

THE CONCEPT OF NEUTRALITY SINCE THE ADOPTION AND RATIFICATION OF THE HAGUE NEUTRALITY CONVENTION OF 1907

EGON GUTTMAN*

Your Excellencies, Members of the Diplomatic Corp, Fellow Academicians, Students, Ladies and Gentlemen

The purpose of this Conference is to review developments in the concept of neutrality since the adoption and ratification of the Hague Neutrality Convention of 1907.¹ That Convention was clearly intended merely to refer to military neutrality. Thus, Article VII states 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 any army or fleet."² Article IX goes on to indicate the concept of neutrality in requiring that: "Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Article[] VII . . . must be impartially applied by it to both belligerents."³

Two issues seem not to have been in the minds of the draftspersons of this Convention: The effect of economic assistance and the question of morality. First, I will address the effect of economic assistance. Though a neutral Power could not itself act as a supplier of war material, there was nothing to prevent nationals of a neutral Power from doing so and thus to profit from such trade. Profit from

* Professor of Law, Washington College of Law, Levitt Memorial Trust Scholar. This paper was delivered by the author at the Conference on Neutrality, Morality, and the Holocaust, which took place on 23 April 1998 at the American University Washington College of Law.

1. Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654.

2. *Id.* art. VII, 36 Stat. at 2323, 1 Bevans at 662.

3. *Id.* art. IX, 36 Stat. at 2323-24, 1 Bevans at 663.

belligerence was accepted and tolerated by this Convention. The draftspersons did not seem to realize that the production of weapons is a bilateral activity; one in which government and industry are closely interlinked. The risk of exporting intellectual property involved in the production of arms to the detriment of the nation requires strict licensing. This clearly blurs the distinction between the acts of a neutral government and that of its commercial entities. Furthermore, the drafters did not recognize that economic assistance, though not of any direct "use to an army or fleet," enables that army or fleet to be supported in its belligerent activities.

Secondly, there is nothing in this Convention that seems to call upon neutral Powers to consider moral issues in relation to economic activities. Although a neutral Power must see that commercial entities and individuals in its realm observe restrictions, if any, placed by it upon commercial activities, a strict reading of the terms of the Convention does not seem to support any moral test. Thus, the Convention does not seem to require that banks determine whether assets deposited within them were obtained in violation of any precept of international law or morality. Also, while referring to the treatment of escaped prisoners of war, the Convention does not protect civilians who may try to seek refuge in a neutral country because one of the belligerents has determined to exterminate them. These are all issues that during the 1940s could only be resolved on moral grounds. Therefore, however effective this Convention may have been considered to be in 1907, much has happened since then.

The circumstances surrounding World War II and the immensity and horror of the atrocities committed by the Third Reich of Germany differentiates this war from previous conflicts. The "normal" wars of the eighteenth and nineteenth centuries were wars of aggrandizement; matters of succession or of territorial expansion or both. In all of these the basis was an economic expansion, despite claims to, and invocation of, divine favor made by all sides to the war. Morality was not an issue. Although the Thirty Years War was fought along religious divides and resulted in a loss to Europe of approximately thirty percent of its population, mass murder and the elimination of an ethnic group was not its aim. Hitler changed all that. The Holocaust was both method and intent. It sees itself reflected in the policy of ethnic cleansing both in the former Yugoslavia and in central Africa.

Following these historical developments, the traditional concept of neutrality as an accepted norm of international law requires reconsideration. This is especially so when one argues that neutral and impartial conduct means not merely standing aside from active belligerence, but calls into question the maintenance of commercial and financial relations with a regime that is conceded to be evil under the moral precepts of countries claiming a "neutral" status. As Ambassador Scheffer only recently stated from this rostrum, "'Neutrality' in the face of genocide is unacceptable and must never be used to cripple or delay our collective response to genocide."⁴

Many countries are forced to re-examine their positions during the Nazi Era in the light of questions raised by the world's conscience. Examples of this re-examination are Argentina's Independent Commission to "clarify the Nazi Role in Argentina," and the Swedish Commission that is about to report on Sweden's role regarding the assets used by Germany as payment for raw material, as well as Sweden's general position as a "neutral" or "unaligned" nation during World War II. A number of Swiss studies have exposed Switzerland's banking and commercial dealings with Nazi Germany. These financial dealings left Switzerland as a major creditor nation of Nazi Germany despite the purchases of stolen gold by Swiss banks to finance the Nazi war effort. These grants of huge lines of credits allowed Germany to purchase war material and to launder gold not only stolen from the national treasuries of conquered nations, but also from innocent victims of genocide. Spain, Portugal, Brazil, and other South American countries are also confronting the issue of economic dealings with Nazi Germany, denying safe-haven to Nazi victims and ultimately granting such safe-haven to participants in the Nazi atrocities.

This symposium seeks to address these issues. It focuses on international law, while acknowledging that such law is not hard science. The aim of this conference is not merely to be an accurate and insightful review but, if possible, to illuminate the outlines of a moral aspect of international law.

Basically the question for international law is whether neutrality is

4. M. Cherif Bassiouni et al., *War Crimes Tribunals: The Record and the Prospects: Conference Convocation*, 13 AM. U. INT'L L. REV. 1383, 1395 (1998) (statement of Ambassador David J. Scheffer).

dependant solely on non-participation in belligerent activities or requires that there be neither direct nor indirect assistance to a belligerent—that there be no commercial transactions with such belligerents. Is there not a moral duty on nations not to turn a blind eye on activities by a belligerent that evidence anti-humanitarian, genocidal endeavors? If we accept this approach, neutral Powers would no longer be considered to have acted within the guidelines of international law when they turn back civilians faced with certain extermination because of their ethnic or political backgrounds.

The concept of total war involving the destruction of civilian population centers makes the traditional concept of neutrality no longer acceptable. If we recognize that the traditional approach to neutrality requires re-examination, then we must ask: What are we going to put in its place? This raises the further question whether an internal conflict not falling within the traditional international concept of war, permits nations to stand aside despite violations of human rights by one of the parties. On the other side of this equation is the question, can nations claim a neutral status in an “internal conflict,” or must they await a determination by the United Nations Security Council (“UNSC”) prohibiting direct or indirect assistance to either side in a struggle?

International law is not Austinian in nature. There is no sovereign who gives international law. International law is the law of nations, and as such represents the accepted moral basis of what we would like to call civilized nations. International law is the common denominator of morality. If one accepts that international law is the *jure gentium*—the generally accepted minimum morality among nations—and it includes the *jus cogens*, then international conventions are either the written embodiment of these accepted principles of internationally recognized concepts, or are binding because of the accepted norm of international law: *Pacta sunt Servansa*.

International concepts are not final, they are not immutable, nor embodied in cement. An approach that may have been satisfactory in 1907 may no longer reflect the view of the present time and may no longer be fully acceptable. The world has moved away from ignoring evil to confronting evil. Thus, the traditional concept of neutrality may no longer be acceptable to nations. Therefore, we must consider what to put in its stead. The Charter of the United Nations

still clings to the traditional concepts of international law. Have we only progressed to the point where we ask, what will the UNSC do? Can we justify turning away refugees from our borders because they have not yet been able to cross these borders? Is it only after they have crossed these borders that the provisions of a convention that governs the treatment of refugees can become effective? All of these are questions that cry out for answers. We cannot expect to find these answers in this one-day Conference, but if we can start thinking about answers and can begin to discuss these issues, this Conference will be a success.

I would like to add my welcome to that extended by our Dean, Claudio Grossman. In particular I would like to welcome representatives of the Bergier Commission whose report most of us are anxiously awaiting. On one of our panels we have Mr. Michael Bradfield who is associated with the Volker Commission. There are various officials of the United States Department of State and Department of Justice present, who have been working on what has become known as the Eizenstat Report. We are hoping to receive the final publication of this report.

We are honored to have representatives from Europe and South America at this Conference. These distinguished scholars came specifically to Washington to participate in this Conference and we would like to thank their respective governments for making their presence here possible.

Our guests from Europe include: Professor Schindler, from Switzerland; Ambassador-Professor Wahlbäck, from Sweden; Professor da Costa Leite, from Portugal; and Professor Antonio Marquina, from Spain. We have also been fortunate to be honored by His Excellency Ambassador Dr. Diego Guelar of Argentina and Rabbi Henry Sobel of Brazil, who will join us in panel discussions.

We must note that speakers at this Conference are presenting their personal points of view which may not necessarily reflect those of the government with which they have a relationship.

I would like to thank the Dean of the Law School, Claudio Grossman, for having supported Ambassador-Professor Rubin and me in preparing for this Conference. Our thanks also go to the Federal Bar Association-International Law Section, The International Law Institute, represented by Professor Don Wallace of the Georgetown Law

Center, The Washington Foreign Law Society, The International Association of Jewish Lawyers and Jurist-American Section, and B'nai B'rith-Chesapeake Region, who have assisted us in allowing us to use their mailing list.