

Chapter VI Neutrality

by
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Neutrality, at least as a legal concept, existed neither in antiquity nor during the Middle Ages.¹ It may well be that some international practice hardened into a customary law of neutrality in the 18th and 19th centuries, a development owing much to the theory and practice of the United States,² but the traditional legal edifice, structurally uncertain at the best of times, was badly shaken by the contrary usages of the 20th century's two world wars and nowadays, in terms of practice, the neutrality laws have sunk into a condition of "chronic obsolescence."³ In terms of theory, article 2(4) of the Charter of the United Nations makes war technically illegal,⁴ and, there being neither formal "belligerents" nor "neutrals," the "rights and duties of the old law of neutrality have terminated with the Charter."⁵

What, then, to make of Chapter 7 of the new *Commander's Handbook on the Law of Naval Operations*: "The Law of Neutrality?"⁶ There are good English-language accounts of the traditional rules of the law of neutrality in the treatises of Oppenheim,⁷ Colombos,⁸ and O'Connell.⁹ A thoroughgoing account of the history of neutrality is to be found in Jessup's impressive four volumes.¹⁰ The *Commander's Handbook* means to give a brief rendition of the traditional law.¹¹ How might it do better? Three ideas come to mind.

First, the *Commander's Handbook* ought to acknowledge that modern international theory and practice rarely deal with "belligerents" and "neutrals" in their traditional senses. Virtually every paragraph of Chapter 7 makes reference to "belligerents" and the introductory wording that "it has become increasingly difficult to determine with precision the point in time when hostilities have become a 'war' and to distinguish belligerent nations from those not participating in the conflict" only makes matters worse.¹² The point is that doctrine and practice no longer try to decide what is formally "war" and what is formally "peace." There are simply conflicts between nations which involve the use of force and/or economic sanctions. These conflicts usually entangle third states more or less uninterested in the outcome, but hopeful of remaining on friendly terms with both sides in the dispute. These third states are what we still call "neutrals," but they are no longer "neutrals" in the context of the traditional rules.

Second, Chapter 7 ought to abandon its more or less unskeptical treatment of the traditional law of neutrality. Its approach seems to be grounded on the commentary of observers like O'Connell and Baxter who have argued that, in theory at least, the old law of neutrality may still come into play if the United Nations fails to act at a time of armed conflict.¹³ But this is a minority point-of-view. Most commentators agree that the technical abolition of "war" has also technically abolished the old laws of neutrality. Quincy Wright, for example, refutes Baxter simply and plainly: [N]eutrality in principle cannot exist."¹⁴ Kussbach writes: "It seems clear that the rules of international law concerning neutral trading are applicable only when the state of neutrality itself is called into being, i.e., when a state of war exists."¹⁵

Moreover, whatever the outcome of the doctrinal debate about the legal effect of the U.N. Charter, even the most energetic proponents of the traditional elaboration must admit that there is little in modern practice to substantiate their theoretical preference. O'Connell himself observes respecting blockade (a topic which, along with its related rules respecting contraband and visit and search, absorbs most of Chapter 7's attention): "There has been practically no experience of blockade since 1945 to test the matter."¹⁶ More realistically, Admiral Miller, dating the demise of traditional blockades to the uniform practice of the two world wars, has argued that it makes little sense to cling in theory to out-moded rules when "a new look is required at the legal framework by which the community seeks to regulate the conflict."¹⁷ And McNulty makes good sense, not only about the rules of blockade specifically but about the laws of neutrality in general, when he writes about the legal and practical climate after 1945:

In point of fact, it seems ludicrous to contemplate the possibility of any meaningful observance of the "legal" code of blockade in the current or predictable state of political reality. It is clear that the rules of blockade came into existence solely to protect the ordinary sea commerce of neutrals and to regulate the circumstances under which such trade could be interrupted. The rules derive out of a 19th century legal regime—a regime oriented toward *regulating* the conduct of states in war and peace. But modern international law, of which blockade is a part, no longer seeks to regulate war but to prevent its occurrence.¹⁸

Looking to recent events, Lauterpacht sees little modern practice of a traditional neutral-belligerent sort. In the Vietnam and Yemen conflicts, for example, there was no attempt "to require states not immediately involved to adopt positions of 'neutrality'."¹⁹ And Norton, in a very helpful 1976 survey,²⁰ concludes that "[r]ecent armed conflicts have provided little cause to invoke the maritime rights and duties of the law of neutrality."²¹ Looking at the United Nations naval blockade of North Korea in the Korean War and the Kuomintang blockade of the Communist Chinese, he decides the first "was only of marginal significance" because the North Korean supply routes were overland,²² while the second was futile because the naval powers rejected it for being ineffective.²³ Norton does find three examples of visit and search:

Egypt's contraband system through the Suez Canal in the 1948 and 1956 Arab-Israeli wars, India's and Pakistan's contraband lists in their 1965 conflict, and France's searches of merchant ships in the Algerian War of Independence.²⁴ But he concludes that all three visit and search cases are "anomalous" since in France's case, "the rights were improperly invoked" and in the other two cases "the belligerents relying upon these rights had virtually no navies and therefore could only apply them to neutral vessels coming within the belligerents' own waters."²⁵

In the Iran-Iraq war there has been a case made that traditional neutral rights and duties are still at stake. Shortly after the war began in September 1980, both Iran and Iraq declared war or "exclusion" zones.²⁶ Iraq's only major oil port was destroyed early in the fighting and it developed over-land pipeline routes, but Iran continued to rely on shipping oil. Beginning in 1984, Iraq began to strike at Iranian shipping and Iran at third country shipping, especially shipping of Iraq's friendly neighbors; altogether between 1984 and 1987, Iraq attacked 234 ships and Iran 163 ships.²⁷ Iran has also visited and searched a large number of ships in the Gulf.²⁸ Beginning in 1987, Iran mined shipping lanes in the Gulf.²⁹ Employing traditional law of neutrality concepts, it has been argued that:

[T]he Persian Gulf belligerents, particularly Iran, have systematically violated the rights of neutral shipping. Nonbelligerent merchant vessels that are engaged in neutral commerce may not be attacked indiscriminately, as Iran has been doing.³⁰

On the other hand, it has been pointed out that whether such shipping is "neutral" or not depends on how you decide the question of whether a country, such as Kuwait, whose vessels are attacked, is truly a non-belligerent when the country is a direct financial supporter of Iraq.³¹ Furthermore, looking to the United Nations Charter and to the protection of reflagged Kuwaiti tankers by the United States, Professor Henkin has argued:

In the Gulf, some spokesman said recently, the United States remains formally neutral. But even if the concept of neutrality can still apply in some cases, can the United States be neutral here? No one would accuse us of being a friend of Iran, but there is a strong case that Iraq is probably the aggressor. No one has mentioned that for some years now. It is true that the Security Council refrained from so holding, in part because the United States would not have permit [sic] it, or because the Russians would not permitted [sic] it. That raises some questions, but that doesn't change the law. In the absence of a Security Council determination that one party was the aggressor, do the laws of the Charter not apply? In the absence of such a finding by the Security Council, are states free to be neutral even if it is clear that one side had launched the war in violation of the Charter? . . .

Is Kuwait neutral, or is it, as the first speaker suggested, perhaps a co-belligerent? Is the United States supporting Kuwait, and, if so, are we also co-belligerents? If so, we may be not only supporting the aggressor—but if the old laws of war apply—we also may be violating the laws of war.

I suggest we may not only have slipped into the war but, from the international lawyer's point of view, we seem to have slipped into a particular position on international law without much thought about it and without any thought to the long-term

consequences. In fact, we seem to be taking seriously the outdated laws of war, but not the contemporary law against war. In the process we may have eroded both. At least, it cannot be said that the law on neutrality and belligerency is what it was before 1945.³²

This is not to say that rules about neutrals might no longer be useful, only that a rendition of the traditional rules, whether they be read in full in Oppenheim or Colombos or in brief in the *Commander's Handbook*, no longer either describes practice or easily comports with theory. I agree that the object of the neutrality exercise should remain much what Chapter 7 says it ought to be: "to localize war, to limit the conduct of war on both land and sea, and to lessen the impact of war on international commerce."³³ But a faithful account of antique rules is simply not a realistic way to proceed.

Take, for example, the 1962 United States quarantine of strategic arms to Cuba. As Miller points out, "the United States could have declared war on Cuba, established a blockade, or announced lists of contraband items; although undoubtedly, many would have cried that the declaration of war, itself, was violative of article 2(4) of the U.N. Charter."³⁴ Rather, because "traditional 'blockade' implies and requires a state of belligerency or war, the United States did not seek to justify the quarantine as a blockade. There was no assertion of a state of war or belligerency."³⁵ Instead, the United States fashioned the quarantine as a regional security action under the Rio Treaty and in accord with article 53 of the U.N. Charter.³⁶ It might also have been justified as an exercise of a country's right of self-defense pursuant to Charter article 51.³⁷ In any case, the quarantine fell short of full-scale armed conflict. Indeed, the interference was intended to help establish a level of international conflict well below that of traditional legal "war" or the "war" more or less technically abolished by the United Nations' Charter.

If my second proposition is right, that given the doctrinal quandaries and practical problems besetting the "shadowy existence" of the law of neutrality,³⁸ the *Commander's Handbook* does not give that subject that "certain measure of scepticism" which most observers feel it deserves,³⁹ what is to be done? Booth has suggested that since "[w]ar is rarely declared . . . it is incumbent upon military organizations . . . to make officers conversant with the background to the general rules of law governing military operations short of war."⁴⁰ My third proposition is that Chapter 7 ought to explain that whatever we do have for rules respecting neutrality, even when they are invoked, they fall short of being the same sort of international law that is described in some other parts of the *Commander's Handbook*. Looking, for example, at the law about "Legal Divisions of the Oceans and Airspace,"⁴¹ "International Status and Navigation of Warships and Military Aircraft,"⁴² and "Protection of Persons and Property at Sea,"⁴³ one sees, in my opinion, a much "harder" law than one observes reviewing the law of neutrality. It is, I think, unrealistic to assume that all international law is of the same

certainty or of the same legally binding effect. To do so casts unwarranted shadows of uncertainty and ineffectiveness on the more successful forms of the law of nations.

It was John Austin, the English legal positivist, who wrote in 1832:

[T]hat the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . . [T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.⁴⁴

As early as 1836, international lawyers were having to cope with Austin's critique of their discipline as being merely a form of morality.⁴⁵ And, although some are satisfied as to the law-like quality of international law, others are doubtful. H.L.A. Hart, for example, in a modern reformulation of legal positivism, argues that international law is more like primitive law than like municipal law because international law lacks "the formal structure of . . . a legislature, courts with compulsory jurisdiction and officially organized sanctions. . . ."⁴⁶

However, neither Austin's nor Hart's nor most other general jurisprudential characterizations of international law pay particular attention to the diversity of international law. That is, most discussions of the problems of the certainty and efficacy of international law assume that there is a system, uncertain and ineffective though it may be, of international law and suppose that there is something like a single general integrated, if not hierarchial, international legal process. Reality is otherwise.

Various forms of international law vary along what might be called a "structural spectrum," there being "a great variety of international legal systems, some more structured than others."⁴⁷ In some of its forms, for example, the system regulating nuclear weapons, international law may be so unstructured in terms of both rule-specificity and rule-enforcement as to be, at best, a sort of Hart's so-called "primitive law."⁴⁸ In some other of its emanations, for example, the systems pertaining to the European Economic Community and to European Human Rights Law, international law may be so well-structured in terms of rule-specificity and rule-enforcement as to be virtually as "hard" as any ordinary domestic law.⁴⁹

Given the diversity of international legal systems, we should assume that there will be differences in the certainty of their rules and the efficacy of their enforcement processes. In analyzing the relationships between law and society, Max Weber, at the turn of the century, defined "law" as "an order system endowed with certain specific guaranties of the probability of its empirical validity."⁵⁰ Weber's necessary "guarantees" for law are more sophisticated than Austin's necessary "sovereigns" for law. Weber wrote of

a “coercive apparatus, i.e., that there are one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement.” The coercive apparatus” may use psychological as well as physical means of coercion and may operate directly or indirectly against the participants in the system.⁵¹ Weber’s conceptual framework is, I submit, a more useful and realistic way to understand the nature and diversity of international law than the theories provided by Austin and Hart.

Looking back to neutrality, it is helpful to remember that “the rules of neutrality are products of two forces pulling in opposite directions, the final result being determined by the relative bargaining power of the parties.”⁵² This is not a promising circumstance, either for the elaboration of certain rules or for the efficacious enforcement of those rules. Indeed, in great wars, whether they be the Napoleonic Wars or the World Wars, the legal system of neutrality has been apt to collapse altogether.⁵³

It may be that there will be periods of time, such as that between 1815 and 1914, when, because of the conditions of international politics, there will be a sufficient consensus to generate generally accepted rules and a coercive apparatus for a law of neutrality.⁵⁴ Moreover, even in times of uncertainty and inefficacy, there may be occasional authorities which will pronounce an illegality under the law of neutrality.⁵⁵ However, for the most part, the rules respecting “neutrality” or what Fenwick preferred to call “non-participation”⁵⁶ will be rules tailor-made to fit particular conflicts and will neither be norms of general specificity nor will they be enforced by a coercive apparatus comparable to that available for “harder” forms of international law.

Notes

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1. L. Oppenheim, *International Law*, 5th ed. (London: Longmans, Green, 1935), v. 2, pp. 492-493 [hereinafter cited as “Oppenheim”].

2. Philip C. Jessup, “Diversity and Uniformity in the Law of Nations,” *American Journal of International Law*, 1964, v. 58, pp. 344-345. James Kent, *Commentaries on American Law*, 2d ed. (New York: O. Halsted, 1832), v. 1, pp. 47-179.

3. Neill H. Alford, Jr., *Naval War College International Law Studies 1963* Vol. 56, *Modern Economic Warfare (Law and the Naval Participant)* (Newport, R.I.: Naval War College, 1967), p. 326.

4. Elihu Lauterpacht, “The Legal Irrelevance of the ‘State of War,’” *Proceedings of the American Society of International Law*, 1968, pp. 62-63.

5. C.G. Fenwick, “Is Neutrality Still a Term of Present Law?” *American Journal of International Law*, v. 63, p. 102 (1969) [hereinafter cited as “Fenwick”].

6. U.S. Navy Dept., *The Commander’s Handbook on the Law of Naval Operations*, NWP 9, 1987 (Newport: 1987), pp. 7-1 to 7-12 [hereinafter cited as *Commander’s Handbook*].

7. Oppenheim, *supra* note 1, at pp. 492-738.

8. Constantine J. Colombos, *The International Law of the Sea*, 4th rev. ed. (London: Longmans, 1959), pp. 562-760.

9. Daniel P. O’Connell, *The International Law of the Sea*, (Oxford: Clarendon Press, 1984), v. 2, pp. 1141-1158 [hereinafter cited as “O’Connell”].

10. Philip C. Jessup and Francis Deak, *Neutrality: Its History, Economics and Law: Vol. 1, The Origins* (New York: Octagon Books, 1935); W. Alison Phillips and Arthur H. Reede, *Neutrality: Its History, Economics and Law: Vol. II, The Napoleonic Period* (New York: Octagon Books, 1936); Edgar Turlington, *Neutrality: Its History, Economics and Law: Vol. III, The World War Period* (New York: Octagon Books, 1936); Philip C. Jessup, *Neutrality: Its History, Economics and Law: Vol. IV, Today and Tomorrow* (New York: Octagon Books, 1936).
11. *Commander's Handbook*, *supra* note 6 at pp. 7-2 to 7-12; The doctrinal bulk of the traditional law is enormous. The Harvard international law reference catalogue dealing with "neutral" topics runs to 73 pages. Harvard Law School Library, *Catalog on International Law and Relations* (Cambridge, Mass., 1966), v. 14, pp. 8-80.
12. *Commander's Handbook*, *supra* note 6 at par. 7.1.
13. O'Connell, *supra* note 9, at pp. 1141-42; R.R. Baxter, "The Legal Consequences of the Unlawful Use of Force Under the Charter," *Proceedings of the American Society of International Law*, 1968, p. 73.
14. Quincy Wright, *Proceedings of the American Society of International Law*, 1968, p. 79; and see Lauterpacht, *supra* note 4, and Fenwick *supra* note 5.
15. Erick Kussbach, "Neutral Trading," *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1982), v. 4, p. 9.
16. O'Connell, *supra* note 9 at p. 1154. Virtually all of O'Connell's evidence of neutrality in general is pre-1945.
17. William O. Miller, "Belligerency and Limited War," Richard B. Lillich and John N. Moore, eds., *Naval War College International Law Studies*, Vol. 62, *Readings in International Law from the Naval War College Review 1947-1977* (Volume II of Readings) (Newport, R.I.: Naval War College, 1980), p. 168.
18. James F. McNulty, "Blockade: Evolution and Expectation," *id.*, p. 180.
19. Lauterpacht, *supra* note 4 at pp. 59-60.
20. Patrick M. Norton, "Between the Ideology and the Reality: The Shadow of the Law of Neutrality," *Harvard International Law Journal*, Spring 1976, v. 17, p. 249 [hereinafter cited as "Norton"].
21. *Id.* at p. 302.
22. *Id.* at pp. 302-03.
23. *Id.* at pp. 303-04.
24. *Id.* at pp. 304-06.
25. *Id.* at p. 306.
26. David L. Peace, "Major Maritime Events in the Persian Gulf War," paper presented at the 82d Annual Meeting of the American Society of International Law, April 21, 1988, p. 3.
27. *Id.* at pp. 4-5.
28. *Id.* at pp. 6-8.
29. *Id.* at pp. 13-16.
30. *Id.* at pp. 17-18.
31. McNaugher, "The Evolution of U.S. Policy in the Persian/Arabian Gulf," Council on Ocean Law and The Law of the Sea Institute, *Transcript of an Evening Panel Discussion on the Persian/Arabian Gulf Tanker War: International Law or International Chaos*, January 26, 1988 [hereinafter cited as "Transcript"], at pp. 1, 2.
32. Louis Henkin, "Commentary," *Transcript*, *supra* note 31, at 8, 9-10.
33. *Commander's Handbook*, *supra* note 6, par. 7.1.
34. Miller, *supra* note 17 at pp. 169-170.
35. Leonard C. Meeker, "Defensive Quarantine and the Law," *American Journal of International Law*, v. 57, p. 515 (1963).
36. *Id.* at pp. 516-524.
37. See Carl Q. Christol and Charles R. Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba," *American Journal of International Law*, v. 57, p. 525 (1963).
38. Norton, *supra* note 20, at p. 310.
39. Yoram Dinstein, *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1982), v. 4, p. 27.
40. Ken Booth, *Law, Force and Diplomacy at Sea* (London: George Allen & Urwin, 1985), p. 200.
41. *Commander's Handbook*, *supra* note 6 at pp. 1-1 et seq.
42. *Id.* at pp. 2-1 et seq.
43. *Id.* at pp. 3-1 et seq.
44. John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832; reprinted ed., Birmingham, Alabama: The Legal Classics Library, 1984), p. 208.
45. Henry Wheaton, *Elements of International Law with a Sketch of History of the Science* (Philadelphia: Carey, Lea & Blanchard, 1836; reprinted ed., New York: Da Capo Press, 1972), p. 47.

46. H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961), pp. 209, 226.
47. Mark W. Janis, "Do Laws Regulate Nuclear Weapons?," Istvan Pogany, ed., *Nuclear Weapons and International Law* (New York: St. Martin's Press, 1987), p. 60.
48. *See id.* at pp. 53-54, 59-61.
49. Mark W. Janis, *An Introduction to International Law* (Boston: Little, Brown, 1987), pp. 229-30; Mark W. Janis, "International Courts and the Efficacy of International Law," *Connecticut Journal of International Law*, 1987, v. 2, p. 261.
50. Max Weber, *Law in Economy and Society* (New York: Clarion; Rheinstein & Shills trans., 1954), p. 13.
51. *Id.* at p. 13.
52. Nils Orvik, *The Decline of Neutrality 1914-1941, with Special Reference to the United States and the Northern Neutrals*, 2d ed. (London: F. Cass, 1971), p. 13.
53. *Id.* at p. 16.
54. A good account is in Holland, "Neutral Duties in a Maritime War," *1905-1906 Proceedings of the British Academy*, p. 55.
55. For example, in the 1982 Falkland/Malvinas conflict, the United States Court of Appeals for the Second Circuit found Argentina guilty of violating international law for "attacking a neutral ship in international waters, without proper cause for suspicion or investigation." *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F. 2d 421, 424 (2d Cir. 1987), reversed 109 S.Ct. 683 (1989).
56. Fenwick, *supra* note 5 at p. 102.