States.[8] The action in regard to submarines is in accord with the resolution adopted by the Inter-American Conference at Panama on October 3, 1939.[9] The Panama resolution in regard to armed merchantmen accepts the position taken by the United States in its reservation to Article 12 of the Havana Convention of 1928, rather than the text of that article which more closely reflected the sound position under international law.[10]

Although it is impossible to review here all aspects of the neutrality policy of the United States during the present wars and conflicts, one cannot mention the repeal of the arms embargo without also calling attention to the imposition of a "moral embargo" on shipment of aircraft to states charged with bombing of civilians. The Soviet Union and Japan are the anonymous and undeclared-belligerent objects of this "moral embargo." [11]

PHILIP C. JESSUP

THE DUTY OF IMPARTIALITY ON THE PART OF A NEUTRAL

During the recent debate over revision of the neutrality legislation of the United States, the position was taken by certain distinguished international lawyers that it would constitute a violation of international law for the Congress of the United States to change its legislation, during time of war, by repealing the arms embargo for the purpose of helping the enemies of Germany.[1]

It has frequently been said by text-writers that impartiality is the essence of neutrality; and from this it might be deduced that, since many changes in domestic law made during wartime would work to the benefit of one or other of the belligerents, any such change would violate the duty of impartiality and is, therefore, prohibited. Practice, however, does not support such a statement of the rule, which is believed to be better expressed in the draft convention prepared by the Harvard Research in International Law:

[8] Department of State Bulletin, Nov. 4, 1939, Vol. I, p. 456; Supplement to this JOURNAL, p. 56.

[9] *Ibid.*, Oct. 7, 1939, Vol. I, p. 328; Supplement to this JOURNAL, p. 9.

[10] See the Draft Convention cited *supra*, note 6, Art. 28 and Comment, p. 435, at 446.

[11] See Third Annual Report of the National Munitions Control Board, For the Year Ended November 30, 1938 (76th Cong., 1st Sess., H. Doc. No. 92), pp. 79–80, and New York Times, Dec. 3, 1939.

[1] See the letter signed by Charles Cheney Hyde and Philip C. Jessup, in the New York Times of Sept. 21, 1939. Subsequent debate over this letter in the same journal is to be found in the issues of Sept. 25 (Eagleton); Oct. 1 (Breckinridge); Oct. 5 (Hyde and Jessup); Oct. 7 (Breckinridge); Oct. 14 (Laporte); Oct. 15 (Eagleton); and in the New York Herald-Tribune, Oct. 26 (Kuhn).

The New York Herald-Tribune asked of certain international lawyers who had been connected with the study made by the Research in International Law the following question: "Would a repeal of the arms embargo at the present time constitute, under existing international law, a violation of the neutral obligations of the United States?" In its issue of Oct. 25, it listed replies as follows: Borchard, Hyde and Jessup in the affirmative; Briggs, Burdick, Coudert, Dulles, Eagleton, Fenwick, Kuhn, Turlington, Woolsey, Q. Wright, in the negative.

> A neutral State, for the purpose of better safeguarding its rights and interests as a neutral or of better fulfilling its duties as a neutral, may, during the course of a war, adopt new measures or alter the measures which it has previously adopted, provided, however, that the new measures adopted do not violate any provision of this convention.[2]

The revised Neutrality Act passed during the special session of Congress seems to conform to this statement of the rule. Since it restores our practice, to some extent, to accord with the normal and generally understood practice of nations, it enables the United States better to fulfil its duties as a neutral. If it is argued that it constitutes a relaxation of restrictions, it must be admitted that other provisions of the law increase restrictions; it would be difficult to show that the Act as a whole has relaxed or increased restrictions. Certainly, if the repeal of the arms embargo should be a change to the disadvantage of Germany, other provisions of the law would equally work to the disadvantage of the enemies of Germany, and would be equally illegal.

It is a slightly different argument that change in law made during time of war is illegal when made for the purpose of assisting one belligerent side. If, however, such a statement of the rule is correct, how could such a purpose be established? There is no evidence of an intent to aid England and Germany in the law itself, nor could it be established from the debates in Congress. The desire to return to normal practice, and to uphold international law in general and our neutral position in particular, affords ample justification for the change. What tribunal could pass upon the intent of Congress, and ascribe to it motives which are not found in the law itself? [3] As an answer to this question, it is suggested that the displeased belligerent, and it alone, would sit as the judge in this case, and would assess penalties; and this leads us into much broader inquiries into the meaning and operation of the law of neutrality.

Is it the legal duty of a neutral to be impartial? If a neutral state should change its law during war, for the deliberate and openly acknowledged purpose of aiding one or other of the belligerents, would it thereby fail in any duty imposed upon it by international law? Many writers could be cited in the affirmative answer to this question; yet there appear to be no cases upon the point. Can any case be cited in which the tribunal was called upon to decide that a neutral had lost its status as a neutral, or that a neutral should pay damages, because it had failed in its duty to be impartial? Did a neutral ever plead before a tribunal that a belligerent should make reparation to it on the ground that the belligerent had denied to the neutral the status of neutrality which it claimed?

There are, of course, various specific duties for the non-performance of which international law holds a neutral responsible. Thus, the failure of

[2] This JOURNAL, Supp., Vol. 33 (July, 1939), p. 316, Article 13.

[3] See the argument upon this point of James W. Ryan, Congressional Record, Vol. 85, pp. 585–589, Oct. 11, 1939.

England to prevent the departure of the *Alabama* might have been regarded as showing favor to one side; but damages were awarded by the tribunal because of failure in a specific duty. From such cases the conclusion is not to be derived that any act which results in helping one side more than the other is to be regarded as illegal. The very fact that specific rules are in some cases stated, and the additional fact that states are held judicially liable only for violation of such specific rules, indicate that failure in some vague general duty of impartiality is not a justifiable issue.

What are, in practice, the results of a neutral's failure to be impartial? There is no evidence that it results in responsibility, adjudicated by a court and calling for pecuniary or other reparation—aside from failure with regard to specific duties expressed in the law of neutrality. The failure to perform a specific duty (as in the *Alabama* case) would permit a legal claim and perhaps the collection of damages, but would not affect neutral status; the failure to be impartial, on the other hand, would not arouse or justify a legal claim for damages, but might modify or end neutral status. In the latter case, the decision would seem to lie entirely with the belligerent, which may seize upon some action of the neutral, denounce this action as a violation of the duty of impartiality, and reply to it by resorting to war against the neutral, thus ending its status as a neutral. This, certainly, would not be a legal decision. Germany might thus assert, without reference to any tribunal, that Holland had failed in her duty of impartiality (it would not matter how), and thereupon invade Holland. Apparently, the belligerent may also reply to an alleged failure in impartiality on the part of a neutral by measures less than war, such as seizing vessels, which would have the effect, not of ending neutral status, but of denying a portion of that status, or denying certain rights of neutrality to this neutral. Again, this is not a matter which the belligerent refers to a court; it is a unilateral decision on the part of the belligerent against which the neutral has no judicial remedy. Perhaps impartiality is to be regarded as an attribute or qualification of neutral status, rather than as a positive duty; lack of impartiality might, then, mean that the neutral is no longer to be regarded—by the belligerent—as a neutral.

This situation appears to be political or military in character, rather than legal. It would not be beyond the capacity of the judges in an international tribunal to give a decision as to whether a neutral had been legally impartial or not, if this were required, but no cases are known of this type. There is no practical way in which the belligerent can be submitted to the jurisdiction of the court for this purpose, at the time when the neutral most needs protection. We encounter here another of the anomalies which must always be found in international law so long as war, the antithesis of law, is permitted to continue. The so-called law of neutrality is for the most part a game to be played between the neutral and the belligerent, usually without an umpire, and with very few rules. The game depends largely upon how far the neutral may be "bluffed" by the belligerent. The character of mod-

ern war and the pressure of modern interdependence reveal this situation. It is obvious today that, whatever action a neutral may take, even without reference to the war, will favor one belligerent more than the other; whereupon, the displeased belligerent may accuse the neutral of a failure in its duty of impartiality. The belligerent, however, will not take this claim into court and ask for reparation or a decree; instead, it will act as its own judge and impose its own penalties in the form of captured ships or other reprisals. Must the neutral, for fear of such a one-sided decision, or for fear of being drawn into war, refrain from taking the action contemplated? His decision on this question, it is submitted, must be a political one; he could not find relief by bringing the belligerent before a court.

Taking the situation of the United States today, let us suppose that the repeal of the arms embargo was intended to build up our trade in arms and thereby our munitions factories, so that we would be better equipped to defend ourselves in the dangers which surround us. Assuming this to be the sole or chief reason for the change, must this nation refrain from strengthening itself in this fashion because the fortuitous result would be to aid England more than Germany? Self-preservation is sometimes listed as one of the fundamental rights of a sovereign state; is this vague neutral duty, interpreted only by the belligerent, to supersede this fundamental right?

Let us suppose, again, that a neutral state is permitting sale to belligerents, but that later, while war is in progress, it comes to fear the exhaustion of certain of its natural resources, such as oil or iron, and therefore, for purposes of national conservation, forbids further export of these materials. The result would undoubtedly be to hurt one belligerent more than the other; in this case, could the former complain that the neutral was violating its duty of impartiality and demand that it abandon its efforts at conservation? Or again, if the United States should discover vast new supplies of helium and therefore relax restrictions against its sale, during war, would this be an illegality? If, in pursuance of the requirements of our present tariff laws, we should change our rates and make them discriminatory against a state which had discriminated against us, would this be illegal when that state happens to be a belligerent? What law could be passed by a neutral during a war anywhere in the world? Even a change in postal regulations might not work out impartially as between belligerents. It would even be possible for a state at peace, fearful of a change in our laws, to declare war against Liberia or Yemen, without moving a man or a gun, and thus make it impossible for us to proceed with the proposed change of law.

This is a *reductio ad absurdum*, of course; but it none the less calls for reflection. Many strange things are being done nowadays. It is no answer to point out that the examples above are not neutrality laws; the arms embargo or its repeal was not a neutrality law, from the viewpoint of many of those who supported it; it was simply a measure to keep the United States out of war. If the duty of the neutral is to be impartial, there are few laws

which it could change during war; for, in this interdependent world, almost any change would have some effect upon other states. Indeed, if its duty is to be impartial, it must worry about the effect of some laws in effect before the war began. The arms embargo, passed before the present war was commenced, was disadvantageous to England and France; was not this as much a failure in impartiality as repeal of the arms embargo, which would be disadvantageous to Germany? One answer to this would be that the rule forbids changes only after war has begun; but surely this is nonsensical, for one is as much a failure in impartiality as the other. Another answer would be that the impartiality required is a technical one rather than a factual one: that the neutral state has no duty to equalize geographical factors, or inequalities in armaments or other materials. But if this is to be the guiding principle, surely it should apply to laws passed after war has begun as well as to laws already in effect before the war.

No self-respecting state can submit to a rule which would deny the use of its own legislative function, or prohibit it from taking discriminatory action in its own behalf, simply because a war is somewhere in existence. It is bad enough to permit any one state to upset the order and happiness of the entire world simply through the magic of a unilateral declaration of war; but to permit such a declaration to overshadow and override actions of a neutral government having no relation to the war except that of accident, cannot be conceded. It cannot even be conceded that the power of discrimination is taken from it. The neutral has already been forced to submit to far too much interference. There are no judicial precedents to show that a neutral may not change its laws as it pleases, during war; the treaties and codes ask only that the laws of neutrality be impartially applied.[4] And certainly the right of retaliation has never been taken from the neutral: if the belligerent violates the law to the injury of the neutral, the neutral may equally violate the law by way of reprisal. It is not pleasant to think of replying to one illegality by another illegality; but how else, in the absence of international government, can a state defend itself against a law-breaker?

Nor are there judicial precedents to show that a neutral owes a duty of impartiality between belligerents; this is a political matter, to be fought over by diplomats, or decided by the high command. A neutral will not ordinarily care to risk offending one belligerent by favoring another; but he may find it desirable to do so. He may find that a belligerent is stretching the law of neutrality to his injury; in such a case, he may properly wish to retaliate by discriminating in some fashion against that belligerent. Is he

[4] Art. 9 of the Fifth Hague Convention of 1907: "Every measure of restriction or prohibition taken by a neutral power . . . must be impartially applied by it to both belligerents." Note also the Preamble and Art. 9 of the Thirteenth Hague Convention of 1907, which speak of the duty to apply impartially *these rules—i.e.*, certain specific rules therein stated. To the same effect Art. 9 of the code of the International Law Association, 1928. These statements do not lay down a general rule of impartiality; they require impartiality in the application of certain designated and specific rules.

forbidden by international law to do so? Certainly not. He is not forbidden to go to war; why should he be forbidden to take measures less than war? In either case, he takes a risk; but it is not the risk of judicial condemnation; it is the risk of hostile action from the belligerent. This, to sum up, is all there is to the so-called rule of impartiality in the law of neutrality.

Such an inquiry as this reveals again the futility and sterility of neutrality. Except for a few specific rules which the court will apply, the neutral is free—and he must be free—so far as law goes, to make his own decisions. Judicial decisions in the field of the international law of neutrality have dealt for the most part with neutral individuals; they have set but few restrictions upon the freedom of action of a neutral government. Neutrals have been too submissive to war-makers; they are now learning that they must stand up against the war-maker, if they wish to have any freedom left. They should emphatically repudiate such a statement as this:

> The neutral State which takes action under this article may be required to bear the burden of showing that the change in its rules was induced by its own neutral necessities and not by the desire to aid one or the other belligerent.[5]

No such burden rests upon the neutral. It is the belligerent which has precipitated the disorder; it is the neutral which wishes to pursue the ordinary activities of life. If justification must be found for limiting the right of the neutral to pursue his ordinary courses, that burden must rest upon the belligerent. The mere fact of belligerency does not establish the belligerent upon Olympus, with power to command all other states. Even if the action taken by the neutral be for the definite purpose of aiding one of the belligerents, he has committed no illegality; he may have subjected himself to the risk of attack, but he has violated no law. He has as much right to lesser actions to maintain his own interests as the belligerent has to resort to war. The belligerent has too long dominated the scene; neutral states should stand up against his pretensions. Their safest course is to combine in advance and forbid him to make war.

CLYDE EAGLETON

AËRIAL FLIGHTS ABOVE A THREE-MILE OR OTHER VERTICAL LIMIT BY BELLIGERENTS OVER NEUTRAL TERRITORY

Following the vigorous protests by the Belgian and the Netherlands Governments to Germany, because of the various flights by military aëroplanes over the territory of these neutrals, a Havas dispatch reported on November 14, 1939, that the German Government was seeking to justify these flights by the fact that they were conducted at a height above neutral territory of more than three miles. Although no official pronouncement to this effect

[5] Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War, this JOURNAL, Supp., Vol. 33 (July, 1939), p. 318.