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The Effect of the League of Nations Covenant on the Theory and Practice of Neutrality

NEUTRALITY AND THE STATE SYSTEM

IT IS a commonplace that the law and practice of neutrality, as a part of the modern law of nations, dates from the time of Grotius and the Peace of Westphalia. The historian of the law of nations accepts it as a valid, unquestionable feature of the political and legal system of the world since the end of the wars of religion. The jurist, accepting equally the fact of the Grotian system, has traditionally been interested mainly in seeking, at any given time, the most acceptable harmonization of belligerent prerogative and neutral claim, taking into account only the technical factors involved in making an equitable adjustment. The efforts of jurists and statesmen have been concentrated, particularly since the beginning of the twentieth century, on perfecting that adjustment and enacting the law of neutrality into a code, along with the rules comprising the modern law of war.

One of the outstanding achievements of the Second Hague Conference of 1907 and the London Naval Conference of 1909 was that they produced, as concrete, tangible results of international deliberation, a code of the rules affecting belligerents and neutrals in land and maritime warfare. Admittedly effecting a compromise between the claims of the most outspoken defenders of a wide construction of neutrality and neutral rights and those of the bluff champions of *Kriegsraison* on land and sea, the Hague Conventions and the Declaration of London set up a standard of treaty law, both substantive and procedural, apparently acceptable to both prospective belligerents and prospective neutrals in the first decade of the twentieth century. Accepting the existing state system with utter finality, the formulators of the broad code and standard of neutrality of 1907-1909 merely sought to adjust the basic principles of the tri-

partite law of nations to the changed and changing conditions of land and maritime war. In 1914, on the eve of the World War, neutrality was as firmly rooted a concept in international law as any part of the legal system so painfully elaborated since Grotius' day. In fact, neutrality had been, in the eyes of many, particularly entrenched, sanctified, made strong by the dual benedictions of London and The Hague.

It remained for the World War to destroy that illusion and to reveal what, under changing technical conditions of modern warfare, actually became of rights and duties in a great cataclysm. Broadly speaking, while neutrals, by instinct and good conscience, observed the duties of neutrality in their own several domains, their rights suffered continual and consistent abridgment at the hands of the belligerents on land, on sea and even in the air. The actual test of the World War, then, revealed that the rights of neutrals tended to diminish, while the rights of belligerents were vastly extended. The breakdown of the rules of international law previously in force, their drastic modification by the unilateral act of the belligerents, the vast extension of the economic aspects of modern maritime war, all rudely assailed the ancient foundations of neutrality, and the technical legal status of political and military neutrality alone remained at the end of an economically exhausting conflict. A status without the means for effective extra-territorial enforcement of rights, a condition heavily fraught with thankless duties—such was neutrality at the end of the World War.¹ Its practical bearing had been definitely curtailed, its legal embodiments severely shaken.

Such a situation would in itself have impelled a re-examination of the position of neutrals both from the standpoint of strict law and stubborn economic fact, but, in addition, the whole political foundation, the entire state system underlying and conditioning neutrality, was in upheaval and transition and the rearrangement of that general world order had to be a preliminary step to any legal reconstruction of the general scheme of inter-relationship of states under the varying circumstances of war and peace. Manifestly, then, a conventional redefinition of the possibilities or the extent, the rights or the duties, of neutrality was dependent upon, indeed was preconditioned by, the reordering which should take place in the general state system. The first factor to be considered as affecting the post-war status of neutrality was, therefore, the nature of the reconstructed state system.

¹ Cf. M. W. Graham, *Neutrality and the World War* (1923) 17 *American Journal of International Law*, 704-723.

It was left to the Peace Conference of Paris to undertake the reorganization of the existing community of states, with the addition of new units formed from disrupted or dissolving empires, into a legally incorporated society with a basic charter of superior obligation, establishing full self-government and independent nationality as the essential conditions of membership. This was achieved through the Covenant of the League of Nations of June 28, 1919, but the aim of universality which the Society of Nations set for itself has not been attained, and the existence outside its membership of other states stands as a complicating factor. The state system of the present day must, therefore, be envisaged under existing treaties and practice as consisting of (1) those entities bound together by the Covenant of the League of Nations as members of that society, and (2) those not so bound.

In view of the fact that the Covenant operates, both by its own terms and by the admitted practice of the members bound by it, as a treaty-law of superior obligation,² it is essential to determine in how far the creation of the League has modified, through the various clauses of the Covenant, the traditional relationships of states under the classic Grotian system. If neutrality was a status born of that system, it is obvious that any far-reaching modifications of the system must affect that status and the legal rights and duties flowing therefrom. If, and so long as, the legal possibility of resort to war exists, the correlative possibility of the occurrence of neutrality as a *de facto* and *de jure* relationship to belligerent states is not excluded. In order effectively to examine these legal possibilities, there may be taken for granted as basic postulates underlying the present situation, (1) that the conduct of all relations, whether of peace, war or neutrality, between non-members of the League (leaving aside for the moment whatever mediatory moves the League may undertake) is governed solely by the traditional law of nations and in no wise by the stipulations of the Covenant; (2) that in all relations, peaceful or conflicting, between League members, the stipulations of the Covenant, as a law of superior obligation, have legally binding force and are applicable, irrespective of what the previously existing rules of international law provide; and (3) that it is only in the case of relations between members of the League and non-members that there exists any possibility of clash between the pre-existing rules of the law of nations binding on non-members and the specific principles set up under the Covenant and binding upon members. It is

² Article 20.

in relation to these basic postulates that the divers situations arising under the different stipulations of the Covenant and affecting neutrality, must be considered.

THE COVENANT AND THE LAW OF NEUTRALITY

A. fundamental question in connection with the creation of an international organization was whether, in the stricter relations to be established between its members, a place would be left for neutrality as an institution of the law of nations. It was the obvious desire of the countries which had managed to maintain their neutrality during the World War to buttress their position,³ and the newly formed states, created by the collapse of the German, Austrian and Russian empires, coveted a position in the international community which would safeguard them from exposure to war.⁴ Nevertheless, there was a widespread realization that if a genuinely international organization were to be created, there would be no room for neutrality within it.⁵ The hope was, on the one hand, that every opportunity for war would be barred by the provisions of the forthcoming constitution of the League, thus avoiding the possibility of neutrality, while, on the other hand, the advocates of stringent international sanctions anticipated that the application of sanctions by an all-inclusive League would create a *bellum omnium in unum*, and thus exclude the possibility of neutrality by making every war world-wide in its scope. Such was the viewpoint of President

³ This was the stand taken by the Swiss Federal Council in its notes of February 8, 1919, and early March, 1919, to the Peace Conference of Paris. Cf. the *Message du conseil fédéral à l'assemblée fédérale concernant la question de l'accession de la Suisse à la société des nations* (Aug. 4, 1919) pp. 348-350 and 289-291.

⁴ Suggestions for the permanent neutrality of Poland, Finland, Esthonia, Latvia and Lituania were put forward either in official diplomatic documents or in party manifestos or proposals. Cf., for Poland, the party project given in the (July 1, 1917) *Bulletin périodique de la presse polonaise*, No. 25; for Finland, cf. the Finnish-Socialist Party manifesto, January 8, 1919, in the Helsingfors *Sociali-Demokraatti*; for Esthonia, cf. the *Mémoire sur l'indépendance de l'Esthonie* presented to the peace conference, pp. 21, 41, 46, 49; for Latvia, cf. *La revue baltique*, No. 1, pp. 20, 33, 60; for Lituania, cf. Art. 5 of the Treaty of Moscow of July 12, 1920, 3 Treaty Series of the League of Nations, 126-7.

⁵ Such, from a theoretical standpoint, was the view of the Swiss Federal Council: "It is undeniable that from the point of view of logic and pure reason, neutrality and League of Nations are two mutually exclusive ideas" (*Message*, supra, n. 3, p. 27). Cf. also Cohn, George *Neutralité et société des nations* in 2 *Les origines et l'œuvre de la société des nations*, 155: "In the new great ideals, conceived by public spirit, there was no longer any place for the idea of neutrality." Cf. also De la Sala Llanas, *El nuevo concepto de la neutralidad*, 1 *Revue de droit international* (Geneva), 112-115.

Wilson⁶ and, to a considerable extent, of the French supporters of a League of Nations. By a curious paradox of history, the extreme pacifists joined with the extreme upholders of belligerent pretension in demanding the extinction of neutrality.

If only because of the radical antithesis of viewpoints, it would have been impossible to go to either extreme. As a matter of historic fact, the non-universality of the League destroyed the first possibility; the reluctance of a war-wearied continent precluded the second. Thus beset by both jurisdictional and psychological limitations, the Peace Conference of Paris was forced to a median course of action with stipulations inclining to each of the extremes. The Covenant did not outlaw all wars, nor did it endeavor to make each breach result in a new World War. In the *media sententia* of procedural restrictions on resort to war was found, for the time being, the solution of the problem of the future rôle of neutrality.

In view of this situation, it becomes necessary to examine the occasions, as permitted by the procedural forms imposed, on which neutrality can arise under the Covenant. But immediately one is confronted with the fact that since 1919 juristic schools of strict and broad constructionists have arisen which have interpreted the Covenant from opposite points of view. Once the issues were decided in the Paris Conference and a compromise was reached in the basic text of the Covenant, the contest between schools of thought shifted to interpretation and the battle was fought on this new ground. Commentators on the Covenant, writing from a purely theoretical viewpoint or from an examination of the few existing precedents, have joined with the representatives of various governments in Council and Assembly to present or refute rival theses or interpretations of the document. These will be noted under each of the articles in point. Let it suffice for the moment to remark that the advocates of broad and of strict construction have each had their innings and that only slowly is a third point of view emerging, as will be noted later.

It is important to note initially that the very conditions set up by the Covenant for admission to membership⁷ demand a specific avowal and specific guarantees of sincere intention to observe all international obligations assumed under the Covenant. Thus breaches of the Covenant may, in legal theory, be breaches of any part thereof,

⁶ According to Article 6 of his original League draft, a covenant-breaking state was to "become at war" with all the other members of the League. Cf. Cohn, *op. cit.*, p. 156.

⁷ Article 1.

although in fact it is in reference to the breaches of territorial guarantee and the obligations as to pacific settlement of international disputes, either as between members *inter se* or as between members and non-members, that the sanctions provided in Article 16 are likely to be invoked. This is a point of crucial importance, for the extent of possible neutrality under the Covenant varies according to the interpretations initially adopted as regards the occasion of breach and the applicability of sanctions.

The first stipulation giving rise to a possible application of sanctions is Article 10. Its provision requiring members "to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League" has been variously construed in the course of the eight years since the Covenant was drafted. The passive aspect of this territorial guarantee, "to respect," was no departure from the existing practice under international law in 1919, but the active, positive phrase, "to preserve," clearly expressed a new obligation previously unrecognized and implied a potential coercive duty as a consequence of the new order under the Covenant. Its further stipulation requiring the advice of the Council as to the modalities of fulfillment of this obligation in case of actual or threatened aggression is indicative that sanctions might conceivably be invoked in such contingencies. The viewpoint of the various commentators in relation to such a possibility is of distinct interest.

The Swiss Federal Council in its commentary declared, in 1919, that sanctions, with any possible belligerent consequences arising therefrom, were clearly inapplicable under Article 10 because Article 10 was not mentioned explicitly under Article 16 as being included in the articles giving rise to sanctions.⁸ Hence, it declared, neutrality would be possible for members of the League under Article 10 in case of tolerated wars, i.e., wars not giving rise to sanctions. Cohn, in an elaborate expose of the same situation,⁹ holds that no sanctions can be invoked under Article 10 but that reprisals by League members are permissible, including territorial occupation; that in case of *de facto* wars all League members save those attacked have the right to remain neutral, and that a war of legitimate self-defence is permissible to the attacked state, while the neutral third parties, if in turn attacked, have, under the Fifth Hague Convention, the right to repulse armed aggression without thereby losing their neutrality. Such is strict construction *a l'outrance*.

⁸ *Message*, supra, n. 3, pp. 17, 36, 66, 133.

⁹ Cohn, *op. cit.*, pp. 160-161.

On the other hand, beginning with Schücking and Wehberg, an opposite point of view is taken. Assuming initially¹⁰ that attacks on a member are answerable by equal force, the affronted member being an executor for, or mandatory of, the League, and that a general League war against the aggressor state would be produced, the authors argue that sanctions in their full are clearly applicable under Article 10.¹¹ Likewise Hoijer, a Scandinavian commentator, writing in 1926, declares sanctions obligatory, the Council being called upon merely to define their extent.¹² The various Assemblies have attempted expositions of the obligations under Article 10, almost all of which specifically regard the sanctions invocable under Article 16 as applicable under Article 10. Indeed, the second Assembly declared that Articles 11-13 and 15-17 were all to be taken into account in enforcing Article 10.¹³ It may be taken as clearly the weight of authority under the League's own interpretations that the meticulous strict construction of Article 10 as precluding sanctions is to be rejected, and that the obligatory character of sanctions for League members is to be affirmed. Hence, however disheartening it may seem to would-be neutrals, it must be admitted that, if their hope of being able to remain neutral under the *casus foederis* of Article 10 is conditioned on the inapplicability of sanctions, that hope is vain.

Turning to Article 11, an analysis of its provisions reveals a new element not hitherto involved in the system of obligations set up by the Covenant. Any actual or threatened violation of the peaceful status of the world, "whether immediately affecting any of the members of the League or not" becomes "a matter of concern to the whole League" which must take whatever action it deems "wise and effectual." During the first years of the League's activity, the strict constructionists endeavored to deny, on the same grounds as those advanced for a similar interpretation of Article 10, the applicability of sanctions of any character,¹⁴ although the Swiss Federal Council believed that where a flagrant breach of the Covenant was shown, they might become applicable.¹⁵ Both hold, however, that neutrality is possible under the stipulations of this article, the Federal Council

¹⁰ *Die Satzung des Völkerbundes*, p. 118.

¹¹ *Ibid.*, p. 465.

¹² Hoijer, *Le pacte de la société des nations: commentaire théorique et pratique*, pp. 186, 310.

¹³ Cf. Document (A. 24(1) 1021) pp. 3, 10; Records of the Second Assembly, Committee I, pp. 107, 191 ff; Records of the Third Assembly, Committee I, p. 79.

¹⁴ Cohn, *op. cit.*, pp. 158-159.

¹⁵ *Message*, *supra*, n. 3, p. 36.

limiting it merely to tolerated wars,¹⁶ while Cohn believes neutrality possible in any event,¹⁷ particularly if an appeal to the Council is followed by inaction.

On the other hand, the broad constructionists hold that Article 11 confers a broad general right, indirectly giving the League the right to go to war,¹⁸ even in the case of breaches other than those of aggression.¹⁹ This right is not merely the "friendly right" of diplomatic interposition, conferred in paragraph 2, but a new right, a bold doctrine of effectual intervention entrusted to the League for the safeguarding of collective social peace. As such, it may be invoked not only independently of the stipulations of any other article, but particularly to enforce the territorial guarantees of Article 10²⁰ and the procedural forms of Article 12,²¹ Article 13, paragraph 4,²² Article 15 (especially with reference to paragraph 8),²³ and finally Article 17, paragraph 4.²⁴ It may also be noted that the report of the Committee of the Council, made in December, 1926, definitely stresses the importance of Article 11 in relation to the whole preventive and pacificatory policy of the League.²⁵ The actual legal significance of Article 11, as regards the meaning which has attached to the concept of intervention, will be treated in detail later; for the moment it may safely be concluded that by the interpretation given to Article 11 through the report of the Committee of the Council the strict construction above mentioned, under which neutrality was once thought possible, has been discarded, and a broad construction of intervention opened up.

Considering next Article 12, with its provision for arbitration or inquiry by the Council and its three month moratorium on resort to war, there is a consensus of opinion. Even the most rigid strict constructionists hold that sanctions are applicable in case the prescribed procedure is violated (as is also true of that under Articles 13 and 15 and, by implication, under Article 14). If the procedure is followed but proves unavailing, there arises the possibility of a licit war or war-duel.²⁶ In such wars there can be no question that

¹⁶ *Ibid.*, p. 66.

¹⁷ Cohn, *op. cit.*, pp. 159, 168.

¹⁸ Schücking and Wehberg, *op. cit.*, pp. 118, 469.

¹⁹ Hoijer, *op. cit.*, 192.

²⁰ *Ibid.*, *loc. cit.*

²¹ *Ibid.*, p. 322. This is denied by Cohn, *op. cit.*, p. 174.

²² Hoijer, *op. cit.*, p. 227; regarded as possible but undesirable by Cohn, *op. cit.*, p. 174.

²³ Cohn, *op. cit.*, p. 169.

²⁴ Hoijer, *op. cit.*, pp. 222, 322.

²⁵ Official Journal of the League of Nations, 8th year, pp. 133-138, 221-222.

²⁶ On licit wars cf. *Message*, *supra*, n. 3, pp. 18, 235; Cohn, *op. cit.*, p.

neutrality on the part of League members would be entirely possible. This was recognized initially by Dr. Max Huber in his noteworthy report²⁷ and is reaffirmed by the Federal Council's stand²⁸ and by the other commentators on the Covenant.²⁹ While the strict constructionists primarily construe this to be a right³⁰ and a privilege, it is interesting to note that the broad constructionists consider the neutrality of League members a duty. Only two outstanding points of interpretation need be noted here: (1) that resort to war is still limited by Article 15, so that no hostilities may be undertaken without the additional conciliatory process³¹ and (2) that third parties among League members, being obligatorily neutral, may not resort to war without themselves first going through all the stages of procedure under Article 12.³² It will be noted that this is not, in reality, strict construction, but rather an integrative interpretation of Articles 12 and 15 of the Covenant to keep a licit war from spreading into an illicit one.

The situation under Articles 13 and 14 is somewhat analogous. In substituting general arbitral or judicial procedure or resort to the Permanent Court of International Justice for the arbitral functions of the Council, there is little change in the rules, save that the members of the League pledge that they will not resort to war against any fellow-member complying with an award or judgment. In the view of the Swiss Federal Council, tolerated wars may arise under this situation, and neutrality of League members follows, provided sanctions are not invoked against a non-complying state, as is admittedly possible.³³ Likewise Cohn declares war to be indirectly authorized and neutrality of members other than parties at bar to be possible, indeed, to be even a right and duty.³⁴ Resort to war or the fighting of a war-duel is illicit if an arbitral award has been accepted³⁵ and intervention is possible under Article 11 to execute

163; Schücking and Wehberg, *op. cit.*, p. 513; Hoijer, *op. cit.*, p. 213.

²⁷ *Message*, *supra*, n. 3, p. 235.

²⁸ *Ibid.*, pp. 18, 66.

²⁹ Cohn, *op. cit.*, pp. 158, 174; Schücking and Wehberg, *op. cit.*, pp. 513-514; Hoijer, *op. cit.*, p. 222.

³⁰ Cohn holds, and apparently rightly, that if the parties violate Article 12 and yet are not haled before the Council, the rest of the League members still retain the right to be neutral. In this as in numerous other hypothetical instances cited, Cohn relies on violations of the Covenant or non-observance of its stipulations rather than on what is in conformity with it, to furnish examples of potential neutrality.

³¹ Cohn, *op. cit.*, pp. 163, 167.

³² *Ibid.*, p. 174.

³³ *Message*, *supra*, n. 3, pp. 66, 133.

³⁴ Cohn, *op. cit.*, pp. 158, 175.

³⁵ *Ibid.*, p. 167. Cf. also Hoijer, *op. cit.*, p. 220.

an award, although Cohn, in desiring to safeguard the possibilities of neutrality, regards such intervention as dangerous and as not explicitly authorized by the Covenant.³⁶ Schücking and Wehberg consider a war of execution possible by the affronted state in the event of the non-enforcement of an award in its favor, and thus invoke a legal mandate of the League for such enforcement, although it would be possible, they hold, for the League members to join the affronted state in far-reaching sanctions of either an economic or a military character or both.³⁷ Hoijer holds that the provisions of the moratorium declared in Article 12 possess equal validity for action under Articles 13 or 14, hence an aggrieved state has to postpone recourse to war for three months.³⁸ In summary, under Articles 13 or 14 there is an acknowledgment that in case of non-execution of arbitral awards, licit wars may arise, and with them the pledged neutrality of League members as regards the complying state. This in case of strict construction. The broad construction of the Covenant invokes sanctions and League intervention, thereby strengthening the hands of the flouted state. Even the believers in licit wars or war-duels and the correlative neutrality of League members are prone to demand that the conciliatory procedure of Article 15 be first invoked before the war duel becomes licit.

Under Article 15 the conciliatory machinery of the Council or of the Assembly is invoked in international disputes. Here, as in Article 13, the members are pledged not to resort to war against any party complying with the Council's unanimous recommendations. Except for the modalities in reaching a settlement, the provisions are exactly analogous to those arising under Article 13. However, two further provisos modify the portent of this article. (1) If the Council cannot reach a unanimous decision, "the members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice" and (2) the Council is debarred from making a recommendation in cases found to be of domestic jurisdiction. Clearly, in the last case at least, wars might break out over a domestic question and the League's machinery would be powerless to act, if Article 15 were to be taken isolatedly, while, under the preceding provision, it might appear that an unlimited discretion would be given to "the members of the League" to act or not, as they might see fit.

³⁶ Cf. Cohn, *op. cit.*, p. 174 n.

³⁷ Schücking and Wehberg, *op. cit.*, pp. 532-534.

³⁸ Hoijer, *op. cit.*, p. 220.

Naturally, various interpretations have arisen. According to the Swiss Federal Council, there is no obligation on League members to enforce the terms of the decision if unanimous, unless hostilities are begun by a non-conforming member, thus giving rise to sanctions, and a member may resort to arms to enforce, through a war of execution, the recommendations made by the Council in his behalf. On the other hand, a tolerated war may arise in case there is no settlement. In such event, in the opinion of the Federal Council, members other than the parties to the dispute do not have the right to go to war, and must perforce remain neutral.³⁹ Cohn declares that parties may singly or jointly use self-help to execute recommendations, after the three month moratorium has elapsed, without calling down sanctions on themselves. Holding that the judicial or arbitral or conciliatory processes are alternative and not cumulative, he regards the parties as free, after the requisite delay, to go to war, although this option need not be exercised, but states that non-parties ought, in keeping with the spirit of the whole Covenant, to remain neutral.⁴⁰ In case of the failure of the Council to achieve unanimity in its conciliatory measures, war-duels can come about,⁴¹ giving rise to compulsory neutrality. Cohn regards no solution as possible under the domestic jurisdiction clause and states that wars may arise in consequence, furnishing the occasion for either sanctions or neutrality pure and simple. The point as to whether sanctions may be invoked he regards as undecided.⁴²

Among the broad constructionists, Schücking and Wehberg point out that in case neither party under Article 15 accepts a unanimous recommendation, the parties are free to go to war, unless there is an intervention of the Council under Article 11. This gives rise to neutrality of a compulsory character during a war-duel. If a unanimous report is accepted by only one party, members are forbidden to go to war against that party, and must hence remain neutral, while the accepting party has a right of carrying out its acknowledged rights by force.⁴³ If the defeated party attempts to use force, or "peaceful" occupation or pacific blockade, sanctions

³⁹ *Message*, supra, n. 3, pp. 133, 138, 139, 140.

⁴⁰ However, in his discussion of Article 13, Cohn holds that war-duels are not permitted after an arbitral award and before conciliation has been attempted, thus showing that he subscribed to the cumulative theory of procedure in at least one instance. *Op. cit.*, p. 161.

⁴¹ They should, however, be avoided, he holds, by the application of Articles 11, 12 and 16—another instance of the theory of cumulative procedure. *Ibid.*, p. 167.

⁴² *Ibid.*, pp. 166, 168-9, 174-5.

⁴³ This is the view of Hoijer, *op. cit.*, pp. 220-221.

may be invoked against it. On the other hand, if the defeated party accepts the Council's report as binding, but refuses to execute it, the victorious party may, after three months, resort to forceful measures of execution, other League members remaining neutral. Unless Article 11 is invoked and the Council decides on the intervention of the League to enforce the award, there is no right of League members to assist the victorious state.⁴⁴

In the case of the failure of the Council to make a unanimous report under Article 15, paragraph 7, it is not the intention of the Covenant to leave all members of the League free to participate in a war; only the parties at bar may go to war; the others must remain passive.⁴⁵ If there is to be a licit war, there is once more compulsory neutrality.⁴⁶ Otherwise, there is a serious risk that every licit war might become a civil war within the League, with incalculable consequences.⁴⁷

The consensus of opinion in regard to Article 15 appears to be that, (1) in case of an unexecuted settlement, wars of execution may arise, with the members of the League compulsorily neutral; (2) wars of breach may occur, involving the application of sanctions; while (3) in case of no settlement, due to lack of either unanimity or jurisdiction, tolerated wars may arise, involving compulsory neutrality of League members. Such is the situation in default of any application of Article 11.

A last series of relationships, involving the attitude to be taken under the Covenant toward non-members, is covered by Article 17, with its provision for extending to disputes between members and non-members, or between non-members *inter se*, the arbitral, judicial or conciliatory machinery of the League upon such conditions and with such modifications as the Council may deem just or necessary. In case of a non-member's refusal, followed by resort to war against a League member, sanctions are, by the very text of Article 17, applicable. The case of attack by a member upon a non-member is not mentioned in the Covenant, but has elicited the remarks of commentators. Schücking and Wehberg declare that should an outside state refuse the aid offered by the Council in settling its dispute

⁴⁴ Schücking and Wehberg, *op. cit.*, pp. 596-599.

⁴⁵ *Ibid.*, p. 599.

⁴⁶ Hoijer holds that from a legal standpoint, Bourgeois was right in 1919 when, on the final adoption of the Covenant, he declared that members conserved their liberty of action, that there was no presumption of restricted sovereignty, and that the Covenant forbade only certain kinds of wars. Whether such a construction would be regarded as binding at the present time remains problematical. *Op. cit.*, p. 275.

⁴⁷ *Ibid.*, p. 274.

with a member, no sanctions can be invoked by the League in case of resort to war by the member.⁴⁸ Obviously this results in a tolerated war with consequent volitional, but not compulsory, neutrality of League members. The case of attack by a member on a non-member having accepted the obligations of the Covenant for the settlement of the dispute need not be discussed here because of the fact that it would be exactly analogous to the situation between members under Articles 10-16. Finally, there is the case of refusal by both parties, non-members of the League, to deal with the Council at all, after invitation. In such event, "the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute." Here is a power of intervention of a blanket character, modifying by its application the undeniable right of the members of the League, under the old law of neutrality, to remain aloof from the conflict.

As to interpretation of Article 17: Huber, in his report, envisaged an organization where there would be no actual or potential jurisdiction over non-members. He therefore suggested conciliation treaties between League members and outsiders, and malevolent neutrality of the League toward any member attacking a non-member. Neutrality would, in his opinion, obviously be possible in extra-League wars, or wars of a licit character between members and non-members.⁴⁹ The Federal Council, in its analysis, concluded that tolerated wars could arise under Article 17, and that neutrality would be the positive duty of League members. It also concluded that sanctions were inapplicable to two non-members declining League jurisdiction over their dispute.⁵⁰ Cohn treats all possible cases fully.⁵¹ If two non-members are involved, League members remain neutral. In case of a tolerated war, begun by a League member against a non-submissive non-member, all the other members have the right to remain neutral, and are under no obligation to apply sanctions toward the aggressor member. They are not, however, under the obligation to remain neutral, but must, before taking part in the conflict, invite the non-member to use the pacificatory machinery of the League to settle their differences—this in order not to break the Covenant. If this offer is declined, League members may war against non-members with impunity. On the other hand,

⁴⁸ Schücking and Wehberg, *op. cit.*, p. 643. This, of course, if Article 11 is not applied. This is also the view of Cohn, *op. cit.*, p. 192.

⁴⁹ *Message*, *supra*. n. 3, pp. 235, 239.

⁵⁰ *Ibid.*, pp. 33, 66.

⁵¹ Cohn, *op. cit.*, pp. 192-193.

they may not, without exposing themselves to sanctions, war against the League member involved before exhausting their recourses under Articles 12 to 15. Finally, sanctions may be invoked on non-members going to war against a member. Here Cohn is led to invoke in such a war of aggression the very sanctions he refused under Article 10!

Schücking and Wehberg declare that if a non-member subscribes to League obligations and no solution is reached, a war-duel is permissible on the same basis as between League members who have exhausted all the machinery of pacification. This involves the neutrality of all other League members. In case a non-member declines, members are free to go to war against non-members, without any moratorium being required, while the non-member may not declare war on a member without being treated as an aggressor and encountering sanctions. In case of war by a member on a non-submissive non-member, there can be no collective war of execution by League members, who therefore stay neutral unless Article 11 is invoked. By contrast with the strict constructionist views of Cohn, or of the Federal Council, the authors hold that in case two non-members refuse to accept League obligations, the Council may invoke Article 11, Article 13, paragraph 4, or sanctions under Article 16.⁵²

Højjer, who here acknowledges a very far-reaching competence on the part of the League, is inclined to prefer a middle-of-the-road construction. In his opinion only disputes likely to lead to a rupture call for intervention, and that of a diplomatic character. In case of a non-member's refusal to follow League procedure, League members are authorized to resort to war at once without awaiting a moratorium, unless Article 11 is invoked to restrain them. League members cannot, however, be attacked without violating Article 10 and bringing sanctions under Article 16 into play. If one non-member accepts and another non-member refuses the Council's invitation to submit a dispute and the latter attacks the former, there is no duty binding on the Council to invoke sanctions, and members may remain neutral.⁵³ The consensus of opinion appears to be that neutrality is at least possible in extra-League wars and it is regarded by many as obligatory; the same is true of any tolerated war arising out of the application of Article 17, paragraph 1.

It may be concluded from the foregoing survey of the Covenant's provisions that neutrality of League members is possible, within the framework of the Covenant: (1) in wars of execution, where a League

⁵² Schücking and Wehberg, *op. cit.*, pp. 642-644.

⁵³ Højjer, *op. cit.*, pp. 319-323.

member takes up arms to enforce its rights under a duly made arbitral award, judicial decision or conciliatory report; such neutrality is obligatory; (2) in duel wars, wars fought out between the contestants after exhausting the irenic procedure of the League; here, too, members are compulsorily neutral; (3) in wars outside the League, when the parties have not been invited to use the conciliatory procedure under the Covenant, or when they have declined to submit their dispute; this neutrality is optional, subject to the procedural limitations on the resort by members to war. All these instances presuppose the abstention of the other members from intervention under Article 11 or from the application of sanctions under Article 16. What the situation is under sanctions will presently be seen. All three of the foregoing may be regarded as tolerated wars; only the first two as licit within the general scheme of the Covenant.

THE EVOLUTION OF INTERVENTION

So far no interpretation of Article 16 has been attempted, nor has any effort been made to correlate its applicability with the stipulations of Article 11, Article 13, paragraph 4, or Article 17, paragraphs 2 and 4. It has been thought advisable to reserve to a special section the integration of these articles, as well as the meaning of their interpretation.

First as to the theory of sanctions: The original theory held was one advocated by President Wilson and many others at the end of the World War and at the time of the drafting of the Covenant. It was essentially that, in the event of a breach of the Covenant, an automatic relation of war between all the members of the League and the Covenant-breaking state would be produced,⁵⁴ and that all the measures of compulsion which a *mundus contra Germaniam* had exercised would be not only applicable, but legitimate. That sanc-

⁵⁴ This was the viewpoint of Lord Phillimore's project, Art. 2; General Smuts' draft, Art. 19; President Wilson's second draft, Arts. VI-VII; § 12 of part II of Lord Cecil's plan; and Art. 31 of the Italian government's project. Cf. Schücking and Wehberg, pp. 603-4. So also Cohn, *op. cit.*, p. 154; cf. also the *Message*, *supra*, n. 3, p. 36: "In the hypothesis of a war in which the League of Nations will intervene as such . . . there is, in principle, no neutrality. In virtue of Article 16 of the Covenant, the state which troubles the peace finds itself without further ado, in a state of war with all the members of the League." Cf. also J. M. Mathews, *The Conduct of American Foreign Relations*, p. 271: "The Covenant . . . provides for the automatic creation of a state of war between a peace-breaking member and all of the remaining members." Finally, the Council of the League, on February 13, 1920, declared that "the idea of neutrality of members of the League of Nations is not compatible with the other principle that all the members of the League will have to act in common to cause their covenants to be respected." (Cited by Cohn, *supra*, n. 3, p. 193.)

tions would really mean war was the unequivocal viewpoint of this school, and that it would be morally justifiable on the grounds of the social solidarity of members of the League was widely contended. Such a view failed to find fruition in the Covenant for reasons already cited, but it did not fail of interpreters thereafter. Once Mr. Wilson disappeared from the scene, the French⁵⁵ were left the principal contenders for the stand, which the British⁵⁶ openly rejected, as did the wartime neutrals. The idea recurred in the Geneva Protocol of 1924 and in the Locarno treaties of 1925, but finds progressively fewer defenders.⁵⁷

The second theory of sanctions, an antithesis to the first view, and very widely held among the countries neutral during the World War, was that, in the event of the outbreak of a future war, despite the procedural restraints laid down by the isolated articles of the Covenant, the measures called sanctions under Article 16—rupture of diplomatic relations, non-intercourse, economic blockade and military pressure—would be regarded as compatible with the maintenance of neutrality.⁵⁸ Subtle distinctions between the "historic" neutrality of Grotius' day, which recognized the admissibility of troop transit across neutral territory by a "righteous" belligerent in connection with a "just" war, and the "compromise" neutrality of The Hague Conventions which had undoubtedly whittled down accumulated neutral precedents in favor of belligerent prerogative, were paraded by neutrals in an attempt to return to the old neutrality of the seventeenth century. There were even suggestions as to the concerted denunciation of the Fifth and Thirteenth Hague Conventions.⁵⁹ There arose also theories of differential neutrality,⁶⁰ to reconcile economic measures by neutrals in support of covenant-defenders with stringent military neutrality. The whole effort of Cohn, for example, is to justify, by the most minute and hairsplitting strict

⁵⁵ Cf. Procès-verbaux of the International Blockade Commission, p. 5; Hoijer, *op. cit.*, 314.

⁵⁶ Cf. Cohn, *op. cit.*, p. 184, citing the British view before the Blockade Commission.

⁵⁷ The Geneva Protocol sought to vest Covenant defenders with "full belligerent rights." In all probability the attitude which the British had taken as far back as 1921 with reference to such an interpretation of sanctions was largely instrumental in the rejection of the protocol, although the same hypothesis of enforcement underlay the Locarno treaties a year later. Britain envisaged the Locarno treaties as being a necessary commitment to replace the old 1839 treaty with Belgium. The *casus foederis* under the Locarno treaties might be considered, as was that of 1914, as one of intervention.

⁵⁸ *Message*, *supra*, n. 3, p. 66; Cohn, *op. cit.*, *passim*.

⁵⁹ *Message*, *supra*, n. 3, pp. 234, 236.

⁶⁰ *Ibid.*, pp. 43, 234-5.

construction, the compatibility of Article 16—as involving merely economic sanctions by neutrals, supported, if necessary, by military police measures of a non-hostile character—with the idea of neutrality. To neutrals generally, the idea of such sanctions was of constraint by states remaining aloof from a *de facto* but not *de jure* war. It also excluded sanctions of an effective character from Article 10, reduced Articles 11, 13, paragraph 4, and Article 17, paragraphs 2 and 4, to mere isolated gestures, and virtually emasculated Article 16.⁶¹

The third theory of sanctions is one which is as yet only in embryo, but which bids fair to supersede, in practice, the other two theories. The first, as has already been noted, was born of the psychology of war; the second of the enervation of the immediate post-war period. The third has been slowly emerging as the war psychosis of 1919-1920 has subsided and the timidity of the League Council has given way to an atmosphere of confidence. That theory is one of intervention.

The doctrine of effectual intervention was first noticed in regard to Article 11, and the connection of Article 13, paragraph 4, and Article 17, paragraphs 2 and 4, with such a doctrine noted in passing. The three passages in question, relating to critical situations, confer, when cumulatively taken, a most extended jurisdiction on the League institutions. They give power of intervention (1) in disputes between League members, (2) between members and non-members, (3) between non-members *inter se*, and (4) irrespective of parties, in any case of war or threat of war, whether directly concerning the members of the League or not. There can therefore be little question as to the very extensive scope of activity of the League.⁶² The second step in the development of the doctrine has been the linking of the power of sanctions under Article 16 with the power of intervention under Article 11 and the construction of that compulsive power, under both articles, as being applicable to Article 10 as well.⁶³ The idea of making sanctions applicable in any of the cases where intervention is possible, and wherever the League is called on to make good its territorial guarantee is of the utmost importance, because under Articles 10 and 11 such action is, or may be, preventive, before the actual outbreak of war. Therefore the thought of preparing in advance the machinery of constraint has been a guiding consideration for the Council during the past year. In other words, intervention

⁶¹ Ibid., p. 133; Cohn, op. cit., pp. 175-193.

⁶² Schücking and Wehberg, op. cit., pp. 168-9; Cohn, op. cit., p. 174; Hoijer, op. cit., pp. 189-92.

⁶³ Schücking and Wehberg, op. cit., p. 465; Hoijer, op. cit., p. 304.

is coming to be thought of as preventive, as well as punitive, and as capable of being invoked whenever the peace of the world is jeopardized. Rapid, effective intervention, military if necessary, to enforce the authority of the Council, has been favorably considered by the Committee of the Council and a report on the modalities for such intervention is to be laid before the eighth Assembly.⁶⁴

What is intended to be the legal character of such intervention and sanctions? The answer is to be found in the attitude of the British government toward Articles 11 and 16. At the time of the drafting of the Covenant, the British delegation rejected the interpretation that the invocation of Article 16 permitted neutrality. On the other hand, in the deliberations of the Blockade Committee in 1921, the British representatives took the stand that the measures proposed under Article 16 were not invoked as measures involving war. Most of the measures intended were thought of as falling short of war, and therefore as not incompatible with action of peaceful states. This does not appear to involve a *volte face* on the part of the British government in its interpretations of the Covenant, but an attempt to steer between Scylla and Charybdis. Finally, in 1926, the Council, by resolution, referred to the legal section of the Secretariat the evaluation of "the legal position which would be brought about by enforcing in time of peace the measures of economic pressure indicated in Article 16, particularly by a maritime blockade."⁶⁵ It is interesting to note that the report embodying this recommendation emanated from a Committee of the Council in which Viscount Cecil, erstwhile British Minister of Blockade, was the moving spirit.

The only conclusion possible from these viewpoints is that sanctions can be invoked as part of the machinery of the law of peace, as coercive measures producing neither war nor neutrality, but only intervention, diplomatic, military, economic, either independently, alternately, in combination or cumulatively. Such intervention might assume many of the external forms of material war, but would not have the effect of war on either persons or property, as is revealed by the fact that no mention is made of any right of capture in connection with sanctions. Mention has previously been made of the fact that the various broad constructionist commentators on the Covenant have emphasized the rapid and striking growth of the right of intervention under the Covenant. The inquiries made by the

⁶⁴ Cf. Official Journal of the League of Nations, 9th year, pp. 133-138, 221-222; and document C. 677.M.268, 1926. IX. (C. D. C. 61.)

⁶⁵ *Ibid.*, p. 221.

Committee of the Council in 1926 have, in the words of Jonkheer Van Karnebeek, "brought Article 11 into the light" but without thereby throwing Article 16 into the shadow. They have illustrated abundantly the fact that intervention under Article 11 has been invoked as a method of estoppel, to buttress the system of pacification under Articles 12-15 and 17. Where the isolated procedure of each of the articles in question would in given contingencies give rise to tolerated wars and correlative neutrality, the invoking of Article 11 involves an additional procedure of investigation, coupled with a hitherto unasserted power of preventive action. Under such circumstances, if Article 11 comes to be habitually invoked in crises, the virtual extinction of licit wars is to be anticipated. By the very threat of sanctions in the event of a resort to hostilities after the assertion of the League's right of diplomatic intervention under Article 11, potential recourse to wars of execution will become unnecessary, while the additional investigation of a quarrel by the League will in fact discourage potential duelists from commencing hostilities. Finally, it is quite conceivable that if states outside the League were to expect League intervention in any of its forms in order to stop wars outside the constitutional framework of the League, they would ponder carefully before incurring the preventive sanctions involved. Thus the three kinds of wars which would, under the current interpretation of the Covenant, be possible, and, if the articles were taken isolatedly, make neutrality possible, appear destined to be extinguished if the League preserves its right of effectual intervention. Wars of self-defence, for the vindication of territorial integrity, will in future, under the existing interpretations of Article 11, be reduced to collective interventions for territorial guarantee, and so-called wars of breach will be the only residual category.

What can be expected here, or will this remain an irreducible minimum of unavoidable wars, which the League will be powerless to prevent? The answer may be found in a series of suggestions that have been made ever since 1919. Huber was among the first to suggest drastic modifications in the extent of belligerent rights,⁶⁶ while in the actual practice of the Greco-Turkish war, a war *de facto*, there was a flagrant denial of belligerent rights to Greece. The concrete suggestion has come in the plea of Cohn⁶⁷ for a denial of belligerent rights altogether to the Covenant-breaking state—to which might be added states outside the League and rejecting its mediatory overtures. For this there seems to be cogent argument.

⁶⁶ *Message*, supra, n. 3, p. 235.

⁶⁷ Cohn, *op. cit.*, p. 200.

If members of the League, in their endeavors to uphold the peace of the world, begin the process of eliminating war by denying one outstanding belligerent right—right to title by conquest—under Article 10, is there any reason to allow a Covenant-breaking state to enjoy under the caption of belligerent rights a wider prerogative than belongs to the defenders of the legal order? The answer must be in the negative, but it can assume two forms. It can assume the form set forth in the Geneva Protocol, giving the Covenant-defenders equal rights with the lawless belligerent, and thereby provoking a large-scale war duel. Such a position, from the British standpoint, has been rejected as undesirable, and there remains only one alternative—the denial of belligerent rights to a Covenant-breaking state. Under such circumstances, a collective intervention backed by forceful sanctions of the law of peace might take place against a lawless state, which would be deprived, by its breach of the Covenant, of any immunities, rights or prerogatives under the old law of war. The correlative consequence would be, undoubtedly, the extinction of neutrality.

NEUTRALITY AS A FUNCTION OF NEGATIVE JURISDICTION

Neutrality, as viewed in these pages, has been treated primarily as a legal status whose implications run athwart the whole field of international political, economic and military activity. Neutrality was noted initially to be dependent upon two basic considerations: (1) the nature of the state system in general and (2) the existence of a relation of war between two or more states. Neutrality might, consequently, be regarded as, first, a negative function of the state system, a "logical consequence" of the lack of a common judge, and, secondly, as a function of the war relationship, as inseparable from it as the convex is from the concave side of a curve.⁶⁸ Mention has already been made of the change in the general nature of the state system in 1919, a change which in large measure eliminated the vitiating anarchy of the pre-existing order and established much machinery of international government where little had existed before. Thereby the first basis of neutrality, as a function of the state system, was markedly reduced.

In the second place, the whole trend of the Covenant of the League of Nations is, as has been shown in the foregoing pages, in the direction of establishing various "instances of jurisdiction" differentially suited to the nature and type of international contro-

⁶⁸ *Ibid.*, p. 193.

versies and intrinsically adapted to the exigencies of each situation. The Covenant has attempted, for the sake of the susceptibilities of supposedly sovereign entities, to leave as large a choice of jurisdictions as possible, hence the idea of alternative jurisdictions bulks large, while the idea of cumulative jurisdictions, although growing in acceptance in proportion as the practice of League institutions develops, remains somewhat in the background, as a disagreeable but assertible doctrine. Since 1919 the effort has been to endow institutions with a minimum positive jurisdiction and then to increase the scope of their competence either incrementally, by the superposition of bilateral on multilateral treaties, or by referential transfer, as, for example, when cases are transferred in advance by an exchange of notes from the Permanent Court of Arbitration to the Permanent Court of International Justice.

The outcome of that process is far from complete, but it is obvious that, although the world has not yet reached the stage where every loophole for war is closed, the free leeway for states to resort to war, due to the absence or non-existence of pacificatory agencies or instances, is being materially lessened. The breaches in jurisdiction are slowly, but with a certain inevitability, being closed. It is just in proportion as such positive jurisdictions are built up, under arbitration or conciliation treaties and under the Articles of the Covenant, as analyzed in the foregoing pages, that the specific instances of war—i.e., of the result of negative jurisdiction over states—and of its concomitant function, neutrality, are due progressively to lessen and eventually to disappear.

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