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## The Concept of Neutrality in International Law

### Keywords

International Law: History, Neutrality, Abortion, Jurisprudence, Politics, Arbitration, History

# The Concept of Neutrality in International Law\*

ALFRED P. RUBIN\*\*

## I. ORIGINS

### A. *Religious and Secular Obligations*

Earliest written records show an interesting contrast between the notion of war as the imposition on another religious-political organization of a tribe's "law" in obedience to the directions of a tribal god, presumably as interpreted by a priestly caste spokesman, and imposition of "law" by asserting secular "jurisdiction." By the first notion, "neutrality," non-involvement in the struggle for life and dominance, was a temporary political fact but inconceivable as a legal status; a state could not opt out of the struggle for survival any more than a person could. The only path to avoid the struggle was to die.

Illustrations of this abound. In the Old Testament, God commands the Jews:

When you draw near to a city to fight against it, offer terms of peace to it. And if its answer to you is peace and it opens to you, then all the people who are found in it shall do forced labor for you and shall serve you. But if it makes no peace with you, but makes war against you, then you shall besiege it; and when the Lord your God gives it into your hand you shall put all its males to the sword . . . Thus you shall do to all the cities which are very far from you, which are not cities of the nations here. But in the cities of these peoples that the Lord your God gives you for an inheritance, you shall save alive nothing that breathes, but you shall utterly destroy them . . . that they may not teach you to do according to all their abominable practices which they have done in the service of their gods, and so to sin against the Lord your God.<sup>1</sup>

This command was in fact obeyed literally, according to the Bible, except for the one case of the Hivites from Gibeon who, masquerading as people "from a far country," concluded a treaty with the secular leader Joshua and the leaders of the Hebrew congregation under which peace with forced labor was provided as a matter of what seems secular Jewish law.<sup>2</sup>

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1. *Deuteronomy* 20:10-18 (Revised Standard Version).

2. *Joshua* 9:3-27. It is possibly evidence of one of the underlying roots of the modern

This religious conception of the impossibility of neutrality with regard to holy commands is carried on in the New Testament where the universality of monotheism and the conception of life as a continuing battle between good and evil, between the Kingdom of God and the Kingdom of Satan, is summed up by Jesus: "He who is not with me is against me, and he who does not gather with me scatters."<sup>3</sup>

As to the second notion, just as the secular needs of even a conqueror like Joshua overrode the religious commandments passed to the nation by the priests, so notions are anciently evident of the limits of legal prescription even when uttered by sacerdotal rulers sharing religious worship with their neighboring kings. The earliest known example of this is about two centuries after the events narrated in the Book of Joshua; it is in an Egyptian papyrus of the early Twenty-first dynasty, in the 11th century B.C. An Egyptian priest, Wen-Amon, on a religious tribute-collecting mission at Dor, on what the translator calls the Syrian coast, was robbed on his ship in the harbor. He appealed to Beder, the local ruler, also a worshipper of Amon and under Egyptian political influence (although not legal control):

I have been robbed in your harbor. Now you are the prince of this land, and you are its investigator who should look for my silver. Now about this silver — it belongs to Amon-Re, King of the Gods, the lord of the lands . . . It belongs to you . . .

Beder replied:

Whether you are important or whether you are eminent — look here, I do not recognize this accusation which you have made to me! Suppose it had been a thief who belonged to my land who went on your boat and stole your silver, I should have repayed it to you from my treasury, until they had found this thief of yours — whoever he may be. Now about the thief who robbed you — he belongs to you! He belongs to your ship! Spend a few days here visiting me, so that I may look for him.<sup>4</sup>

The underlying legal conception seems to be that Beder, as the secular ruler of Dor, alone had the legal power to search out and arrest the thief in the territory of Dor, but only Wen-Amon and the ship's authorities could make rules to govern what happened on board the ship; that the limited extent of Beder's jurisdiction made him legally "neutral" with regard to affairs on board the ship regardless of religious and moral arguments, but that his neutrality could be interpreted to permit, or even to

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concept of the bindingness of treaties that this one, procured by fraud, was considered to supersede even the express command of God. The degree to which any "Jewish" law in the biblical period can properly be called "secular" is, of course, unclear. But that the treaty was inconsistent with the religious command is certain. The job of reconciling the two sources of law, and the two elites responsible for uttering "law" and enforcing it, is best left to historians and theologians.

3. *Matthew* 12:30.

4. PRITCHARD, *THE ANCIENT NEAR EAST* 17-18 (5th ed. 1971).

require, him to search out an accused thief escaping to his territory and hand him back to the ship's authorities for legal disposal.<sup>5</sup>

This conflict between religious obligations to side with God and a conception of the limits to secular authority and political bases for action and inaction became most notoriously significant during the days of declining religious influence and expanding secularity in ancient Greece. In its origins in 435 B.C., the Peloponnesian War was a struggle by Corcyra to remain unentangled, "neutral," in the internal affairs of Epidamnus. In Epidamnus, the defeated nobility had sought allies against the popular party that had taken control of the constitution of the town. When Corcyra would not intervene, the popular party of Epidamnus got help from Corinth. Corcyra, to maintain what she regarded as her rightful external relationship with Epidamnus, attacked Corinth. After winning a battle at Epidamnus, Corcyra admonished Corinth to withdraw from involvement in affairs between Corcyra and Epidamnus, and called vainly on Sparta to help. Corcyra, after further defeating Corinth, and not being a member of either the Athenian or Lacedaemonian League, then appealed to Athens and offered to join its League. Corinth appealed to Athens to remain "neutral."<sup>6</sup> The arguments by Corcyra before the Athenian Assembly were based on (1) morality and the glory of helping the oppressed against their oppressors; (2) future interests and the store of gratitude that would make of Corcyra a reliable ally if Athens later needed help; and (3) current interest and the strength of the Corcyran Navy, the second largest navy in Greece at the time. Corinth also put first emphasis on their moral stature, denying that Corcyra was an oppressed state but considering her "criminal" in her acts regarding Epidamnus; secondly, Corinth argued that admitting Corcyra to the Athenian League would make Athens an enemy of Corinth and necessarily and legally involve war: "For if you become the allies of the Corcyraeans you will be no longer at peace with us but will be converted into enemies. But you ought in common justice to stand aloof from both . . ." The decision by Athens was cynical: Corcyra was not taken into the full alliance, but a defensive commitment was made in case of an attack in its territories or the territory of an "ally" of either. The reason, according to Thucydides, was the military calculation regarding the strength of the Corcyran navy and Corcyra's strategic location between the Peloponnesus and Italy.<sup>7</sup>

The most famous dispute regarding neutrality in the ancient writings

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5. It is not suggested that this natural law underpinning to an early, perhaps the earliest, non-political extradition arrangement is in any way involved with modern extradition practice or conceptions. Something like the assumed moral obligation to search out thieves and hand them over to the territorial authority of the place in which the rights of property had been violated by them is apparent in a lot of the current rhetoric about terrorists. It might be noted that Beder denied any legal obligation in this transaction, only promised out of grace to search for the thief.

6. THUCYDIDES, I THE PELOPONNESIAN WAR 24, 33, 40, in 1 THE GREEK HISTORIANS 565 (F. R. B. Godolphin, ed., 1942).

7. *Id.* at 44.

is, of course, the Melian Dialogue of 416 B.C.<sup>8</sup> The people of Melos, a small island, were linked legally and politically to Sparta, but tried to maintain neutrality in the Peloponnesian war. The Athenians rejected the Melian argument that Melos, having maintained a strict neutrality in its actions, there was no justification in law or morality for Athenian action against it. The Athenian "justification" was that other client states of Athens would be tempted to "neutrality" if Melos could opt out of the struggle, and that disintegration of the Athenian system was an even greater threat to the well-being of Athens than defeat; the primary argument was thus not military or moral, but expediency and political interest. Eventually the discussion turned towards religion; the Melians argued that the gods would likely favor the righteous against the unrighteous, so Athens should think twice about her threat. The response by the Athenians was that by a law of nature reflecting the gods' will as perceived by common opinion, it is in the nature of man to rule wherever he can. This natural law, perceived by physical observation, was said to justify Athens. Moreover, the Athenians argued, the Spartans themselves could be seen to identify whatever is expedient with "justice" in their own transactions outside of their municipal sphere, so the Spartans themselves were not likely to believe that they had any obligation to come to the aid of Melos against Athens. The Melians disagreed on an analysis of the deeper interest of Sparta in supporting its colonists even when "neutral," but concluded that in any case it should be seen to be in the interest of Athens to leave Melos unmolested. The Athenians made their own decision and shortly afterwards killed all the military age men, enslaved the women and children, and colonized with 500 of their own settlers the island of Melos.

#### B. Positivism and Natural Law

This is not the place for a deeper analysis, but it is important to an understanding of the legal and moral underpinnings of the concept of "neutrality" to know that Aristotle, lecturing in Athens in the middle of the fourth century B.C., after Athens had lost the Peloponnesian War, adopted the Athenian view identifying natural law with the observable physical laws of nature. He rejected the sophists' argument that similar municipal laws of many states reflect a natural overarching law such as the physical law that a flame burns upright both in Greece and Persia, pointing out that notions of "justice" shift and change.<sup>9</sup> Cicero, about 300 years later, on the other hand, adopted a view that identified the moral law, the "*vera lex*" discoverable by right reason and inherently universal and eternal, with an overarching and binding system superior to the "positive" laws of the Roman Senate, and thus superior to the laws of any single municipal order.<sup>10</sup> To the Athenian-Aristotelian "positivist," neu-

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8. *Id.* at V, 84-114, 116.

9. ARISTOTLE, NICHOMACHEAN ETHICS 1134b18 sec. 7.

10. CICERO, DE RE PUBLICA, III, xxii, 33.

trality is permissible when acceptable to the legislator of the system within which it is asserted; when legislation is by such use of force as seems expedient to the dominant force possessing actor, "neutrality" is made a permissible legal status only within whatever bounds that legislating actor allows. In the horizontal, tribal-council-like, legislative structure of the current international legal order, where legislation is induced from customary behavior or from treaty commitments, no single state has legislative authority; therefore the bounds of what is "neutral" remain subject to counter-assertion and change. When legislation is conceived as the adoption of moral rules perceived by right reason, then "neutrality" is a matter of each state's claiming the clearest insight into the implicit rules of the community and quarreling with its neighbors as to which perception is deepest or reflects the higher values. In neither the physical-naturalist Aristotelian or "positivist," nor the Ciceronian-moralist "naturalist," framework is "neutrality" a uniform conception, although to those who claim a monopoly of moral insight, it does appear to them as if it were so and they are likely to feel very frustrated by the obtuseness of their neighbors.

## II. THE EVOLUTION OF DOCTRINE

### A. "Just war" Doctrine and Neutrality

To "naturalist"-moralist jurists and historians, like the Melians and the Roman Livy (d. 17 A.D.), breach of "neutrality" in circumstances in which "law" required neutrality could be seen as a reason for defeat. Thus, to Livy the Fabian Ambassadors to the Gauls in Etruria (386 B.C.) violating their legal obligation to abstain from participating in the military struggle between Clusium and the Gauls committed an unjust action worse than the injustice of the Gauls' attack on Clusium. That delict, in Livy's view, justified the sack of Rome itself by the Gauls.<sup>11</sup> The gods took care of enforcing the law.

With the development of political influence in the moral institution of the Church, moral-natural law theory was strengthened and became more abstract. The notion that God enforces "justice" was too simplistic to survive in a world that read the Biblical book of Job, and the religious notion of "just war" became part of the currency of legal as well as moral thought.

In order to clear away some confusion in modern literature, it should be pointed out that the phrase itself, "just war," is not a correct translation of the pre-renaissance Latin "bellum justum." "Jus" in Ciceronian Latin related to "law," not "justice;" "lex," as in "vera lex," the eternal and universal rules superior to positive law, more nearly approximated

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11. LIVY, HISTORY OF ROME V, 36-49. Modern scholarship regards the entire narrative as baseless in fact except for the sack of Rome. See OGILVIE, A COMMENTARY ON LIVY BOOKS 1-5, at 716 (1965).

our concept of "justice." But the reception into English, via clerical scribes, of the Latin genitive "legis" as the root of our word "legislation," and the insistence of natural law scholars that their conceptions of "justice" were binding as "law" universally, and their appropriation of the word "jus" to emphasize the legally binding effect of "lex," seem to have led to a reversal of meanings in English.

The first use of the phrase "just war" in a sense that has survived and had direct influence was by St. Augustine,<sup>12</sup> who suggested about 420 A.D. that the injustice of an opposing side might require a wise man to wage war, and that no other war than such an one is morally defensible. But, if moral law is binding not only on conscience but in action, and injustice can morally require a military response, then surely "neutrality" in some cases is not only morally reprehensible, but also illegal.

It would serve no point to trace in detail the elaboration of this thesis in medieval legal theory. Those aspects of the definition of "just war" that relate to the legal authority of the parties to engage in duels or wars are of no concern to the concept of "neutrality," nor are questions of personal capacity to bear arms in feudal theory. But the idea that there must be a "just cause" (e.g., a prior injury) and a "just object" (i.e., no better way to resolve the dispute) to the recourse to arms, and that there must be a "just intention" (i.e., a personal commitment to the righting of a moral wrong as the dominant motivation for the war), notions that speak to the belligerents and imply some need for *jus standi*, some legal interest in the struggle, presume an underlying concept of neutrality. Those who lack the standing; the just cause, object or intention, have no moral or legal basis for participating in the armed struggle. Neutrality for them would not be a right, but an obligation.

Interestingly, Islamic legal theory seems to have paralleled Christian thought in this regard, as Ibn Khaldun, writing about 1377 A.D., also divides wars into categories of "just" and "unjust." He reserved for the "just war" category only wars required by religious law (which included rules of normal behavior, since the Koran, to Muslims, is the primary source for legal rules as well as a religious work in the secular Western sense)<sup>13</sup> and "dynastic war," presumably war based on vindicating a right to inherit authority, which also has at least overtones of religious law.<sup>14</sup>

Now, if wars within the legal order could be classified as "just" or "unjust" and "neutrality" was an obligation in most cases even with regard to "just wars," the situation was quite different with regard to wars fought with those outside the order. In Western legal theory, Crusades,

12. St. AUGUSTINE, DE CIVITATE DEI XIX, 7.

13. To translate this conception into more familiar terms, the Koran might be compared to the Pentateuch in Jewish society; the rules of behavior in Leviticus and here and there elsewhere, like the rules explicit and implicit in the New Testament, are binding in daily life to those within the religious worship; to those who, in St. Augustine's felicitous phrase, live in the City of God.

14. IBN KHALDUN, THE MUQADDIMAH 224 (Rosenthal, trans., Dawood, ed., abr. ed. 1967).



religious wars, were a moral obligation and to establish a legal right to abstain from such a war seems to have involved strains and ultimately a rejection of the bindingness of the order itself. Quite apart from the struggles within Europe between Church and State authorities for the ultimate power to make law, it is probably not merely coincidental that the split between the Eastern Church and Rome occurred formally in 1054 A.D. and relations between the Byzantine rulers and the "Franks" ("Kelts" to Anna Comnena) were established on strictly secular lines with the Empire feeling no obligation at all to help in the struggle of "Christendom" to "recover" the Holy Land.<sup>15</sup> Byzantium remained "neutral" as suited her political situation.

In Islamic theory such "neutrality" would have been hard to justify, and the classical distinction between the Dar-al-Salaam and the Dar-al-Harb, the lands in which applied the laws of peace based on the Koran and the lands in which Islamic peoples were bound by the laws of struggle, seem to allow of no intermediate status.<sup>16</sup> On the other hand, there is ample evidence that in practice Islamic rulers did in fact conclude armistices and treaties with non-Islamic authorities, and "neutrality" was practiced regardless of the "natural" or "divine law" theories.

The Christian theory was necessarily modified as the balance of influence in daily affairs changed between the secular legal order on the one hand, and the religious legal order interpreted by the Papacy on the other. The moral requirement of a crusade lost its persuasiveness over time, and the struggle among temporal rulers for empire assumed a larger role in statecraft, although until the 16th century in Europe the major rationalizers of policy remained clergymen. Even in countries faithful to the Catholic institutions, like Spain, by the early 1500s, difference in religion was rejected by influential advisers as a cause of "just war."<sup>17</sup> Indeed, the only just cause admitted by Vitoria was response to a wrong received, and then only a proportional response limited to righting the wrong.<sup>18</sup> The wars of conquest in the New World were rationalized by this enlightened writer as vindicating the legal rights of trade, transit and peaceful sojourn found in natural law, evidenced by various analogies and the *jus gentium* adopted as municipal law in many European nations. Religious wars, to protect native converts from their neighbors, and to end the abominable practices of the Indians, which were viewed as violating natural and divine law at least when they involved human sacrifice, were also permissible.<sup>19</sup> But from the point of view of this brief study, the most significant basis found for engaging in a "just war" was to assist

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15. COMNENA, *THE ALEXIAD*, 309 sq. (1148 A.D.) (Sewter, trans., 1979); Cf. BERMAN, *LAW AND REVOLUTION* 104-105 (1983).

16. SHAYBANI, *SIYAR* 75 sq. (c. 800 A.D.) (Translated as KHADDURI, *THE ISLAMIC LAW OF NATIONS* (1966)).

17. VITORIA, *DE INDIS*, §§ 427-429 (1532, 1557, 1580 rev., Carnegie Endowment, 1917).

18. *Id.* at 430.

19. *Id.* at 386-403.

"allies and friends." Support for this was found in Roman practice and Biblical incident when Abraham was said to have fought with the "King of Salem" and others against four kings who had done Abraham himself no injury.<sup>20</sup> This expansion of "just war" theory, to allow for collective action by those who had not suffered injury taking part of one who had, was to have major consequences.

## B. The Resurgence of Positivism

Positivism makes a resurgence as the authority of the institution of the Church broke down. Doctrinally, it might be a significant marker that by 1612 even the Catholic jurist Suarez, by some viewed as the founder of modern international law, distinguished between the *jus gentium* reflecting natural law perceived by all or many societies and *jus gentium* as the coincidental prescriptions of different municipal legal orders reflecting only similar policy choices, thus part of the human or positive law and not necessarily reflecting natural law.<sup>21</sup> But the great founder of modern positivism was Alberico Gentili, an Italian Protestant Civil law expert teaching at Oxford. His pleas as an advocate for Spain in the Royal Council sitting in Admiralty<sup>22</sup> evidence the long and complex evolution of Maritime law as applied to questions of belligerent rights and neutrality. It was in this area that technical rules of neutrality arose and found their greatest elaboration.

In the earliest days of recorded European civilization north of the Alps, private reprisals were the normal way of resolving conflicting assertions of right. "Just war" theory under a feudal political organization made the natural law of reprisal, taking back that which has been unjustly taken away by another, available to equals on the feudal scale nearly at all levels. With the growing centralization of authority in the 13th century, one of the areas into which royalty moved at the expense of its magnates was control of activity outside the boundaries of a county. In England, by the end of the 14th century this took the form of the King appointing an "Admiral" as his direct subordinate to issue "letters of

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20. *Id.* at 405. The Biblical incident is cited by Vitoria to *Genesis* 14. In that place, the incident is justified on the basis of the aggressive Kings (against Sodom, not Salem) having taken prisoner Lot, Abram (not yet Abraham's) nephew. Obviously, in the light of kinship ties in the society described in the Old Testament, Abram did have standing based on the injury to Lot, his nephew. Vitoria's conclusion thus seems unsupported by his appeal to Divine Law. Distortion of the facts to create a legal argument is not uncommon in publicists of international law, even today, but this seems egregious.

21. SUAREZ, *DE LEGIBUS, AC DEO LEGISLATORE*, II, 187-188 (1612) (1944 ed.).

22. English Admiralty law was based on the code of judicial decisions of the Island of Oleron adopted by statute in England about the end of the 12th century. It was supplemented by Roman law principles and the Admiralty advocates were all trained in Roman (Civil) law. Gentili seems routinely to have had his Spanish clients sell their interests to English people, so he could always appear to be arguing English interest as the ultimate beneficiary of the Spanish claims. See GENTILI, *HISPANICAE ADVOCATIONIS* (pleas of 1605-1608, published 1613) (1921 ed.).

marque and reprisal" to private individuals authorizing reprisals. The Admiral then conducted a tribunal before which "prizes" were brought and title adjudged according to the rules promulgated by the Admiral. Since title, to be useful with regard to ships and articles in international commerce, had to be accepted as valid in foreign countries, the "natural law" basis for the rules of Admiralty, particularly the rules of "prize," was vigorously asserted. The rules of Admiralty were asserted to be of universal validity; argumentation before Admiralty tribunals rested on Roman law and on scholarly writings that seemed to have wide appeal. Since the statutory laws of Oleron dealt in the main with distributing the risks of a voyage among persons all subject to the laws of the "flag" state of the vessel, and not with the laws of naval prize, there was no serious conflict between the statute law and the natural law as they both evolved, and eventually they evolved together.

The elaboration of the rules of prize reached major levels of interest and complexity during the 16th century. During that century privateering as an act of private reprisal authorized by a state, and privateering as a belligerent act of the state by which mariners were encouraged by the potentialities of great private profit to risk their ships and lives in naval adventures, lost their distinction. By about 1600, it had become clear that privateering was an act of the state and implied that the special laws of naval warfare applied and the special Admiralty laws of prize. This meant that specification of the permissible targets of privateering was essential if the sovereign were not to get embroiled in naval struggles against the whole maritime world at the discretion of a profit-seeking privateer under an imprecise letter of marque. But, to say that no ship flying a "neutral" flag, or a flag not specified as a proper target in the letters of marque, could go entirely free was to invite foreign and even domestic merchants to fly false neutral flags in order to protect their cargoes and ships. The answer adopted by England as she became the strongest sea power in the world was the elaboration through judicial pronouncements in Admiralty and prize of the validity at law of certain captures from neutrals and the invalidity of others.

Gentili was a central figure in this rapid evolution. While this is not the place to analyze his logic in any depth, his Spanish advocacy is filled with argumentation about the limits of neutral and belligerent rights as a matter of law. For example, in one case an English ship (with apparent, but unstated, Spanish connections) taking some militarily useful material to Constantinople was captured by privateers from Sardinia and Malta. It was in the interest of Gentili's clients that the taking be held improper. Gentili states the arguments against his clients by citing Justinian's code as forbidding trade with heathendom, thus holding the Civil Law against them. He then finds religious Canon Law to the same effect. Turning to the "jus gentium," the "law of nations," he finds a precedent against his clients in English complaints to the Hanseatic League trading in military supplies to Spain at a time when Spain was at war with England, a complaint based on the logic of reciprocity and the Golden Rule. He even

finds a treaty between England and Spain under which each party undertook to prevent its nationals trading in munitions of war with an enemy of the other. He then turns the arguments around, principally on the basis that most of the goods carried by his clients were not "contraband," i.e., that the goods had no significant military use, and construing the prior arguments to be valid only in the case of a short list of military hardware. Thus, he argued for the return of the bulk of the cargo and of the ship itself. As to the militarily useful material, he argued that it was part of the ship's own store, not for distribution to the Turks in Constantinople, and therefore, not subject to confiscation in prize.<sup>23</sup>

This particular case does not illustrate any great jurisprudential shift from naturalism to positivism, but such a shift was in fact under way and is made more evident in a series of three cases argued by Gentili concerning the proper classification of the Barbary states: Pirates or Sovereign equals of England?<sup>24</sup> The progression is clear. In the first case, Gentili argued that the Barbary authorities should be classified as pirates, thus in law unable to change title to captured goods; in the second he dithered on the point, and in the third he came to precisely the opposite conclusion, that those who purchase captured goods and ships in Algiers get good title, therefore the Barbary states must be classified as sovereign, able to make and enforce the law, and not as "pirates." In all three his logic is invincibly "positivist." He finds his legal categories to suit the policy ends: In the first, to inhibit legally the establishment of markets able to pass good title in a place close to the lines of trade where captures of doubtful validity are likely to occur; by the third, that the need for certainty of title in goods and ships purchased dictates the need for markets able to establish valid title close to the lines of trade where such questions are likely to arise. The notion that the legal rule is not the abstraction perceived by moral reasoning and applied in order to do "justice" is impliedly rejected. Instead, the basic logic rests on expediency, political choice by the law-maker, in this case by the English Royal Council able by its decision to determine the law that will be applied in England with regard to such title transfers.

The jurisprudential battles raged throughout the 17th century, but by the early eighteenth century it was clear that in practice the "positivists" had won and it was important then to find a way to "legislate" the rules in the community of sovereign equals that emerged from the religious and dynastic wars and the constitutional shifts of authority within the leading European trading states of the 17th century. The way found was by treaty. In the elaborate series of treaties that formed the Peace of Utrecht at the end of the War of the Spanish Succession in 1713, rules were bargained for and agreed through a negotiating process that took account of the needs of both belligerents and neutrals, because each

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23. *Id.* at I. The actual decision in the case is not known, only Gentili's argument.

24. *Id.* at iv, xv, xxii.

party could imagine itself in either position in some future war. The holding of "prize courts" was agreed by the parties to those treaties addressing the matter to be a belligerent right; states undertook that when neutral in a conflict in which the other party to the treaty was a belligerent, not to permit the other belligerent to disencumber itself of its naval captures in any of the neutral's ports. The rule argued for by Gentili was adopted by treaty between England and France that free (neutral) ships and their cargoes are free to trade with an enemy without fear of capture and condemnation in prize except with regard to contraband on board the vessel: "Free ships shall make free goods except contraband" was the phrase. A separate article defines "contraband." Yet another article specifies items that are by the parties deemed in law not to be contraband, and that list includes "all Provisions which serve for the Nourishment of Mankind and the Sustenance of Life," and all things proper either for building or repairing ships "and all other Goods whatever, which have not been worked into the form of any Instrument or Thing prepared for War, by Land or by Sea."<sup>25</sup> Obviously, the specification of precisely what the belligerent's rights are against neutrals, and what the neutral's rights are against belligerents, and the definitions of contraband, are matters that would vary from negotiation to negotiation, and the positive law would determine in each case with regard to each incident what the respective rights were. In the absence of treaty, the questions would be left to diplomatic discussion and prize cases in which the national policy interest in universal uniformity of the law might dictate reference to an otherwise inapplicable treaty, but in which such a reference would not necessarily produce the uniformity that would be wanted because the judge in prize would not have his interpretation tested by the possible remonstrances of the actual parties to the treaty and their adjustment of its terms by supplemental negotiation. And treaty texts negotiated in different political contexts had different terms. There was no necessary uniformity in the treaties taken as a group.

To expand the authority of belligerents with strong navies, the rules surrounding naval blockade had been elaborated in prize courts to permit complete interdiction of neutral trade with an enemy port when the blockade was publicly declared and could be maintained effectively, i.e., not merely imposed by paper to give a legal basis for sporadic captures of neutral vessels engaged in non-contraband trade with the enemy. But by the end of the century it had become clear that reference to even identical texts of different treaties could not create a uniform law. When France and Spain declared war on Great Britain in 1780, the Baltic states found their trade interrupted by British privateers and naval ships.

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25. 28 *Cons. Tr. Series 3* (French text). The English text used here is from a book of EXTRACTS FROM THE SEVERAL TREATIES SUBSISTING BETWEEN GREAT-BRITAIN AND OTHER KINGDOMS AND STATES, OF SUCH ARTICLES AND CLAUSES AS RELATE TO THE DUTY AND CONDUCT OF THE COMMANDERS OF THE KING OF GREAT-BRITAIN'S SHIPS OF WAR 1, arts. 17, 19, 20 at 5, 7-8 (London 1741).

Under the leadership of Russia, they, ie., Denmark and Sweden, later joined by Prussia, declared their own interpretation of the privileges of neutrals in maritime war, and began to defend those rights by force.

The "armed neutrality" episodes of 1780 and 1800, coupled with an evolution of British administration and centralized authority over an increasing area impossible to govern effectively from London alone, can be argued to have ended the practice of licensing privateers in Europe. If "free flags" really covered "enemy goods except contraband," there was every incentive for even belligerent traders to ship their goods on neutral vessels, and the profits dropped out of privateering.<sup>26</sup> By 1856, the pertinent rules of naval warfare could be reduced to a simple prohibition of privateering and three statements of principle: Neutral flag covers enemy goods except contraband; neutral goods other than contraband are free on board even enemy ships; and a blockade, to have legal effect against neutral trade, must be effective, i.e., maintained by a force sufficient really to prevent access to the coast of the enemy.<sup>27</sup>

### III. CODIFICATION

As the positivist impulse ground itself more deeply into the legal order during the 19th century, the utility of neutrality as a concept, and the possibility that it might be expedient to use that concept to accomplish humanitarian purposes, thus to satisfy "natural law" in its "morality" guise, became apparent. In 1863 the United States issued its General Orders 100 to the Union Armies in the Field which recited that honorable belligerents allow themselves to be guided by flags or signals of protection to avoid firing on hospitals.<sup>28</sup> The next year in Geneva the first multilateral convention directed solely toward the amelioration of the condition of the wounded in war was concluded. Most of the major states of Europe were signatories, although such important signatory states as France and Spain ultimately failed to ratify it. It provided for "Ambulances and Military hospitals" to be "neuter" and as such to be protected and respected by belligerents as long as used by the sick or wounded and not by military forces as such.<sup>29</sup> In 1868 an additional convention amended the 1864 convention somewhat and extended the applicable provisions to naval warfare. It also adopted the "white flag with a red cross" as the protecting symbol.<sup>30</sup>

The positivist impulse to codify and transform whatever principles might be derived from practice, diplomatic correspondence, moral insight

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26. At least, that is the conclusion in BERGBOHM, *DIE BEWAFFNETE NEUTRALITÄT, 1780-1783* (1884), (*translated and extracted* in 2 SCOTT, *THE ARMED NEUTRALITIES OF 1780 AND 1800* 2, at 4 (1918)).

27. Declaration of Paris, 16 April 1856, 46 *Br. and For. St. Papers* 137.

28. SCHINDLER & TOMAN, *THE LAWS OF ARMED CONFLICT* 18 (2nd rev. ed. 1981) (The "Lieber" Code, arts. 115, 116).

29. 129 CTS 361.

30. 138 CTS 189.

and other sources into law binding because of the form in which produced probably hit its peak with regard to the law relating to neutrality with the great 1899 and 1907 partial codifications of the laws of war at The Hague. It cannot be the function of this study to examine the extraordinarily complex role that neutrality had assumed in the legislative thinking of the framers of the 1899 and 1907 conventions, or, for that matter, the 1904 convention regarding hospital ships, the 1906 convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the 1909 London Declaration concerning the Laws of Naval Warfare, or, indeed, any of the other documents attempting with ever increasing particularity to provide detailed rules which would distinguish between legitimate military targets and targets that should be "neutral." All the conventions presume a legal status of "neutrality" and provide for rights of neutrals against belligerents, and obligations of "neutrals" owed to belligerents. In a positivist legal order, states assert rights for themselves and obligations for others on the basis of autointerpretation, municipal tribunals are bound by national constitutions to interpret the law as accepted for purposes of adjudication by the particular constitutional order creating the municipal tribunal. They are not bound (in most cases barely influenced) by the opinions of sister tribunals pronouncing interpretations of municipal law or the municipal version of international law for other states. Even with regard to the uniform law adopted by language formulations in multilateral conventions, national interpretations by the organs of states deriving their authority from municipal constitutions and answerable to municipal constituents, are the rule. From this point of view it is impossible to generalize about "neutrality" in the abstract; to conceptualize principles from the evidence of particulars even in multilateral conventions negotiated wholly within the international legal order. The political process by which the formulations are negotiated does not reflect attempts to approximate an abstract law dimly perceived by mankind's fallible reasoning powers and susceptible to scholarly refinement; it reflects political compromise based on perceptions of national expediency in a negotiating context, similar to the political process by which individual municipal systems legislate. Suarez's valid stated distinction between the *jus gentium* and "natural law" blocks the analysis.

But the other meaning of *jus gentium* familiar to naturalist jurists and now codified in article 38.1.c of the Statute of the International Court of Justice, the search for general principles of law recognized by civilized nations as evidence of general principles binding states in the international legal order, can proceed.

#### IV. THE REVIVAL OF NATURALISM AND NEUTRALITY

Natural law thinking was never wholly overcome by the rise of positivism. Whatever the logical weaknesses of the approach, it is also possible to seek some abstract conception of "neutrality" by examining municipal legislation to see if the political legislative processes of different countries, reflecting different political pulls, still come to the same result,

reflecting perhaps some consistent common thread. It is also possible to engage directly in moral argument, weighing the values protected by competing rules and deriving an ideal conception of what "neutrality" should be if it is to maximize the values implicit in the moral system of the international order. The first job, weighing the national statutes of many different countries to look for their common base, is at this point impossible. The groundwork has been done<sup>31</sup> but the job of collating the data reflected in the form of legislation in many different countries is far too big for a single researcher with limited time. It might, however, be of some interest just to note some of the more significant points of United States neutrality legislation. It should be borne in mind that this legislation is the product of a constitutional order in which the authority of the legislative branch of government is restricted. Thus, it cannot be pretended that the restrictions placed by legislation on the activities of American nationals abroad or any persons within American territory necessarily exhaust the legal obligations of the United States under the international law regarding neutrality; there may be international legal obligations which the United States is bound to observe in the international legal order, but which it cannot enforce against persons within its prescriptive jurisdiction for constitutional reasons. Nor can it be argued convincingly that all the restrictions adopted by the American Congress to avoid foreign entanglements represent the translation into municipal law of abstract principles of international law. The debates in the United States concerning the legislation rarely referred to international obligations, but reflected predominantly the opinions of the American legislators as to the expedient interests of the United States.

The first "Neutrality" legislation of the United States was the Act of 5 June 1794.<sup>32</sup> Under this statute, it was made subject to criminal penalties for "any citizen of the United States" acting "within the territory" or "jurisdiction" of the United States, to exercise a commission to "serve a foreign prince or state in war by land or sea." The dual qualification of citizenship and territoriality would have left John Paul Jones, a citizen, free to accept a naval commission from Russia because his service in war by sea was outside the territory or jurisdiction, as jurisdiction was then conceived, of the United States. Jones had in fact accepted such a commission as Rear Admiral in the Russian Navy and fought against Turkey in 1788-1789 without renouncing his American citizenship. He had died in Paris in 1792. Many other Americans accepted commissions as privateers against Spain from Buenos Aires during the second decade of the 19th century without running afoul of the Neutrality Act.

Section 2 of the Act of 1794 made it a crime in American law for any person, regardless of citizenship, to enlist in foreign military or privateering service in the territory of the United States, or to hire another

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31. F. DEAK & P. JESSUP, NEUTRALITY LAWS, REGULATIONS AND TREATIES (2 vols.) (1939).

32. 1 Stat. 381; *Id.*, at 1079.



person within United States territory to go abroad and enlist. Exceptions were made for enlisting in a friendly foreign privateer or warship transiently in the United States, and for a *locus poenitentiae*, an exemption for persons illegally enlisting who, within thirty days, came home and gave information leading to the conviction of the person soliciting enlistments for the foreign state. This last exception was deleted by a superseding statute in 1818.

Section 3 forbade the arming or fitting out within the United States of a foreign privateer or naval vessel knowing it to be for employment against another foreign country with which the United States was at peace. It did not apply to the acts of American citizens abroad.

Section 4 forbade in the United States the augmenting of existing armaments on a foreign vessel merely owned by foreigners whose prince was at war with another country at peace with the United States.

Section 5 forbade any person within the United States to "prepare the means for any military expedition or enterprise to be carried on from thence against the territory . . . of any foreign prince or state with whom the United States are at peace." In 1917, this provision was augmented by forbidding also the furnishing of money in the United States for military or naval expeditions against friendly foreign states.<sup>33</sup>

All these provisions, with the amendments noted, and with some minor technical modifications, are still in force in the United States.

It seems noteworthy that this original view of "neutrality" maintained since 1794 emphasizes the territory of the United States as the limit of prescriptive authority. The only provisions dealing with activity outside the United States relate to enlistments set in motion under arrangements made within the United States. The only mention of citizens of the United States does not extend jurisdiction to actions abroad, but, in section 1, limit the territorial prescription to exempt foreigners who have foreign commissions from their scope; foreigners with foreign commissions can legally "exercise" those commissions within the territory of the United States or on board American vessels, subject, of course, to other laws of the United States which might make criminal here any of the particular actions that might be required by some foreign government under its commissions.

The continued validity of section 5, and its place in the basic network of criminal law certainly raises questions about unlicensed fundraising and other private activities in the United States in support of foreign "freedom fighters" against the governments of countries with which

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33. The augmentation was merely to insert the words "or furnishes the money for, or who takes part in" between "prepare the means for" and "any military expedition." F. DEAK & P. JESSUP, *supra* note 31, at 1097, *reprinting* 18 U.S.C. § 25 (1934 ed.). The current codification appears in 18 U.S.C. § 960 (1976 ed.). The history of this language is summarized by the Editor's Note in F. DEAK & P. JESSUP, *supra* note 31, at 1081. The key amendment was made in the Act of 15 June 1917, § 8, 40 Stat. 217 at 221.

the United States is at peace, like Nicaragua. Whether or not permitting such fund-raising to continue is a violation of the public international law regarding neutrality, a question as to which the municipal statute is not determinative and, in theory, not even very persuasive, there are certainly questions about the apparent failure to enforce the law by those officials in the United States who are charged with constitutional responsibility under the President to "take care that the laws be faithfully executed."<sup>34</sup> It is, of course, possible that the fund-raising and other activities in the United States of supporters of the Nicaraguan "contras" have not been supporting any "military or naval expeditions" but only activities unrelated to the ongoing hostilities in Nicaragua, despite the talk of helicopters and support for the struggle that the fund-raisers are reported to have used so freely. And activities by our government directly are authorized by later statutes which, to the degree inconsistent with the 1794 statutes as occasionally re-enacted, would supersede them.

An Act of 14 June 1797 forbidding the fitting out of privateers by citizens of the United States outside the territory of the United States for employment against friendly foreign powers or against citizens of the United States or their property, extended the jurisdictional conception beyond territoriality. The Act specifically applied to the actions of American citizens abroad only. It was renewed in 1818 but repealed in 1909.<sup>35</sup> Presumably the repeal was based upon the almost universal abolition of privateering by the middle of the 19th century, and not any return to a strict territorial conception of prescriptive jurisdiction, any perceived loosening of the international legal obligations of a neutral state, or any change in the perceived expediency of preventing citizens entangling the United States in foreign complications or preying on their fellow-citizens.

On 20 April 1818 a new "Act for the Punishment of Certain Crimes Against the United States"<sup>36</sup> reenacted the provisions of the Act of 1794 and the Act of 1797 summarized above making one significant change; section 2 of the Act of 1794 was extended to forbid, within the territory of the United States, entering into the service of a foreign "colony, district, or people" as well as a foreign prince or state. The purpose was to forbid the use of the United States territory as a recruiting ground for foreign revolutions. In 1818, Latin American wars of independence were at issue and, as noted, above, many Americans in fact enlisted in the revolutionary cause and took out privateers' licenses from unrecognized revolutionary authorities to fight against Spain.<sup>37</sup>

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34. U.S. CONST. art. II, sec. 3.

35. F. DEAK & P. JESSUP, *supra* note 31, at 1083.

36. 3 Stat. 447, DEAK & JESSUP, *supra* note 31, at 1085.

37. This caused significant legal problems in the United States when the authority of the Latin American authorities to condemn Spanish vessels in prize arose. See *U.S. v. Palmer et al.*, 16 U.S. (3 Wheat.) 610 (1818). Nor does it appear that the United States had provided by the neutrality legislation the legal means necessary to enforce against American citizens United States obligations under Pinckney's Treaty with Spain dated 27 October 1795, 11 Bevens 516, 53 CTS 9. Article 14 of that Treaty obliged each party to punish as a

The first legislation authorizing an American official abroad to use "such force as may at the time be within his reach, belonging to the United States" to "prevent the citizens of the United States from enlisting in the military or naval service" of foreign countries to make war against a third state with which the United States was at peace, i.e., extending the reach of the Neutrality Act of 1794 provisions to the actions of Americans outside the territory of the United States, related only to American Ministers and Consuls in China, Japan, Siam, Persia and other countries where by treaty the United States officials had the authority to apply American law directly to citizens through consular courts.<sup>38</sup>

Limitations on the export of what some belligerent might want to call contraband do not appear in American municipal legislation until 1898, when the Congress authorized the President to prohibit by Executive Order the "export of coal or other material used in war."<sup>39</sup> It was repealed in 1922. Meantime, in 1912, 1915, 1916 and 1917, by a series of statutes Congress authorized wider and wider discretion in the President to control American trade in the interest of "neutrality." The 1912 Act recites only concern about "domestic violence" in Latin America,<sup>40</sup> but the succeeding statutes related much more generally to "the existence of war to which the United States is not a party,"<sup>41</sup> "the existence of a war in which the United States is not engaged,"<sup>42</sup> and "a war in which the United States is a neutral nation."<sup>43</sup> Since the last of these three statutes was passed after the United States joined in the European War of 1914-1918, presumably it reflects the experience of the United States as a neutral in the changed world of the twentieth century, and is not bound to the immediate "expediency" considerations of the statutes passed in response to ongoing crises. Indeed, the 1917 Act, slightly modified in parts, served the United States neutrality interest during the first two years of the 1939-1945 war in Europe and the first four years of the 1937-1945 war in the Far East.

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"pirate" its citizens taking letters of marque to act against the subjects or property of the other in times of peace between the United States and Spain. No prosecutions for "piracy" have been found in which this language was significant, and the one famous case in which the Executive officials of the United States thought it should apply resulted in an acquittal. Lewis, *John Quincy Adams and the Baltimore "Pirates"*, 67 A.B.A.J. 1011 (1981).

38. 12 Stat. 72 at 77, The Act of 22 June 1860, § 24, reproduced in F. DEAK & P. JESSUP, *supra* note 31, at 1086.

39. 30 Stat. 739; F. DEAK & P. JESSUP, *supra* note 31, at 1088. There are other statutes, not reproduced by Deak & Jessup, which involved conceptions of "neutrality." But they seem to have been more a response to political pressures than the implied acceptance of any particular obligation as a matter of natural law. *E.g.*, the Act supplementary to the Act of 20 April 1818 "for the prevention of American Armed expeditions against certain Foreign Territories [in Canada] conterminus with those of The United States," 10 March 1838, reproduced in 26 B.F.S.P. (1837-1838) 1349. The Act expired in 1840 and was not renewed.

40. 37 Stat. 630; F. DEAK & P. JESSUP, *supra* note 31, at 1089.

41. 38 Stat. 1226 (Act of 4 March 1915); F. DEAK & P. JESSUP, *supra* note 31, at 1089.

42. 39 Stat. 756 (Act of 8 September 1916); F. DEAK & P. JESSUP, *supra* note 31, at 1090.

43. 40 Stat. 217 (Act of 15 June 1917) at p. 221, Title V of the Act; F. DEAK & P. JESSUP, *supra* note 31, at 1092.

Somewhat modified, it is still in force.

The 1917 Act authorizes but does not compel the President to forbid the departure from the jurisdiction of the United States of any vessel, domestic or foreign, which "is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship . . . of a foreign belligerent nation in violation of the laws, treaties, or obligations of the United States under the law of nations." It is not entirely clear what the Congress thought the "law of nations" might require in this regard. Moreover, since the authority granted to the President is discretionary in him, it would seem that the Congress was actually authorizing him to permit acts which would place the United States in violation of the "law of nations."<sup>44</sup>

Section 2 of the Act authorizes the President to forbid the departure from the United States of any vessel owned in part by an American, or any foreign vessel not a public vessel at the time it entered an American port, which is "manifestly built for warlike purposes."

Section 3 forbids the delivery from American jurisdiction of any vessel potentially a vessel of war to be delivered under contract to a belligerent nation. It does not authorize any Presidential discretion in this regard and can be viewed as implementing a view of neutral obligations which the United States had adopted during the American Civil War when the Confederate forces bought ships and supplies in England. The United States had then strongly protested the English breach of "neutrality," which the British had denied was a breach of "neutral" obligations at all.<sup>45</sup>

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44. The President's obligation to faithfully execute the laws was probably felt to assure that he would not permit the departure of vessels in violation of other laws of the United States; the statute of 1917 certainly does not supersede obligations of the President, only authorize further action to implement his obligations. By Article VI of the Constitution, treaties are also law in the United States and subject to the same obligation in the Executive. It is an unresolved question whether the obligations of the United States under general international law are part of the legal order established by the Constitution. See Rubin, *Professor D'Amato's Concept of American Jurisdiction is Seriously Mistaken*, 79 AM. J. INT'L L. 105 (1985).

45. The British Government eventually agreed to the United States position for the purpose of re-establishing friendly relations with the victorious Union, and an international arbitration instructed as to this view of the law awarded the United States an indemnity of \$15.5 million in 1872. See 1 MOORE, INTERNATIONAL ARBITRATIONS 315, 343 (1898). In the attempted codification of the law in 1907, The Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in War on Land, art. VII, it is provided that "A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet." On the other hand, in the Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, while this article is repeated in substance, it is immediately followed by another article: VIII: "A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace." How the two articles can be reconciled seems to lie more in the realm of metaphysics than law. See

The next several sections prescribe technical rules for the enforcement of the first three sections

Title VI of the 1917 Act authorizes officials designated by the President to confiscate "any arms or munitions of war, or other articles" attempted to be exported from the United States "in violation of law" and does not relate that enforcement authority only to laws designed to protect the "neutrality" of the United States. This provision has been expanded over the years, and given ever increasing substance to the point that it now amounts to a general authority in the president to control entirely and for any foreign policy purpose the export of arms, ammunition and implements of war. In its current incarnation (1988) this authority of the President to control the import and export of defense articles and defense services involves inscribing the categories of controlled items and services in a "Munitions List" and authority to issue or refuse licenses is lodged in the State Department with discretion to be exercised in coordination with the Director of the Arms Control and Disarmament Agency. In fact, the bureaucratic coordination of munitions export license applications is a complex matter in which issues of the legal restraints on "neutrals" have little if any role.<sup>46</sup>

## V. CONCLUSIONS

Looking back at the American legislation, it seems clear that conceptions of international law played little if any role in the drafting of the Neutrality Act of 1794 and its successors. The current controls on the export of arms, ammunition and implements of war are related solely to policy, not at all to legal or moral considerations, except perhaps such legal considerations, like treaty obligations, that are embedded in policy by the operation of municipal American law under our Constitution. But the fact that legislation is the product of political choice does not mean that the uniform political choices of many countries, or the political choices that seem likely to be uniform because compelled by similar political factors in the foreign relations of many countries, do not reflect a legislative process in the international legal order. There is no reason why international law cannot be made by political decisions on the part of states as legislators; the analogy is to municipal law processes in which the personal motivations of members of a legislative body are irrelevant to considerations of whether the product of their actions, legislation, is binding as law within the legal order in which they function as legislators.

From this point of view, reviewing the overall conceptions that seem to be reflected in the treaties and in American legislation, and in the light of about three thousand years of jurisprudential thought in which the ba-

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Rubin, *The Laws of War*, 76 PROC. AM. SOC. INT'L L. 139, 142-143 (1982).

46. See Rubin, *United States Export Controls: An Immodest Proposal*, 36 GEO. WASH. L. REV. 633 (1968), for some indication of the coordination process as of 1968 and the lack of any role for lawyers in it. The current statute is, if anything, more complex.

sic principles seem remarkably stable, it is possible to attempt some generalizations.

The first would be that the basic underlying principle is not one of substance at all, but one of a distribution of authority. Under that principle, pretensions to universal legislative authority exist only when "universal" religions or political organizations exist which in fact persuade their subjects of their authority. That condition does not exist today, when statesmen might pay lip-service to some common substantive ideals, such as a commitment to human rights, but absolutely deny the legislative authority of any body beyond their municipal constitutional orders to translate those ideals into "law." The legislative authority of the international legal order does not rest on dominant, or even near universal, acquiescence or practice, but on express or implied consent. It is true that an implied consent can be derived from rather distant evidence, but in the final analysis, the more indirect the evidence of that consent, the less likely it is to convince the statesmen who must be convinced in order actually to affect the conduct of states. Moral suasion can be used, but claims, diplomatic correspondence, appeals to tribunals and the other enforcement mechanisms of the international legal order do not flow from mere moral positions, however widely held.

From this it can be concluded that there is now no overarching natural law of "neutrality."

Nonetheless, it can be seen that there is a distinction in positive law, and possibly in natural law, between the acts of states as such and the acts of individuals. Obligations relating to neutrality contained in treaties and derived from any analysis of custom as evidence of law seem to emphasize territoriality. Even in the export control laws of the United States, which do affect the legal liability of Americans acting outside the territory of the United States by defining "export" to include such things as the imparting of "technical data," mere information, to foreigners in any place,<sup>47</sup> there is implicit a limit to American authority to make rules. It is the international legal order that defines the limit of that authority. It would probably be undisputed, if ever anything were undisputed among international lawyers, that there can be no obligations under international law that would require a state to act outside of its legal capacity to act. Thus, while there might be some disagreement as to precisely what actions taken by a state within its own territory represent "unneutral" behavior of that state, and that determination is made by reference to treaties and general international law subject to a great deal of interpretation and dispute,<sup>48</sup> it is probably correct that in its essence the law of

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47. This was the principal basis for the conviction and imprisonment of one former CIA agent and the indictment of another in 1982 for activities that they argued occurred entirely in Libya. See Rubin, *To Prosecute Qaddafi's American Mercenaries*, N. Y. Times, Nov. 13, 1981, at A34, for citation and some quotations from the relevant statutes.

48. For example, the United States regarded as within its concept of "neutrality" the exchange of fifty overage armed naval vessels for control over British bases in the Western

neutrality fixes obligations on a state but not directly on its nationals. Thus direct transfer of military vessels, legislation favoring one party to a foreign war, the use of public land to support one party's military effort, and similar public acts of the public authority seem to engage the public international law of neutrality. The failure to control the acts of nationals abroad probably does not, and it might even be questioned whether historically the failure to control the "unneutral" commercial acts of any persons within the territory of the "neutral" state involves any degree of state responsibility in the absence of treaty relating to the subject. The inhibition on individual activity favorable to one or another belligerent was historically the risk of loss; the capture of transferred property and its condemnation in prize.

On the other hand, the extension of state authority into realms of commerce hitherto thought distinct,<sup>49</sup> and the general extension of conceptions of municipal prescriptive jurisdiction to include acts done by foreigners abroad with only some (ever diminishing) impact on the territory of the prescribing state, can be argued to have expanded the conception of state responsibility. But many states have reacted to new assertions of legislative authority by the United States, whose legislature, after all, does not contain British, West German, Japanese or other foreign representatives, not by imitation and expanding their own legislative purview to create a new pattern of overlapping jurisdictions, but by resisting the new assertions as beyond the legal authority of the United States in the

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Hemisphere in 1940. At that time the United States was not yet a belligerent in the Second World War. The exchange clearly favored the British in their fight with Germany on both ends of the deal; it increased their naval capacity and relieved them of a defense burden in an area of the Empire into which German military planners might have wanted to move because of the bases' strategic locations near important shipping lanes through which contraband cargo was being sent to England. The American reasoning rested on the assertion that the vessels "were not built, armed, equipped as, or converted into vessels of war with the intent that they should enter the service of a belligerent." 39 Op. Att'y Gen. 484 (1940). I suppose the Attorney General (Robert Jackson) was living in the same world as Sir Winston Churchill. See 2 W. CHURCHILL, *THE SECOND WORLD WAR* 353 (3rd ed., rev. 1951). Churchill was entirely aware that the United States action was "unneutral," but drew a fine distinction between *unneutral* acts and *belligerent* acts. *Cp. id.* at 358: "The transfer to Great Britain of fifty American warships was a decidedly unneutral act by the United States," with his explanation to the Parliament that "Only very ignorant persons would suggest that the transfer of American destroyers to the British flag constitutes the slightest violation of international law, or affects in the smallest degree the non-belligerency of the United States." *Id.* at 367. Because the qualification of an act by one state cannot legally bind another, and Nazi Germany was legally as capable as the British and Americans of categorizing the deal in legal terms, and a qualification as "belligerent" act would not have been inconsistent with the facts, I confess to being a very ignorant person, but nonetheless thankful that the deal was consummated.

49. This point has frequently been exaggerated in legal argument. The Dutch United East India Company established in 1602 was in all significant ways an arm of the state; the English East India Company had the legal authority under English municipal law both to trade and, in some cases, to go to "war," and did so in India and elsewhere, where the niceties of European classifications were not appreciated.

international legal order.<sup>50</sup> Thus, the degree to which state responsibility will be engaged by the failure of states to control the commerce or overseas activities of their nationals seems very questionable at the moment. It is entirely possible that the United States, with its great claims to legislative authority over both its nationals and foreigners based on minimal territorial contacts with the United States, has a higher standard of behavior if it wants to avoid international claims, than other states which do not make equivalent claims to jurisdiction. If that is so, then United States assertions of authority, denial of responsibility, and apparent disregard of the views of other states on the issues, threaten the equal application of the law to all its subjects and with it the stability and security that the law provides.

From this point of view, an entire new vista is opened for study, in which the law of "neutrality" re-enters the natural law domain as a mere aspect of the ancient rule, *res inter alios acta* reflected in the law regarding *jus standi*. There is irony in this, since the modern spokesmen for natural law theory seem the most inclined to disregard national sovereignty as part of the law-making process, substituting reason and moral perception for formal consent as an exercise of national discretion. But since the trend led by the United States seems to have hit serious opposition, and some retreat will be compelled either by the politics of international trade and our alliance structure, or by direct acknowledgment of the limits the international legal order places on national jurisdiction, further analysis of this aspect of the modern law of "neutrality" seems premature.

A final implication of all this is not premature to mention. If the legal responsibility of a state under evolving conceptions of jurisdiction is expanding to make a state legally responsible for the acts of others, including other states whose activities could have been prevented by the "neutral's" exercise of its jurisdiction, serious questions can arise about the failure of "neutral" states, like Austria and Sweden, to exercise that jurisdiction. For example, would it be a breach of Austrian neutrality for Austria to fail to erect a missile defense system that could deny overflight

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50. See, e.g., Amicus Curiae Brief submitted by Australia, Canada, France and the United Kingdom in *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 24(5) I.L.M. 1293 (1985). The petitioners and Japan argue that the United States antitrust laws cannot properly extend to forbid acts of foreign defendants mandated by the foreign state within whose territory those acts occurred, even if the result of those acts has an effect within American territory. Instead of adopting a universal "effects" doctrine as the basis for overlapping jurisdictions, the petitioners deny the doctrine justifies the reach abroad of the American prescriptions. Cf. *British Airways Board v. Laker Airways Ltd.*, 3 W.L.R. 413 (H.L. 1984), summarized in 79 AM. J. INT'L L. 141 (1985). The House of Lords in that case held that the alleged conspirators against Laker Airways, accused of violating the American antitrust laws, could be tried by each country involved with regard to that part of their actions that fell within the jurisdiction of each country. The Lords' conception of actions falling within each country's jurisdiction was not based on remote impacts, but on actual physical activities by licensees of the petitioners carried out within the territory of the United States.



of Austrian airspace to NATO cruise missiles? Or Soviet equivalents aimed at NATO bases in Italy? Must Austrian nationals in West Germany be prevented by Austrian legislation from participating in any aspect of West German industry that contributes to NATO defense? It seems to me that a "natural-moral" law case can be made out that extensions of national jurisdiction have created these new responsibilities.

On the other hand, if a fundamentally "positivist" view is taken of the law, then what constitutes "neutral" behavior is not susceptible of grand generalities. As long as Austria's obligations are codified in the basic treaty,<sup>51</sup> then the treaty means whatever its parties intend it to mean, and references to general international conceptions in the documents related to the treaty and in Austrian municipal law are meaningless in the absence of diplomatic correspondence to clarify what interpretation of general international law is intended. To the degree that state practice "accepted as law" is a source of clarification, differences in interpretations of the practice and the degree to which any particular practice is accepted as "law" or merely asserted by one party to be "law" are immediately apparent. Are Sweden's obligations under Sweden's own interpretation of neutrality identical with the obligations equally strongly asserted for itself by Finland? Are Soviet interpretations, or American, under which all acts favorable to the one side are considered consistent with neutrality, and all acts unfavorable considered questionable, in anyway binding on anybody? Yet, because as a matter of politics those assertions cannot be totally disregarded, the adjustments in national policy made in consideration of the views and anticipated sensitivities of others can be viewed as part of the legislative process of positive international law.

Some closer analysis of the evolution of practice seems also necessary. For example, if the Soviet explanation for its submarines' presence in Swedish waters beyond the scope of the rules of "innocent passage" assumed in the Corfu Channel Case, or "transit passage" as negotiated in the 1982 UNCLOS III Convention, is to deny that presence or to excuse it on the ground of navigational error or accident, then there is some persuasive evidence that Swedish "neutral" obligations toward the Soviet Union do not extend to allowing Soviet naval penetration of the closed areas; but perhaps the situation would be different if NATO submarines were permitted access analogous to that which Sweden denies to the Soviet Union. But these are questions which I believe bring us to the frontiers of the current law-making process, where assertions of law are based more on perceptions of political advantage than on any analysis of values agreed to or inherent in the legal order.

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51. State Treaty for the Reestablishment of an Independent and Democratic Austria, Vienna, 15 May 1955, 217 U.N.T.S. 223.

