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International Law.

Lecture No. 7.

Neutrality - Rights and duties of neutrals. Belligerent acts are not permissable in neutral territory.

Lecture No. 7.

Neutrality

Rights and duties of neutrals. "The right of every independent State" says Wheaton, "to remain at peace, whilst other States are engaged in war, is an incontestable attribute of sovereignty. It is, however, obviously impossible, that neutral nations should be wholly unaffected by the existence of war between those communities with whom they continue to maintain their accustomed relations of friendship and commerce. The rights of neutrality are connected with correspondent duties. Among these duties is that of impartiality between the contending parties. The neutral is the common friend of both parties and consequently not at liberty to favor one party to the detriment of the other."

Neutrality may then be defined as the position occupied by those States which in time of war do not take part therein, but continue friendly relations and proper intercourse with the belligerents. This is in its broad sense State neutrality and is not only a right but a duty. It is also voluntary neutrality as distinguished from conventional neutrality, the latter being the neutrality required by special compact or conventions fron neutralized states such as Switzerland and Belgium. It may be said that neutrality is in a certain sense the continuance of the previously existing state of affairs so far as the non belligerents are concerned But as a result of experience, by growth and evolution, international law has assigned to the condition of neutrality certain rights and obligations which exist only with a state of war. Limitations are placed upon the use of neutral ports by belligerent cruisers, some supplies are denied to them, others are given in a sparing manner. The neutral government enforces respect for the neutrality of its waters and territory and military or naval expeditions cannot be recruited in or based from, its territory. On the other

hand commercial intercourse of the subjects of neutral States becomes subject to certain kinds of loss and punishment from the belligerent who suffers ~~from~~ by his action.

These examples show some of the changes in conditions that may be caused to neutrals by the existence of a state of war. Notwithstanding that international law in its treatment of the rights and duties of neutrals is occupied entirely in setting forth the changes, every restriction upon the rights of the neutral must have a clear and undoubted rule and reason. The burden of proof lies upon the restraining government.

"The Law of Neutrality", says T.J. Lawrence, is a comparatively modern growth, in so far as it deals with the mutual rights and duties of belligerent and neutral states. It has arisen during the last three centuries from a recognition, dim at first but growing clearer as time went on, of the two principles of absolute impartiality on the part of the belligerents. But in so far as it deals with the right of belligerent States to put restraint on the commerce of neutral individuals, it is at least as old as the maritime codes of the Middle Ages, and in some of its provisions traces can be found of the sea laws of the Greeks and Romans. Opposing self-interests are the operative forces which have determined the character of this part of the Law of Neutrality. At first the powers at war were able to impose hard conditions upon peaceful merchants. It was a favor for them to be allowed to trade at all, and they were not permitted to do anything that would impede the operations of the belligerents. Then, as commerce became stronger, concession after concession was won for neutral traders; and neutral States made common cause to protect their subjects from molestations they deemed unwarrantable."

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"Up to the middle of the 17th century it was necessary to bind States to neutrality by special treaty stipulations, in the absence of which a so-called neutral allowed one or the other of the belligerents to levy troops, and fit out ships within its dominions, and sometimes furnished him with stores and munitions of war at the public expense. After that time it began to be admitted that neutrality involved abstinence from open aid or encouragement to either belligerent. But an exception was made in the case of solemn promises of assistance made before the war. Grotius had gone so far as to declare that, even when two States were bound by a league, one of these might defend a third power from the attack of its ally without a general breach of peace between them. But the accepted doctrine of the 18th century was not quite as broad. It laid down in the words of Vattel that "when a sovereign furnishes the succor due in virtue of a former defensive alliance, he does not associate himself in the war. Therefore he may fulfil his engagements and yet preserve an exact neutrality."

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Towards the close of the 18th century eithical ideas advanced beyond the practice, and writers who were in accord with the best opinion of the day condemned warlike acts from neutral powers. In 1788 probably the last act of the kind occurred when Denmark furnished aid to Russia then at war with Sweden. Though this was in accord with her previous treaties with Russia. her action was protested against by Sweden and if the war had not ended quickly there is little doubt that Denmark would have been made a belligerent by Sweden.

But the permanent and definite improvement in these matters was due to the policy of the United States from 1793 onwards.

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the cause of great trouble. By the 17th article of the treaty, French vessels of war or privateers were allowed without restriction to take their prizes into American ports, while at the same time we were compelled to close our ports in ordinary circumstances against all prizes taken from the French. By another article privateers of any nation at war with France were prohibited from fitting out or selling prizes and restricted from obtaining any but absolutely necessary supplies.

In 1793 a French frigate captured a British vessel in Delaware Bay and brought her to Philadelphia. At the same time M. Genet, the French minister, undertook to fit out privateers in U.S. ports to cruise against British commerce, enlisting American citizens to man them. The prize captured by the French frigate was restored as the capture was a violation of U.S. Territory. The British claim for the restoration of their prizes on the grounds that the privateers capturing them were fitted out in our ports was a more difficult question in view of our treaty with France. President Washington issued however as a consequence of these events his celebrated proclamation of neutrality, there being at this time no laws upon the subject of neutrality. The chief feature of this proclamation was the anouncement that as President of the United States he had been instructed by the proper officials to institute prosecutions against all persons who within the jurisdiction of the U.S. Courts violate the law of nations with respect to the powers at war.

As the object of M. Genet was not only to use the coasts of the United States as a base of maritime warfare, but to involve us in a war with England, this proclamation met with much opposition and criticism and on account of the hostile feeling still existing towards England and from other circumstances was enforced with great difficulty. The attempt of the French Consuls to hold prize courts

in our ports was stopped however, and in answer to a remonstrance from the British Minister, Mr. Jefferson then Secretary of State, wrote his letter of (May 25, 1793), which marked another advance in our stand for neutrality. In that, he said that "the commissioning, equipping and manning vessels in our ports to cruise against any of the belligerent parties, is entirely disapproved, and the government will take effectual means to prevent a repetititon of it" but that the right of our "citizens "to make, vend, and export arms" which were legitimate and customary callings, was one which a foreign war could not take away. If our citizens exported arms on their own account they did it subject to capture and condemnation by belligerents."

Genet claimed the right of French cruisers to remain in our ports, under the Articles of the Treaty of Commerce with France, but the Government of Washington held that this privilege did not include vessels fitted out in our ports to cruise against friendly commerce. In regard to the claim on the part of the British Minister for the restoration of prizes captured by these vessels, another advance was made by our Government, by a despatch in answer (June 5,1793) which stated that the fitting out and commissioning of cruisers would be prohibited hereafter, and while it required the departure of such vessels from our ports, it declined to restore the prizes already taken on the ground that the circumstances existing before the issue of the President's proclamation excused the ignorance of all parties concerned and that the duty of the United States would be performed by the suppression of all such acts in the future.

In August 4,1893, instructions were issued to the Collectors of Customs throughout the country to follow the following rules.

1.- The original arming and equipping of vessels by belligerents for military service is unlawful.

2. Equipments of merchant vessels, purely as such, is lawful.

3. Equipments of vessels of war in the immediate service of the government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature as being applicable either to commerce or war, are deemed lawful.

4. Equipments, by any of the parties at war with France, of vessels fitted for merchandise or war, whether with or without commissions, which are doubtful in their nature, are deemed lawful

5. Applied the same rule to the French vessels.

6. Equipments of every kind, of privateers of the powers & at war with France are deemed unlawful.

7. Equipments of vessels which are of a nature solely adapted to war, are deemed unlawful.

8. Vessels of either of the parties not armed, or armed previously to their coming into the ports of the United States, which shall not have infringed any of the foregoing rules may lawfully engage or enlist their own subjects or citizens not being inhabitants of the United States.

M. Genet refused to abandon the fitting out of privateers and in one case sent a privateer to sea in violation of his pledged word. As a result of this and the stand taken by our Government he was recalled by the French Government at the request of President Washington and his successor was instructed to disarm the privateers fitted out in the United States, to remove the French consuls who had violated the proclamation, circulars and despatches of the President and to disavow the acts of M. Genet.

At the opening of the next session of Congress Washington sent an account of the facts and circumstances to Congress with all the papers in relation thereto and suggested legislation upon the subject. As a result Congress passed the statute of June

5, 1794, known as the Neutrality Act. This act remained substantially in force until 1818 when a new Act based upon the Act of 1794 was passed which remains in force at the present time.

"The Act of 1794", says Chief Justice Fuller in the "Three Friends case, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality and a remarkable advance in the development of International Law, was recommended to Congress by President Washington, in his annual address on December 3, 1793; was drawn up by Hamilton, and passed the Senate by the casting vote of Vice President Adams. x x x x x And though the law of nations had been declared by Chief Justice Jay in his charge to the Grand Jury at Richmond (May 22,1793) and by Mr.Justice Wilson, Mr.Justice Iredell and Judge Peters on the trial of Henfield in July of that year, to be capable of being enforced in the courts of the United States criminally as well as civilly, without further legislation,yet it was deemed advisable to pass the Act in view of the controversy over that position and moreover in order to provide a comprehensive code in prevention of acts by individuals, within our jurisdiction inconsistent with our own authority as well as hostile to friendly powers."

The Act of 1794 was found in the course of time to be deficient in the powers given of prevention and detention and President Monroe in 1816 recommended that power be given to require security against the improper employment of vessels and authority to seize and detain them in suspicious cases. The Acts of 1817 and 1818 which were the results of this recommendation were again decided steps in advance for higher grounds of neutrality and led to the passage of the Foreign Enlistment Act by Great Britain the following year, a statute professedly based upon the Act

of Congress of 1818. In 1870 a new Foreign Enlistment Act was passed by the English Parliament as result of the experience with the Alabama and other cruisers during our Civil War.

"These proceedings of the United States from 1793 to 1818," says Lawrence, the latest English writer on International Law, "mark an era in the development of the rights and obligations of neutral powers. The grounds on which the action of the American government was based are to be found in the works of the great publicists of the 18th century; but never before had the principles laid down by these writers been so rigorously applied and so loyally acted upon. The practical deductions drawn from them by Washington and his cabinet were seen to be just and logical, and the government of other states followed in their turn the American example. It was recognized that not only must a neutral State refrain from giving official aid to the belligerents in matters relating to war; but it must also restrain its subjects from such acts as have a direct and immediate effect in augmenting the warlike force of any of the parties to the contest. Proper care for its own sovereign rights compels it to insist upon respect for the neutrality of its territory, just as a sense of justice towards the belligerent who would suffer from illegal enterprises causes it to put them down with a strong hand."

Rights and duties of neutrals.--

These rights and duties are linked together, especially so far as State acts are concerned.

For instance the great right of sovereignty of a State gives a right which is but another phase of sovereignty applicable in war times i:e. a right of inviolability of territory from the commission of such acts upon neutral territory.

As the obligations are all founded upon the general sovereign rights of a State it may be well to confine ourselves to a discussion of the duties arising from a condition of warfare dut-

ies that are mutual on the part of the neutral and the belligerents and that are more or less defined by international law in a general sense and made ~~part~~ municipal law by State actions.

The most important of the duties that arise in this connection are grouped under the general statement that

Belligerent Acts are not permissible in neutral territory.

It is a duty on the part of the hostile States to avoid committing such acts while it is a corresponding duty on the part of the neutral to forbid and prevent such belligerent actions.

Hostilities may be carried on properly in the territory of either belligerent and upon the high seas, Within the territorial land and waters of a neutral no such hostilities can be permitted.

Any territory which is not in the possession of any State is held to be in the same category as the high seas.

While it is not a duty on the part of a neutral state to issue any proclamation of neutrality it has become customary to do so especially with us, when our commercial or other interests may be involved.

The practice of issuing a proclamation has several advantages it calls the attention of the subjects or citizens of the State to the neutrality or corresponding laws, to the obligations and penalties of citizens arising from a state of war and supplements the neutrality laws by announcing the attitude of the government towards the belligerents and its rules particularly as to the entry and use of its ports and waters by belligerent cruisers.

Proclamations of this kind have been issued by the President of the United States from the latter part of the last century down to that of President Cleveland on the 27th of July 1896 as to insurrection in Cuba and the duties of the nation and its citizens arising therefrom.

A permission given for the passage of troops of a belligerent through a neutral territory thoßgh sanctioned by earlier writers upon international law is now considered a warlike act and is not permitted. Given to one belligerent it is an act of partiality and favor to one of the belligerents. Given to both it is a matter, which is almost if not quite impossible to arrange impartially, no matter how just may be the ideas of the neutral in the matter. As Lawrence (T.J.) says "In the crisis of a great war it may be a matter of life and death to one belligerent to pass a body of troops across the outlying portion of neutral territory, whereas the other may never be placed in a similar position through the whole course of hostilities. It would be little consolation to him in the midst of defeat and ruin to be told that he would have received the same privileges as his adversary, had the conditions been reversed. Moreover the permission is of necessity given to further a warlike end and is therefore inconsistent with the fundamental principle of State neutrality."

In 1870 The Swiss Republic refused to allow bodies of Alsatian recruits for the French army to cross her frontiers. In 1877 we made the action of the Mexican government in pursuing some insurgents into our territory a subject of serious remonstrance.

Cases arise when naval vessels after an engagement put into neutral ports and waters with prisoners from the captured vessels of the other belligerent detained on board during their stay. The usage in these circumstances is that the authorities of the port have no right to interfere so long as they remain on board ship. Their detention is part of the internal administration of the man-of-war which in this matter comes under the laws of

its own State.

(See case of Sitka in 1855 and Opinion of Attorney General Cushing as to rights to detain prisoners of war.)

If the prisoners of war escape from the vessel the local authorities must not return them or allow any agents of the belligerents to recapture them within their jurisdiction.

The only case in which belligerent troops are permitted to cross neutral boundaries is when they are driven over by the enemy The practice in this case is to disarm the refugees when they have entered the neutral territory and to detain them there until the end of the war. This is called interning and the troops so placed are said to have been interned. In the code recommended by the Institute of International Law in 1880 it is stated that it is the duty of the neutral state to intern such troops as far as possible from the theatre of war. They may be guarded in camps or fortified places. Officers may be paroled not to leave the neutral territory and all expenses occasioned by the internment are to be reimbursed by the neutral state at the close of the war.

The last example of internment was in 1871 when a large force of French troops the last of Bourbaki's army were interned by special arrangement with Switzerland during the closing days of the Franco-German war.

It has been provided by treaty agreement, as in the case of the United States and Mexico, that the regular forces of two countries may under certain conditions reciprocally cross the boundary lines of two states when they are in close pursuit of a band of hostile savage Indians.

In this agreement made in 1890, it was provided that this reciprocal crossing should be confined to certain localities,

which in all cases should be in the unpopulated or desert parts of the boundary line. The pursuing forces were to retire as soon as an engagement had taken place with the hostile band or had lost its trail and the Commanding Officer of the force was obliged to give notice of his pursuit to the nearest civil, or military official of the country entered.

Authorities agree that some exigencies of self defense will justify a temporary violation of neutral territory or waters. But it should certainly be confined within the strictest limits required by the necessities of the case and an ample apology should be given to the State whose territory is violated.

The case of the Caroline is cited in this connection and it rests as all others should rest upon the grounds, given by Mr. Webster, our then Secretary of State, that the necessity of self defense was instant,overwhelming, and leaving no choice of means or moment for deliberation. Those American lawyers and publicists who justified the seizure of the Virginius rested it upon the same ground but of course did not cover the massacre of the prisoners in Santiago de Cuba by the same reasons.

A pursuit of an enemy vessel begun upon the high seas must cease at the limit of the neutral waters as no reason exists that will permit the further pursuit and capture.

The prohibition of belligerent acts in neutral territory extends to the use of ports and waters of a neutral as a base for hostile operations . This includes the fitting out of warlike expeditions. Jomini gives the definition of a base of operations as a place from which an army draws its resources and reinforcements, that from which it sets forth on an offensive expedition and in which it finds a refuge at need.

I do not find myself in accord with the views of Hall and Lawrence that a port must be used constantly or more than once to make it a base in a naval as well as a military sense. A cruise of a man of war is to an extent analogous to a campaign of a military force. The radius of operations given to a full-powered steamer with large bunker capacity may girdle the world. If in addition to this the ship fills her complement of men, refreshes those on board with the resources of the port, fills up with provisions and other stores and by docking and repair is placed in a high state of efficiency, she is in readiness to take the sea for almost any naval operation that her design will permit. The port of the neutral has served its purpose as a base and the cruiser can after a successful cruise or campaign (as the French have it) against the enemy, repair to another port far removed and from there base other hostile operations in a similar manner. The crucial test in my mind of a naval base in these days in a neutral country is not the frequency of resort but the fulness of the necessary supplies and repairs permitted. In the days of the auxiliary steamer like the Shenandoah, a recourse to a base like Melbourne gave to this ship the opportunity to make a campaign that extended to the Arctic Ocean and enabled a return from the North Pacific Ocean to the home base of English waters without resort to any port or to the facilities of any other base.

The supply of a belligerent cruiser in a neutral port to an unlimited extent with coals, provisions &c changes that port into a base. The restrictions of English ports in our Civil War, and the regulations of our government in 1870 forbade the supply of vessels with coal more than once in three months unless the vessel had resorted to a home or European port in the meantime. Even then the supply was limited to an amount

requisite to take the vessel to the nearest port of its own country. The usage though not definitely established for other nations is reaching to that point and may be considered as settled for ourselves. To permit a cruiser to have a greater supply of coals, provisions and stores than the necessities of the case require is to provide her with the means for aggressive action, to make of a neutral port a base and hence to violate the spirit of all rules of neutrality.

In order to carry out its duties of neutrality a State feels itself obliged some times to resort to extreme measures, such as closing its ports or certain of them to belligerent vessels, limiting the stay of vessels to twenty-four hours, and to delay the departure until twenty four hours after the sailing of the other belligerent.

These restrictions and prohibitions imposed by neutrals upon the vessels of belligerents do not extend so far as to deny the hospitality of a port in case of danger or immediate want, such as stress of weather, exhaustion of coal supply or provisions The laws of ordinary humanity would not permit the refusal of a harbor of refuge and supply to this extent.

A complete denial of the use of ports to belligerents cruisers has been made in past history by the Austrians at Cottaro, in 1854, by Sweden at various times, and by Brazil after the Massachusetts affair to both Federal and Confederate vessels. These denials were based upon sufficient reasons, generally from the infringement of neutrality regulations and rights.

It may be well here to give the 2d rule given in the Treaty of Washington in its sixth article. As the United States and Great Britain alone agreed to this rule as a guide for future

action [illegible]

action it cannot be said to be a rule of international law but it accords as a rule with the views of Continental publicists and may be said to be fairly on the way to become so. So far as the United States and we as officials of the United States are concerned it may be said to be binding.

2d. "A neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men." — This rule has not escaped the criticism that has been given to all of the rules formulated in the Treaty of Washington and which has prevented their acceptance officially by the other great powers. So far as I am able to ascertain the only criticism of weight as to the article has, been about the question of the use of a port as a base of naval operations or to its frequency of use. This phase of the rule has already been discussed by me and I think needs no further treatment here.

As to the definition of what can and cannot be done under the circumstances the 2d Proclamation of President Grant in 1870 during the Franco-German war gives to us an authoritative declaration of what can and cannot be permitted until otherwise modified in a war between belligerents of equal standing.

"No ship of war or privateer of either belligerent shall be permitted to make use of any port, harbor, roadstead or other waters within the jurisdiction of the United States as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities of warlike nature; and no ship of war or privateer of either belligerent shall be permitted to sail out of or leave any port harbor or roadstead or waters subject to the

jurisdiction of the United States from which a vessel of the other belligerent (whether the same shall be a ship-of-war, a privateer or a merchant ship) shall have previously departed, until after the expiration of at least 24 hours from the departure of such last mentioned vessel beyond the jurisdiction of the United States. If any ship of war or privateer of either belligerent after the time this notification takes effect, enters any port, harbor, roadstead or waters of the United States, such vessel shall be required to depart and put to sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters, except in case of stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in either of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of 24 hours, without permitting her to take in supplies beyond what may be necessary for her immediate use."

The proclamation further directs that belligerent vessels shall leave 24 hours after repairs, etc. are finished unless a vessel of any kind of the other belligerent shall have left the port in which case her departure must be timed to allow an interval of 24 hours from the previous departure.

To provide further against similar action to that of the Tuscarora (p124 Snow's lectures) the proclamation directs that in case of more than one vessel of each belligerent in the port the vessels of the belligerents must leave alternately with intervals of 24 hours and with the least detention possible.

The coal supplies were to be limited to for full powered steamers to sufficient to carry such to the nearest European port of its own country and to auxiliary propelled steamers, half that amount. Ships were to coal in ports of the United

States only once in three months unless in the meantime the vessel has entered a European port of the government to which she belongs.

It is a duty of neutrals to prevent all hostile operations afloat or on shore within its territory by force if necessary. If a vessel is captured within the waters of a neutral by one belligerent it is the duty of the neutral whose territory is violated to effect restitution and to secure reparation and redress for itself as well as for the injured belligerent.

In the case of a belligerent thus attacked the best ruling is that if the vessel has reason to believe that sufficient protection will be seasonably afforded by the neutral it should not engage in hostilities but that otherwise it has a right to defend itself. Sec Dana - Genl Attorney Cale

If on the contrary a vessel captured in neutral territory was the one to commence the attack she forfeits neutral intervention upon her behalf and for restoration.

In a general way a capture made in neutral waters is in so far as the belligerents are concerned a valid capture, so far as the neutral state is concerned it is however illegal and offensive action on the part of the aggressive and attacking belligerent is concerned. To the injured party the neutral should give proper reparation obtained from the attacking belligerent.