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THE LAW OF WAR AND NEUTRALITY AT SEA

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PART TWO
VI. NEUTRALITY AND THE LEGAL POSITION OF WAR

A. THE TRADITIONAL RELATIONSHIP BETWEEN WAR AND NEUTRALITY

The changes that have marked the international order since the advent of the first World War undoubtedly have had a substantial effect upon the institution of neutrality. At the same time the task of evaluating this effect admits of no easy and wholly satisfactory solution. If anything, it seems reasonably clear that the present status of neutrality is, and will probably remain for some time to come, a matter over which considerable controversy and divergence of opinion can be expected.

In part, this uncertainty must be attributed to the changed position of war in international law. It has already been observed that prior to World War I, at least, the act of resorting to war was considered as neither legal nor illegal but simply a fact, situation or event, occurring periodically in state relations. According to this interpretation states retained the liberty under customary international law to resort to war whenever they deemed such action to be expedient. It followed that the decision by third states to participate or to refrain from participating in war was, as the initial resort to war itself, "not a matter for International Law but for international politics." Once war had broken out, third states, not immediately involved in the hostilities, were neither under a duty to participate nor to refrain from participating in the hostilities. Similarly, belligerents were at liberty to recognize or to refuse to recognize a status of non-participation on the part of third states.

Those states which refrained from participating in a war occupied a status of neutrality. The legal consequence of such non-participation, however, may be found in the fact that it served to bring into operation certain rules, rules presupposing an equality of legal status as between the belligerents with respect to the war itself, hence the duty of non-participants to fulfill their duties and to exercise their rights in an impartial manner toward belligerents. These rules—which may be termed the traditional law of neutrality—remained operative for the duration of a war or until such time as a neutral state abandoned its position of non-participation—either by attacking one of the belligerents or by being attacked by a belligerent.

1 See pp. 3-4.
2 Oppenheim-Lauterpacht, op. cit., p. 653.
3 See pp. 196-202 for an analysis of the traditional concept of neutrality as well as of the problems relating to the commencement and termination of this legal status.
Given the obvious and close relationship between the position of war under customary international law and the traditional legal institution of neutrality, it must appear on first consideration that once the resort to war has been generally forbidden to states, neutrality—or, at the very least, the specific consequences attached to a status of non-participation in war by the traditional law—must be deprived of further legal justification. This conclusion, that the foundations of the traditional system of neutrality have been overturned, appears particularly compelling to those who compare the obligations laid upon non-participants by the traditional system with the obligations incurred by member states within the system of collective security established by the Charter of the United Nations. Indeed, in view of recent developments many observers have ventured so far as to question the continued feasibility of referring to the traditional legal institution of neutrality at all save in the historical sense.

But although the nature of the relationship traditionally obtaining between war and neutrality seems clear enough, the precise changes effected in neutrality by the altered position of war are not as readily apparent as has been frequently assumed. In order to analyze these changes more carefully it is useful to consider the obligations imposed and the rights conferred at present upon third states during a war in which they are not immediately and directly involved as active participants. These obligations and rights may be considered both from the point of view of the General Treaty For The Renunciation of War (the so-called Pact of Paris or Kellogg-Briand Pact) and from the point of view of the Charter of the United Nations.

B. NEUTRALITY AND THE GENERAL TREATY FOR THE RENUNCIATION OF WAR

According to the provisions of the General Treaty For the Renunciation of War and, it may be assumed, according to present general international law, the resort to war is permitted to states only in the following circum-

4 "... the principle explanation and justification of the modern law of neutrality, conceived as an attitude of absolute impartiality, has now disappeared. That explanation consisted in the fact that, until the First World War, the right to wage war constituted an unlimited prerogative right of sovereign States; no neutral State, therefore, could arrogate to itself the right to pass judgment on the legality of a war and to shape its conduct accordingly. The question simply did not arise. In this respect the position has undergone a fundamental change. The unlimited right of war is no longer a prerogative of the sovereign State. International law now recognizes that a State may act unlawfully by the very act of declaring or going to war. It admits the distinction between wars which are lawful and those which are not. To that extent it has re-established the historic foundations of qualified—discriminatory and discriminating—neutrality." Lauterpacht, "The Limits of the Operation of the Law of War," p. 237.

5 A note on terminology may be in order here. The term "general" international law refers to rules binding upon all states and is to be contrasted with "particular" international law, which refers to rules regulating the behavior only of certain states. Although it is possible that both general and particular international law can consist of rules that are either customary
stances: as a collective enforcement measure taken in accordance with the obligations incurred within a general system of collective security, as a measure of self-defense against a prior—and unlawful—resort to war, and as a measure of collective defense taken on behalf of a state waging a lawful war of self-defense. Thus, apart from the obligations resulting from membership in the United Nations, states may now be considered as generally forbidden to resort to war except as a measure of individual or collective defense against a previous—and thereby unlawful—resort to war.

What, then, are the possible effects upon the institution of neutrality brought about by this transformation in the legal position of war? It is clear, to begin with, that under the General Treaty For the Renunciation of

or conventional in origin, it is usual to associate general international law with rules of a customary origin and particular international law with rules of a conventional character. This practice is seldom misleading. There may be significant exceptions, however, especially with respect to conventional rules. Thus the almost universal adherence of states to the General Treaty for the Renunciation of War, and the absence of any time limit set upon the operation of its provisions, serve to give the rules contained therein a character closely akin to that of general international law. In view of this fact the question as to whether or not the position of war under customary international law has undergone change has been deprived, in large measure, of its former significance. In this connection, however, it is submitted that the correct view is that the legal position of war under customary law does not remain unaltered, and that customary international law may now be considered as restricting the liberty of states to resort to war in a manner substantially identical with the provisions contained in the General Treaty for the Renunciation of War. But this latter point need not be pressed.

6 The Preamble, in part, and the first two Articles of this Treaty, signed August 27, 1928, read as follows:

"Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war shall be denied the benefits of this Treaty;

I The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy with one another.

II The High Contracting Parties agree that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

7 In Article I of the Pact of Paris war is renounced as "an instrument of national policy." However, it is clear that enforcement measures taken under then existing collective security arrangements (principally, measures taken under Article 16 of the Covenant of the League of Nations), and having the character of war, constituted a category of measures permitted by the Pact. It is equally clear that enforcement measures taken under Chapter VII of the United Nations Charter fall within this same permitted category.—The right of self-defense is a necessary consequence of the Pact and was so recognized by the contracting parties at the time of signature. The statement in the Pact's Preamble, that "any signatory Power which shall hereafter seek to promote its national interests by resort to war shall be denied the benefits furnished by this Treaty," has been interpreted as permitting other contracting parties the right to assist the state acting in self-defense. Thus in declaring war upon Germany in September 1939 Great Britain and France claimed to exercise a right conferred upon them by the Pact. In this latter respect the similarity between the General Treaty For The Renunciation of War and Article 51 of the United Nations Charter should be noted. (See pp. 177-9).
War there is neither an obligation on the part of third states to abandon a status of non-participation in a war unlawfully initiated nor an obligation to abandon any of the rights and duties attached to the status of non-participation by the traditional law of neutrality. To the extent that states have not incurred obligations in excess of those imposed by the Pact of Paris there seems little question but that non-participants in a war may continue to invoke the traditional law of neutrality.

At the same time, by Resorting to war in violation of its obligations under the General Treaty For the Renunciation of War a state violates the rights of all other contracting Parties. The latter are thereby entitled not only to resort to war against the state so violating its obligations; they are also entitled to take measures of reprisal against the aggressor that may not involve active participation in hostilities but that may involve a departure from those duties otherwise imposed upon non-participants by the traditional law of neutrality. Thus the measures of discrimination taken against Germany in 1940-41 by the United States, although the United States remained at the time a non-participant in the war, were partially justified as measures of reprisal permitted to this country in consequence of Germany’s resort to war in alleged violation of the Pact of Paris.

Admittedly, the position taken above has not been accepted by many writers. The Pact of Paris does not expressly provide that contracting Parties may take discriminatory measures against a violator of its provisions. It has therefore been claimed that the only benefit furnished by the Treaty, which may be denied to states violating the Treaty’s provisions, is the benefit of not being made the object of a resort to war by the other contracting Parties. However, states not participating in a war unlawfully initiated must observe a strict impartiality. The opposing view, given expression in the text, has been formulated in the following manner: “The abrogation of the principle of impartiality is a legal effect which a multilateral treaty prohibiting the resort to war has under general international law. The right to take enforcement measures short of war as reprisals against a violator of the treaty is derived directly from general international law and exists even if not expressly stipulated by the treaty.”


Also the opinion of Oppenheim-Lauterpacht (op. cit., pp. 644-5): “The guilty belligerent, by breaking the Treaty, violates the rights of all other signatories, who, by way of reprisals, may choose to subject him to measures of discrimination, for instance, either by actively prohibiting some or all exports into his territory or merely by submitting passively to otherwise unlawful measures on the part of the offending belligerent.” And for an earlier opinion that parties to the Pact of Paris have the right to take discriminatory measures against a state resorting to war in violation of the Pact, see “Budapest Articles of Interpretation,” International Law Association, Report of the 38th Conference, (1934). Nevertheless, a substantial number of writers have never shared this interpretation of the Pact.

The Anglo-American Agreement of September 2, 1940, whereby the transfer of fifty destroyers to Great Britain was made in return for the right to lease naval and air bases, as well as the “Act to Promote the Defense of the United States” (Lend-Lease Act), by which Congress authorized the production and disposal of articles to “the government of any country whose defense the President deems vital to the defense of the United States,” were partially justified as being measures of reprisal against Germany for the latter’s resort to war in violation of the Pact of Paris. See U. S. Naval War College, International Law Documents, 1940, pp. 74-90, 150-200.
In view of the possibility that the Pact of Paris may be regarded as presently constituting general international law the right to discriminate against a state violating the Pact's provisions may appear to signify a fundamental change in the traditional legal institution of neutrality. In fact, however, the significance of this change ought not to be overestimated. In the absence of any further obligation to discriminate against an aggressor those states not immediately involved in war will continue to invoke the traditional law of neutrality—with its principle of strict impartiality—whenever they consider such action to be to their interests. The practice of states in the period that has elapsed since the conclusion of the General Treaty For The Renunciation of War furnishes impressive evidence in support of this observation.

There is a further, and possibly more serious, objection to be considered in evaluating the contention that the General Treaty For The Renunciation of War has effected a basic change in the traditional institution of neutrality. The Pact of Paris provides for no objective authority competent to determine when a state has resorted to war in violation of the Pact's provisions. In the absence of a procedure making possible an authoritative and binding judgment that in a given instance a state has unlawfully resorted to war, each state must reach such determination independently.

and 132–7, for documents relating to the destroyer-base agreement and for text of the Lend-Lease Act.

In an address of March 27, 1941, before the Inter-American Bar Association the Attorney General of the United States declared:

"The Kellogg-Briand Pact of 1928, in which Germany, Italy, and Japan covenanted with us, as well as with other nations, to renounce war as an instrument of policy, made definite the outlawry of war and of necessity altered the dependent concept of neutral obligations . . . The Treaty for the Renunciation of War and the Argentine Anti-War Treaty deprived their signatories of the right of war as an instrument of national policy or aggression and rendered unlawful wars undertaken in violation of their provisions. In consequence, these treaties destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive wars. It did not impose upon the signatories the duty of discriminating against an aggressor, but it conferred upon them the right to act in that manner." A. J. I. L., 35 (1941), pp. 353–4.

10 In the period up to and including the second World War, the United States provided the only significant example of a neutral state attempting to justify discriminatory behavior toward a belligerent by reference to the Kellogg-Briand Pact. It is necessary to add, however, that the behavior of the United States in the period prior to 1940 would appear to deprive even this one example of much of its significance. In the neutrality legislation enacted during the period from 1934 through 1939 no recognition was given to the possible effects the Pact of Paris might have upon the rights of non-participants in an unlawful war. Instead, it was assumed that whatever the origin of the war the duties of non-participants under the traditional law—and particularly the duty to refrain from discriminatory behavior—continued unimpaired. It is also noteworthy that the resort to the Kellogg-Briand Pact as a justification for discriminatory measures against Germany never formed more than a partial justification for American policy. In large measure, this discriminatory behavior continued to receive justification by reference to arguments whose relevance could be assessed only in terms of the traditional law (see p. 136(n)).
The possibility—or, perhaps more accurately, the probability—must be envisaged that third states will differ in their respective judgments regarding the origin of a war. General international law may be interpreted as presently permitting states to discriminate against an aggressor, but it cannot prevent third states from reaching mutually contradictory decisions as to the identity of the aggressor. The result must be wars in which both sides are made the objects of discriminatory measures. It was precisely this contingency—a product of the decentralization normally characteristic of the international legal order—that served historically as a partial justification, at least, for the traditional legal institution of neutrality with its principle of strict impartiality.

Admittedly, this same argument may be used to call into question the practical utility of the change that has occurred in the legal position of war itself under general international law. For the mutually contradictory de-

11 In this respect the Pact of Paris clearly did not improve upon the situation that has always characterized the application of customary international law. If anything, it provided a remarkable example of the futility of an international instrument which attempts to render the resort to war illegal except when taken as a measure of self-defense against an illegal resort to war, but takes no steps toward the solution of those problems which otherwise make the value of such attempts extremely limited. All the important weaknesses of international law are given express recognition in the Pact’s provisions. Yet it attempted the solution of a problem the existence of which was largely the result of those very weaknesses it expressly recognized. Under the Pact each contracting party has the right to determine—for itself only—whether a resort to war constitutes a violation of the Treaty or a measure of self-defense permitted by the Treaty. It has been asserted that “elementary principles of interpretation preclude a construction which gives to a state resorting to an alleged war in self-defense the right of ultimate determination, with a legally conclusive effect, of the legality of such action.” Oppenheim-Lauterpacht, op. cit., pp. 187-8. This is correct, if by “the right of ultimate determination, with a legally conclusive effect” is meant the right to decide the legality of an action in a manner that other parties are bound to accept. It follows, then, that according to the Kellogg-Briand Pact, and according to general international law, the final—and authoritative—decision as to the character of a war allegedly waged in self-defense must depend upon an express agreement of the parties involved to submit disputed instances of self-defense to the decision of an organ endowed with the requisite competence. In particular, decisions made unilaterally by the victorious states following the conclusion of a war cannot be deemed to fulfill this requirement. And it is hardly necessary to point out that even if such authoritative decisions are finally rendered they do not resolve the difficulties of non-participants during the actual course of the war.

12 Distinguish, however, between the foregoing criticism of the Pact of Paris and the opinion that since “each nation was to be the exclusive and unreviewable judge of the question whether its war was one of self-defense . . . the Kellogg Pact has no legal force whatever . . .” Edwin Borchard, “War, Neutrality and Non-Belligerency,” A. J. I. L., 35 (1941), p. 622. It is one thing to assert that the utility of an international treaty prohibiting—in principle—the resort to war will be severely limited if it leaves the interpretation and application of that instrument to each of the contracting parties, and quite another thing to state that this condition of decentralization serves to deprive the treaty of “legal force.” The latter assertion is surely unwarranted, unless it be contended that most of the rules of international law—whose interpretation and application is normally a product of the same condition of complete decentralization—have no “legal force.”
cisions non-participants must be expected to reach concerning the origin of war will necessarily lead to an equal lack of uniformity in the actual participation of third states in hostilities. Under these circumstances the former liberty to resort to war is likely to remain—in practice if not in law—the prerogative of each state. At the same time, however, the former duty of non-participants to observe the rules laid down by the traditional law of neutrality presumably would be abandoned. This rather paradoxical result can hardly be considered an improvement over the traditional law. Nevertheless, it may be said to follow from the attempt merely to place restrictions upon the liberty of states to resort to war while failing to provide a procedure whereby an authoritative determination can be made that in a given instance a state has resorted to war unlawfully. And it is for this reason that although the traditional law of neutrality grew out of, and received its principal justification from, the unlimited liberty of states to resort to war, a change in the legal position of war does not necessarily imply the desirability of modifying—let alone abolishing—the duties imposed and the rights conferred upon non-participants by this traditional law.13

C. NEUTRALITY UNDER THE CHARTER OF THE UNITED NATIONS

Under the collective security system established by the Charter of the United Nations, Member states no longer possess, in principle, the freedom either to refrain from actively participating in a war that has taken on the character of a United Nations enforcement action, or—should they not be called upon by the Security Council to take military measures—to observe the duty of impartiality as laid down by the traditional law.14 This general observation must presuppose, of course, that the Security Council is able to exercise effectively those functions conferred upon it by the Charter. Even so, there is the possibility of distinguishing between several kinds of situations.

According to Article 39 of the Charter the Security Council shall decide, in the event it determines the existence of a threat to or breach of the peace, what measures shall be taken in order to maintain or restore international

13 And it is presumably for the same reason that the Harvard Draft Convention On Rights and Duties of States in Case of Aggression (op. cit., pp. 82r ff), while permitting third states to take discriminatory measures against an aggressor, nevertheless limited the applicability of the Draft Convention to “cases where a resort to armed force has been in violation of a legal obligation not to resort to such means and where such violation has been duly determined by a procedure to which the law-breaking State has previously agreed” (p. 825), [italics added].

14 A substantial portion of the discussion immediately to follow in the text represents a reformulation of problems earlier examined in Chapter I (see pp. 13–20). Perhaps the best analysis to date of the possible effect that the United Nations Charter may have upon the traditional institution of neutrality is J. F. Lalive, “International Organization and Neutrality,” B. Y. I. L., 24 (1947), p. 8o.
peace and security. These measures may consist of acts not involving (Article 41) or involving (Article 42) the use of armed force. In this connection, it is important to observe that the unlawful resort to armed force by a Member of the United Nations neither automatically involves other Member states in war with the delinquent state nor places upon Member states even the obligation to resort to war. The obligation to resort to measures involving the use of armed force follows only upon the requisite decision by the Security Council, and actual involvement in hostilities occurs only when the Member state has carried out the obligation imposed upon it by the Security Council.15

It is altogether possible, therefore, that in the event of an enforcement action ordered by the Security Council certain Member states may not be required to participate with their armed forces.16 Article 48 of the Charter contemplates this possibility by providing that the “action required to carry out the decisions of the Security Council . . . shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.” Hence, the opinion that the effective operation by the Security Council of the powers granted it under the Charter precludes the possibility that Member states may retain a status of neutrality in a war

15 Under the collective security system established by the Covenant of the League of Nations each Member state retained the right to determine for itself whether another Member state had resorted to war in violation of its obligations. The League Council could give its opinion as to whether a breach of the Covenant had occurred, but the Council’s opinion was not binding upon Members. According to Article 16, paragraph 1, of the Covenant it was provided that: “Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.” This provision has been correctly described as a legal fiction “since the Members against which the delinquent Member did not resort to war are actually not in a state of war and are not obliged to resort to war against the delinquent state.” Hans Kelsen, Principles of International Law (1952), p. 86. So long as each Member of the League did not itself decide that another Member had unlawfully resorted to war, the obligations imposed by Article 16 did not become operative. Even after having so decided there was no obligation to resort to war against the delinquent, although there was an obligation to take certain measures of discrimination, largely economic in character (and, according to paragraph 3 of Article 16, the further obligation to “take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are cooperating to protect the Covenants of the League.”)

16 It is also relevant to recall that the obligation of Member states to take measures of armed force provided for in Article 42 is probably dependent upon the conclusion of the special agreements provided for in Article 43. These agreements, to be concluded between the Security Council and Member states, are to regulate the conditions under which the armed forces and facilities of the Member states will be made available to the Council. However, in the absence of such agreements it is doubtful that the Security Council is competent to oblige Member states to take military measures against a state considered by the Council to have committed a threat to or breach of the peace.
that has the character of a United Nations enforcement action is correct only if neutrality is identified with the duties imposed upon non-participants by the traditional law, and particularly with the duty to observe a strict impartiality.

It is considered preferable, however, to identify neutrality simply with the status of non-participation in hostilities, and not with the specific consequences that are attached to the status of non-participation according to the traditional law.\(^ {17} \) If this concept of neutrality is accepted then it is clear that in an enforcement action taken by the United Nations that has the characteristics of war some Member states may remain neutral, in the sense that they are not required to participate in the hostilities. However, the consequences attached to such non-participation are not the consequences attached to the status of non-participation by the traditional law, for Member states are obligated by the Charter to assist the Organization by measures not involving the use of armed force and to refrain from rendering any assistance to state(s) against which enforcement action is taken.\(^ {18} \)

\(^ {17} \) See pp. 196-8. Though not accepted by perhaps the majority of writers, this identification of neutrality with non-participation in war need not pose any difficulty here. Whether accepted or not there is at least a clear distinction to be drawn between a status of non-participation in hostilities which does entail the duties imposed by the traditional law (particularly the duty to observe a strict impartiality toward the belligerents), and a status of non-participation which may impose a duty as well as confer a right upon a state to discriminate against the side that has unlawfully resorted to war. In the latter case the discriminatory measures taken by non-participants have their basis in norms constituting a general system of collective security. In the former case departure from the duties imposed upon non-participants by the traditional law has no apparent justification and gives rise to a belligerent right of reprisal.

\(^ {18} \) The discussion in the text necessarily assumes that in an enforcement action ordered by the Security Council Member states are obligated, even without specific direction by the Council, to depart from a position of strict impartiality and to discriminate against the delinquent state. In other terms, this assumption interprets Article 2, paragraph 5, as being automatic in its application to Member states. It is possible, though, to interpret Article 2, paragraph 5, as obligating states to take measures of discrimination only when so directed by the Security Council (this interpretation draws added weight if Article 2, paragraph 5, is considered together with Article 48). In the absence of such direction a Member state could then remain neutral and observe a strict impartiality. But there is little doubt that this latter interpretation is contrary to the principles upon which the collective security system established by the Charter is based. (Also see Law of Naval Warfare, Article 232.) At the same time, it would appear that in the light of recent developments a state may be accepted as a Member even though it is committed to a status of permanent neutrality, a status entailing not only the obligation to refrain from resorting to war against any state—save in self defense—but also the obligation to observe all the duties imposed upon non-participants by the traditional law. Thus in 1955 Austria was admitted as a Member state despite its announced intention to adopt a policy of permanent neutrality, and its request to all states to recognize this status. To date, Austria's request has been accorded recognition by a substantial number of states, including the permanent Members of the Security Council. On first consideration, the status of permanent neutrality appears clearly incompatible with membership in the United Nations (an opinion expressed by the framers of the Charter). Nevertheless, Professor Verdross, writing before Austria's admission into the United Nations, has declared that the Security Council "can decide freely
The position of a state that refrains from active participation in hostilities, but nevertheless resorts—in accordance with obligations undertaken within a system of collective security—to discriminatory measures against one side in a war, has frequently been termed “qualified” or “differential” neutrality. During the League of Nations period a good deal of speculation was devoted to the possibility of states occupying a position of qualified neutrality, and was occasioned by the obligations imposed upon Member states by the Covenant of the League of Nations to take measures of discrimination—primarily economic in character—against another Member state that had unlawfully resorted to war. A similar problem arises with

which Members it wants to execute sanctions and compulsory measures and to what extent. The Security Council may therefore permanently relieve individual Members of these obligations by a resolution embodying a principle. Only the Security Council would be able to alter or annul such a resolution . . . “Austria’s Permanent Neutrality and the United Nations Organization,” A. J. I. L., 50 (1956), p. 66. In dealing with the same issue Professor Kunz has more recently stated that even if the Security Council does not adopt such a resolution “it seems that Austria’s permanent neutrality is not endangered by its membership . . . For Austria’s permanent neutrality has come into existence in international law by recognition on the part of the permanent members of the Security Council and many other states; recognition binds the recognizing states to respect permanent neutrality; this respect for permanent neutrality therefore obliges the members of the Security Council not to call on a permanently neutral state for participation in economic and military sanctions.” “Austria’s Permanent Neutrality,” A. J. I. L., 50 (1956), p. 424. It is clear, however, that the situation of Austria is exceptional, and does not detract from the statements made above concerning the obligation of other Member states to accord assistance to the Organization by virtue of Article 2, paragraph 5. Moreover, Austria’s membership is not, as Kunz points out, “unconditional,” since it does not entail all of the obligations normally imposed upon Members.

The terminology employed by writers to describe the position of the discriminating non-participant is not always consistent, however, and this fact may account for some of the confusion that has accompanied discussions of “qualified” or “differential” neutrality. Some writers (e. g., Guggenheim, Traité de Droit International Public, Vol. II, pp. 496-500) use the term “qualified” neutrality to indicate the position of non-participants that assert a right (though not a duty) to assist the victim of an unlawful resort to war, primarily as a consequence of the Kellogg-Briand Pact, and thereby distinguish between the position of “qualified” neutrals and the position of non-participants under the Charter of the United Nations. Other writers (e. g., Verdross, Völkerrecht, pp. 424, 525-6) appear to use the terms “qualified” or “differential” neutrality to describe the position of non-participants that follow—for any reason—a policy of discrimination. In this sense, “differential” neutrality may refer to the position of Member states of the United Nations as well as to non-participants that remain bound by the rules of the traditional law.—It would appear desirable, however, to use the terms “qualified” or “differential” neutrality either to describe the position of states that have both a right and a duty to discriminate against an aggressor (e. g., the position of states Members of the United Nations) or to describe the position of non-participants having only a right of discriminating against a state unlawfully resorting to war (e. g., by virtue of the Kellogg-Briand Pact). In theory at least, it is true that there is a significant difference between these two types of “qualified” or “differential” neutrality. But if the duty to discriminate against an aggressor cannot be effectively implemented the difference between these two types is likely to prove—in practice—very small. On the other hand, the term “non-belligerent” may be reserved to describe the position of a non-participant that departs from the duties imposed upon the latter by the traditional law without having a right to do so (see pp. 191-3, 198-9).
respect to the position of Member states in an enforcement action undertaken by the United Nations.

To the extent that the idea of a qualified or differential neutrality has been based upon the contention that the impartiality required of non-participants by the traditional law refers only to military matters (thus permitting discriminatory acts with respect to non-military matters), it must be regarded as unfounded. In fact, it was hardly possible to reconcile the obligations assumed by Member states under the Covenant with the obligations imposed by the traditional law. Member states could refrain from participating in a war against another Member state that had unlawfully resorted to war. They could not—consistently with their obligations under the Covenant—observe a strict impartiality. But under the Covenant all Member states expressly assumed the obligation to permit measures of discrimination to be taken against them in the event they resorted to war in violation of their obligations; for in this event they forfeited the rights formerly enjoyed by belligerents with respect to non-participants, though retaining all of the belligerent's duties. The same reasoning must also apply to United Nations enforcement actions. Of course, the real difficulty here is not primarily legal but political in character. Will the aggressor tolerate discriminatory measures on the part of non-participants? Experience to date has not yet furnished sufficient indication as to how meaningful, in practice, the position of a discriminating non-participant may be. If anything, it seems probable that this position—if seriously pursued—would necessarily prove difficult to maintain.

The preceding remarks have dealt only with the effect the Charter of the United Nations may have upon neutrality so far as Member states are concerned, presupposing, of course, the effective operation by the Security

20 This was illustrated in the case of Switzerland. In admitting Switzerland to the League the Council of the League declared that Switzerland had no obligation to undertake military measures against a violator or to permit the passage of troops through Swiss territory. Nevertheless, the obligation to take economic and financial sanctions against a Member state unlawfully resorting to war was retained. In order to reconcile this latter obligation with her traditional status of permanent neutrality the Swiss Government contended for some time—as did a number of Swiss writers—that a strict neutrality was compatible with an "economic partiality," that the impartiality demanded of neutrals by the traditional law referred only to the military, not to the economic sphere. This opinion was quickly abandoned, however, during the Italo-Ethiopian War, when economic sanctions were taken against Italy by League members. Shortly thereafter, in 1938, Switzerland declared it would no longer consider itself bound by the obligation to participate in sanctions of an economic character, thereby abandoning a position of "qualified" or "differential" neutrality.

21 In the Italo-Ethiopian War of 1935-36, a limited application of the so-called "differential" neutrality provided for in Article 16 of the Covenant was attempted. Several Members applied discriminatory measures of an economic character against Italy, while maintaining that Italy should observe those duties toward the discriminating states imposed upon belligerents by the traditional law. But this case can hardly be considered as decisive in illustrating the political feasibility of a "qualified" or "differential" neutrality. By 1938 it was generally recognized that Article 16 was no longer obligatory for Member states of the League.
Council of the powers conferred upon it by the Charter. A further problem relates to the effect the Charter may have upon neutrality as far as non-Member states are concerned. The answer to this problem must depend largely upon whether or not the law of the United Nations may be considered as constituting general international law. Despite the claim in Article 2, paragraph 6, it is doubtful that the Charter can be considered as constituting general international law. Accordingly, it is also doubtful that the Security Council possesses the competence to require that non-Member states, in a United Nations enforcement action, depart from a position of strict impartiality.

22 Article 2, paragraph 6 reads: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." Among writers, the majority seem to remain quite skeptical of the validity of Article 2, paragraph 6, so far as non-Members are concerned. Thus Lalive (op. cit., p. 85) writes that there is "room for doubt whether the Charter can lawfully be invoked against a non-Member state," and Kelsen (The Law of the United Nations, p. 110) states that "from the point of view of existing international law, the attempt of the Charter to apply to states which are not contracting parties to it must be characterized as revolutionary." It has even been pointed out that it is not necessary to interpret Article 2, paragraph 6, as imposing obligations upon non-Members but only upon Members. "The Charter, in Article 2 (6), imposes upon the United Nations the obligation to ensure that non-Members act in accordance with its principles as far as may be necessary for the maintenance of international peace and security. Non-Members are not bound by this provision and they may choose to react accordingly. But the fact makes no difference to the obligations of the Members ... in all cases in which the Security Council has taken affirmative action under Articles 39, 41 and 42." Oppenheim-Lauterpacht, op. cit., p. 652.

23 Within the United Nations itself the problem of the status of non-Members during an enforcement action was discussed in connection with the Draft Declaration on the Rights and Duties of States, prepared by the International Law Commission in conformity with Resolution 178 (II) of the General Assembly, November 21, 1947 (U. N. General Assembly, Official Records, 4th Sess. Supp. 10 (Doc. A/1925).) Articles 9, 10 and 12 of the Draft Declaration state: "Article 9. Every state has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another state, or in any other manner inconsistent with international law and order."

"Article 10. Every state has the duty to refrain from giving assistance to any state which is acting in violation of Article 9, or against which the United Nations is taking preventive or enforcement action."

"Article 12. Every state has the right of individual or collective self-defense against armed attack."

The Draft Declaration does not itself constitute positive international law, and as an attempt even to formulate existing general international law it has been subject to much criticism. Even so, Article 10 of the Draft Declaration clearly does not attempt to endorse the claim made by Article 2, paragraph 6, of the Charter. "Every State," which includes non-Member states, is not under the obligation to discriminate against any state made the object of United Nations enforcement action, but is obligated only to refrain from giving assistance to states made the object of such action. To this extent the obligation laid down in Article 10 of the Draft upon non-Member states is no different from the obligation they would otherwise have according to the traditional law, requiring as it does that non-participants in a war refrain from discriminatory measures and observe an attitude of impartiality toward the belligerents.
The problem relating to the Charter's effect upon the status of non-Members in a United Nations enforcement action is likely to prove relatively unimportant in practice, however. Should the Security Council be able effectively to exercise those powers conferred upon it by the Charter non-Member states would, as one writer has observed, "be politically alive to the possible consequence of action in defiance of the United Nations." It is the unlikelihood of such effective exercise of power by the Security Council that renders continued speculation over this problem of distinctly limited value.

More useful, therefore, is a consideration of the far more probable situation in which the Security Council will be unable either to order enforcement measures against a state that has unlawfully resorted to the use of armed force or even to determine the existence of a breach of the peace—as it was able to do at the time of the outbreak of hostilities in Korea. In the event of Security Council inaction the position of Member states not immediately involved in hostilities will be substantially the same as the position of third states—not immediately involved in war—under general international law. Neither Article 51 of the Charter nor the General Assembly's resolution "Uniting for Peace" provide alternative methods whereby an authoritative and binding collective determination can be reached that a state has unlawfully resorted to the use of armed force. It


25 See pp. 16–8, where it has already been observed that the character of these Security Council resolutions renders doubtful the interpretation that the Korean action was a "United Nations' action" in the strict sense of that term. It is still more doubtful that Member states were under the obligation, imposed by Article 2, paragraph 5, to give the United Nations "every assistance in any action" the Organization takes in accordance with the Charter. For these reasons the contention that a strict impartiality in the Korean Conflict was legally excluded for Member states appears unacceptable. At the same time, the particular circumstances attending the Korean conflict, and especially the circumstance that the Security Council was able to determine the existence of a breach of the peace, does allow the interpretation that Member states were obligated to refrain from giving any assistance to the North Korean forces or to states acting in support of these forces.

In practice, questions concerning neutral-belligerent relations were never put to a real test in the Korean conflict, due to the geographical location as well as to the peculiar nature of the hostilities. But several Member states of the United Nations did maintain a position practically indistinguishable from that of non-participants under the traditional law. For a review of the Korean conflict and neutrality, see H. J. Taubenfeld, "International Actions and Neutrality," A. J. I. L., 47 (1953), pp. 390–6.

26 See pp. 18–20. In the first Report (1951) of the Collective Measures Committee (U. N. Doc. A/1891), established pursuant to the "Uniting For Peace" resolution, considerable emphasis was placed upon the desirability of obtaining universal support for the collective measures recommended in accordance with this Resolution. Thus one of the Reports "guiding principles of general application" was that: "All States should support the United Nations when it undertakes collective measures and participate to the fullest extent possible in carrying them out. . . ." Such recommendations as may be made to states, both Members and non-Members, in accordance with the "Uniting For Peace" resolution, cannot serve to create obligations, however.
is equally clear that apart from the powers granted the Security Council under Chapter VII, the collective security system established by the Charter provides no alternative method for obligating Member states either to take measures involving the use of armed force or to take measures of discrimination not involving the use of armed force against a state that is regarded as having violated its obligations under the Charter by resorting to war. Hence, in the event that the Security Council is unable to fulfill its functions Member states may, in the event of war, abstain from all participation in hostilities and observe a strict impartiality.

It is quite true that under Article 51 the Charter does confer upon Members the right to assist any Member state that has been made the victim of an "armed attack," and this right is terminated only when the Security Council has taken "measures necessary to maintain international peace and security." Nor is there any reason for interpreting Article 51 as permitting only such assistance on behalf of the victim of an armed attack as involves the use of armed force. The "collective self-defense" allowed under Article 51 also permits measures of discrimination against an alleged aggressor that do not necessarily involve the discriminating states' active participation in hostilities.

Thus, according to the Charter, the right to participate in the collective defense of a state made the object of an unlawful resort to war may be considered to include the right to discriminate against the aggressor by measures falling short of active participation in hostilities. But the difficulties attending the exercise of this right to discriminate against an alleged aggressor are as readily apparent in relation to the Charter as they

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27 Nor can there be much doubt that—events permitting—a substantial number of Member states would do just this. There is, in fact, little point in continuing to place undue emphasis upon the possible effects the collective security system established by the Charter may have upon neutrality. For that system has never functioned as originally intended, and it is at least highly unlikely that it will do so in the foreseeable future. It is almost equally unlikely that the modest experiment in "collective security" effected during the Korean hostilities will be repeated, dependent as it would have to be upon the same fortuitous circumstances which permitted the Security Council to take in June and July of 1950 a limited form of action. And even during the Korean conflict not only did a number of Member states consider themselves to occupy a position of "neutrality" in relation to the hostilities, but the armistice terminating the hostilities provided for a "commission of neutrals" to insure its observance (though, ironically, four of the five states composing this "commission of neutrals" were Member states of the United Nations). It is true that no state issued a formal declaration of neutrality during the Korean conflict or actually invoked the traditional law of neutrality. It is also true that the accuracy of the term "neutral" with respect to the states policing the Korean armistice may be easily challenged from a technical point of view. But it would be quite unwarranted to dismiss the overall significance of these, and other, recent developments, which indicate that neutrality—even the "old-style neutrality"—may have to be disinterred once again by those who had buried it in the hope that the principle of collective security had finally made this traditional institution obsolescent. Certainly, the framers of the 1949 Geneva Conventions on the Treatment of the Victims of War did not share this view, for these Conventions assign important functions to neutral states.
are when considered in relation to the General Treaty For the Renunciation of War. It may be assumed that under Article 51 of the Charter states will reach the same mutually contradictory decisions concerning the origin of a war with the result that both sides to a conflict will be made the objects of discriminatory measures. 28

This undesirable situation will not be relieved by the transformation of the right of collective defense, granted under Article 51 of the Charter, into a duty. The conclusion of agreements implementing the right of collective defense may indeed severely limit the possibility of states retaining the right to refrain from participating in a war, or, if allowed to remain in a non-participant status, to observe an attitude of impartiality. 29 It

28 More than one writer has accorded clear recognition to the undesirable consequences to which this situation would probably lead. Thus, Professor Jessup (op. cit., p. 205) in considering the possibility of an outbreak of war unaccompanied by the binding decision of a competent "international authority" (in this case the United Nations Security Council) declares:

"If the legal position of non-participants in the conflict is to be regulated by some international agreement short of a return to the old status of war and neutrality, it would be disastrous to agree that every state may decide for itself which of the two contestants is in the right and may govern its conduct according to its own decision, even if it were agreed that they would not actually support one or the other side by force. . . . There is no alternative except to extend throughout the duration of the conflict the system of impartial blockade against both parties to the fighting."

The essence of this proposal is a mixture of both old and new. States are generally forbidden to resort to war. But if war should break out—and be unaccompanied by the binding decision of a competent "international authority"—third states are forbidden to participate, either for reasons formerly admitted by the traditional law or for reason of collective defense on behalf of the alleged victim. Nor are non-participants to be allowed to discriminate against an alleged aggressor. Instead, the position of third states is to resemble the position of non-participants under the traditional law, with the important exception that private neutral trade with the belligerents—allowed by the traditional law—is to be forbidden. The proposal recalls somewhat similar suggestions made in the period preceding World War II, to the effect that an enforced isolation of the belligerents would reduce the danger of conflict spreading and induce the belligerents to cease hostilities. Apart from its possible merits, and they are not inconsiderable, it should be observed that this proposal is at variance both with the General Treaty For the Renunciation of War and with Article 51 of the United Nations Charter.

29 Here again, however, the compatibility of neutrality and collective defense agreements will depend, in practice, not only upon the nature of the obligations incurred but also upon the procedure that is provided for determining the existence of those circumstances (i.e., an "armed attack") serving to bring the obligations in question into operation. Thus, Article 5 of the North Atlantic Treaty, concluded at Washington, April 4, 1949, reads:

"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."
may also be that these agreements confer upon a central organ competence
to determine when the duty of collective defense must be fulfilled, and even
the extent of this duty. But such decisions are binding only upon the
contracting parties to the agreement. It must be expected, therefore, that
different decisions will be reached by those states parties to different—and,
presumably, opposed—collective defense agreements. In this situation
the resort by non-participants to measures of discrimination may only
serve to provoke retaliatory measures on the part of the state against which
they are taken. Nor will it normally prove possible during the course of
a war to determine that acts of retaliation on the part of the alleged ag­
gressor are without legal justification.