "interpretation" of the law within the realm of the laws of neutrality: in consequence the typical camouflage.

It may be doubted whether a status of "nonbelligerency" can in the long run even be maintained in fact, whether the "nonbelligerent" will not have to return to neutrality or find himself at war. But however that may be, the *legal* question—and that alone is the problem of the international lawyer—is clear: There is no distinct status of "nonbelligerency" in the positive international law, actually in force.

[125] Borchard in article cited supra, note 124, at 697.