and search neutral vessels upon the high seas, not neutral vessels which have subjected themselves to French jurisdiction by entering a French port, and the German subjects not actually incorporated in the army, but capable of being so incorporated, are to be removed from the neutral vessels upon the high seas and made prisoners of war.

Now, the reason for this is, not that neutrals have committed any crime for which they are to be punished, but the reason, or pretext, is that German authorities in Belgium and in France have made prisoners of war, or have otherwise held French citizens and Belgian subjects fit for military service. This action of the German authorities is regarded as wrong, and neutral vessels carrying German subjects of the class specified are to suffer for alleged misconduct of German authorities in Belgium and in France.

Retaliation is at best an ugly word, and leads easily to reprehensible acts which people regret and would rather have undone when it is too late. But retaliation upon the enemy which affects only, or principally, neutrals who have committed no wrong is indefensible, and the nation doing so makes the justification of its course very difficult and alienates the sympathy of the neutrals of which the belligerents of to-day stand so sorely in need.

JAMES BROWN SCOTT.

SOME POPULAR MISCONCEPTIONS OF NEUTRALITY

There seems to be considerable popular misconception of the rights and obligations involved in a proper idea of neutrality.

In the first place, it should be observed that the popular idea of neutrality seems to differ widely from its juristic conception or content. In the eyes of the international jurist neutrality is a status or condition, and consists in the observance of the *law of neutrality*. This law consists of certain fairly well-defined rules and regulations which are, historically speaking, for the most part the results of precedents and of a series of compromises between the opposing interests of neutrals and belligerents.

Neutrality has been well defined as "the condition of those states which in time of war take no part in the contest, but continue pacific intercourse with the belligerents." States choosing a neutral status during war enjoy certain legal rights, such as the inviolability from belligerent activities of their own territory and the free use of the high seas,

the common highway of nations. This latter right is, however, subject to the exercise of the belligerent rights of visit and search and, under certain circumstances, of capture or even of destruction of neutral vessels and cargoes.

The rules of neutral obligation prescribe total abstention from certain acts (such as the sale of warships or the fitting and sending out of military expeditions); the observance of a formal impartiality in cases where indirect aid is permissible (as in that of the sale of munitions and war supplies); and the toleration by neutrals of the exercise of certain belligerent rights (such as those of visit, search, and capture).

The popular idea of neutrality seems to be much broader and far more comprehensive than the legal conception thereof. The popular idea seems to imply an attitude of assumed indifference or impartiality, of isolation or aloofness, involving a total abstention from acts which might possibly be of material assistance to either side. Or, if such indirect aid be permitted, this conception of neutral obligations would require that the impossible attempt be made of holding even the balance of indirect assistance between the opposing belligerents. Some would even go so far as to demand a sort of spiritual, moral, or intellectual neutrality involving (as such an attitude would) a suspension of judgment, a suppression of emotional life, and a negation in practice of our fundamental conceptions of justice and righteousness.

It is not always remembered that the status or condition of neutrality is not itself a legal duty. No state is under legal or moral obligation to be or remain neutral. Whether, for example, the United States shall continue to act the part of a neutral or belligerent in this war is a question of national policy which, like any other political question, should be decided from the standpoint of what we deem to be our own essential and permanent interests coupled with those of humanity at large.

It is of particular interest to note that the idea of juristic neutrality is comparatively recent. The theory of neutral rights and obligations was first formulated by the great publicists of the eighteenth century like Bynkershœk, Hübner, and Vattel; but was first put into real practice by the United States during Washington's administration. The so-called "founder" or "father" of international law, Grotius, was not an advocate of neutrality. In a single passage—almost his sole reference to the subject—he thus summarizes his position:

> It is the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just

war; and in a doubtful case, to act alike to both sides, in permitting transit, in supplying provisions, in not helping persons besieged.[1]

So recent and great an authority as Westlake practically indorses this view. He says:

> The general duty of every member of society is to promote justice within it, and peace only on the footing of justice, such being the peace which alone is of much value or likely to be durable. Thus in a state the man would be a bad citizen who allowed a crime to be committed before his eyes without doing his best to prevent it, or who refused to assist the magistrates in punishing crime; and in the society of states the action of all the members in upholding its laws is the more required since an organized government is wanting. . . . We may sum up by saying that neutrality is not morally justifiable unless intervention in the war is unlikely to promote justice, or could do so only at a ruinous cost to the neutral.[2]

Most publicists agree that the conception of "benevolent" neutrality is foreign to international law. This is entirely true from a purely juristic standpoint, for a state which was "benevolently" neutral in the observance of its neutral duties toward a belligerent would not be observing a real neutrality.

Yet benevolent neutrality may be an actual political fact. The neutrality of Germany toward Russia was confessedly "friendly" during the Russo-Japanese War.[3] The German Government failed to prevent (if, it did not, indeed, encourage) the sale to Russia of a number of transatlantic steamers belonging potentially to its auxiliary navy, and it appears to have permitted the exportation overland of torpedo boats to Russian territory.

As stated above, a state desiring to remain neutral is certainly bound to discharge its neutral obligations. But it is not legally bound to insist upon the observance of its neutral rights except in so far as these involve a performance of neutral duties. There is here a large sphere within which neutral statesmen may act at their discretion and be

[1] *Jure Belli ac Pacis, lib.* III, *cap.* 17.

[2] Int. Law, II, pp. 160–61. Westlake cites with apparent approval the views of Lorimer as set forth in his Institute of the Law of Nations, II, Bk. IV, ch. 19. Lorimer considers neutrality or non-participation in belligerency justifiable only in the following cases:

(1) involuntary ignorance of the merits of the quarrel; and (2) impotence or physical inability to participate in the war.

[3] Von Bülow, Imperial Germany, p. 81. Von Bülow claims that without "failing in strictly proper neutrality," the neutrality of Germany with respect to Russia was "even a shade more kindly than that of France."

properly influenced by motives of national policy or considerations of humanity or justice.

Thus, in this war we could not permit our territory to be used as a base of direct political or military activity in the interest of any belligerent, for that would involve a breach of neutral obligation as well as a violation of sovereign rights. Nor would motives of national honor and self-respect allow us to permit the massacre of those of our nationals who are non-combatants while on board common carriers on the high seas or to accept a mere money indemnity as compensation for the loss of our murdered dead.

But when we come to consider the questions involved in Great Britain's straining of the law of contraband, blockade, and continuous voyage, the case stands far otherwise. Mere property rights on however large a scale are here involved, and the case is not complicated by considerations of national honor or a violation of sovereign rights.

Questions relating to our rights as traders or property owners should be decided primarily from the standpoint of the national interest. In their decision we must, however, consider not merely the temporary or even the material interests involved, but problems of present and future policy. Of these the main problem relates to our future relations with that Power, which it is almost certain will remain the "Mistress of the Seas" for many years to come and with whom we have enjoyed close cultural and social relations for several centuries.

AMOS S. HERSHEY.

THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

The JOURNAL has devoted several editorial comments to the American Institute of International Law, stating the reasons which suggested its foundation, the progress made towards its permanent organization, and the services which it is expected to, and believed by its partisans that it can, render to the development of international law in the Western Hemisphere.[1] Without seeking to cover this ground again, it is proper to state that, with the approval and co-operation of a publicist in each of the twenty-one American Republics, such progress was made that on October 12, 1912, the Institute was declared founded. It was the hope, however, of its founders that it might have in the near future a formal

[1] See comments in the JOURNAL for October, 1912, p. 949; January, 1913, p. 163; and October, 1915, p. 923.