Chapter 17

British Contribution to the Law of Neutrality: Principle and Practice

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I Introduction

The law of neutrality seeks to strike a balance between the protection of States not involved in an armed conflict (‘neutrals’) and measures parties to an armed conflict (‘belligerents’) may take to restrict trade with an opposing belligerent. According to traditional doctrine, the existence of war permits belligerents as of right to take measures affecting neutral shipping.1 First, belligerents may visit and search neutral merchant shipping for contraband or if there are grounds for suspecting that the neutral ship is acting as an auxiliary or support in favour of one of the belligerents (‘unneutral service’). Second, belligerents may establish a blockade to prevent the ingress or egress of all shipping, belligerent or neutral, from an enemy coast or port.

The precise balance between these belligerent powers and neutral commerce was long a matter of bilateral treaty as well as customary international law. Historically, the UK’s position had tilted in favour of broad belligerent powers since, according to Hall, ‘the harm done to a belligerent by noxious trade is so great as to outweigh the loss inflicted upon a neutral by interruption or restriction of his commerce’.2 The armed conflicts of the twentieth and twenty-first centuries, however, saw the UK embrace a far more restrictive approach to belligerent rights in light of fundamental changes in international law.

In the years following the First World War, the UK was at the forefront of attempts to articulate how neutrality could be reconciled with both the Covenant of the League of Nations and with the General Treaty for Renunciation of War as an Instrument of National Policy 1928. The position of the British

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1 According to Colombos, ‘[t]he belligerent, being left to protect himself against all intervention in war by neutral merchants and shipowners to his disadvantage, defends himself by the exercise of the right of visit and search’. C Colombos, The International Law of the Sea (5th edn) (Longmans, Green and Co., Ltd 1962) 712. As has been pointed out, belligerent ‘rights’ is a potentially misleading term for what are in fact powers to take certain actions. See A Roberts, ‘The Equal Application of the Laws of War: A Principle under Pressure’ (2008) 90 IRRC 931-935.

Government was supported by jurists who sought to translate this doctrinal shift into practice. The most prominent was Sir Hersch Lauterpacht, who offered a comprehensive vision of neutrality within a system of collective security and an international order that prohibited war. During the Second World War, Lauterpacht’s approach was adopted not by the UK but by the US, which, prior to its entry into the war, set out a concept of ‘non-belligerency’ as an alternative to neutrality. Since 1945, in a number of major armed conflicts, but particularly during the war between Iran and Iraq from 1980–1988, the UK has gone further than other States in articulating a principled basis for the integration of neutrality with the law on the use of force. It is an approach that emphasises integration and coherence with wider trends in international law, in contrast to other States that continue to adhere to the traditional law as a self-contained regime.

The more recent practice of the UK highlights how far it has travelled from its position in the nineteenth and early twentieth century as a champion of expansive belligerent rights. In seeking to align the exercise of belligerent rights with the law of self-defence, the UK’s approach emphasises systemic integration of neutrality within broader principles of international law. The historian Isabel Hull has noted that, in the First World War, the UK ‘preferred to cover its changes to law by referring to general, underlying principles’.3 It is this approach to change in international law that is a consistent feature of UK doctrine and practice concerning neutrality in the period between 1915 and 2015. The principal doctrinal representative was Lauterpacht, whose interpretative methodology is, to a certain extent, echoed in British practice.

This distinctive approach has certain implications for any attempt to assess the influence of the UK in the area of neutrality. The role of power and the development of customary international law is complicated in this area, owing to the fact that the same States have over time been belligerents as well as neutrals. This potential dual status has meant that, with some exceptions, most States have preferred to reaffirm established custom rather than to develop the law in a particular direction. The breadth of the traditional law of neutrality has led States largely to isolate it from broader developments in international law. In its readiness to reconcile elements of the law of neutrality with the law on the use of force, the UK position is unusual in being prepared to accept restrictions on the exercise of belligerent rights. Perhaps because of its narrower approach, it has not found broad acceptance amongst other States. Nevertheless, Lauterpacht’s conceptual resources and the translation of his approach

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