United States armament is dependent in time of war on the right to purchase arms from neutral countries until sufficient war materials can be obtained and prepared in this country. If the principles of the Burton resolution were adopted by other nations, it might force all nations to accumulate supplies of war materials and tend to increase militarism at home and abroad.

The prohibitions in the Burton resolution are much stricter than those in the Geneva Convention of 1925, which in time of peace allows shipments to governments or their agencies, and which in time of war is suspended. At Geneva the small nations, who depend on foreign war supplies, appear to have opposed any arrangement which would exclude them from the purchase of arms abroad. The events of the last war were still fresh in their minds. What would have been the situation of Belgium, or indeed of Holland, as to their military defenses if the purchase of war supplies in other countries had been prohibited?

Finally the Burton resolution obliterates the distinction long maintained in this country between an exportation of arms as a purely commercial venture, and an exportation involving the use of territory as a base of operations. It would place a restriction by municipal law on a trade which international law sanctions. At the same time, it would place a very onerous duty of self-imposed neutrality on the United States, violations of which would no doubt bring charges by the belligerents of laxity or bad faith on the part of this country, particularly if any change in the resolution were made by Congress during the progress of a war in which the United States was neutral. For these reasons, it has been suggested that any restriction or control of the kind proposed by the Burton resolution should be made by the importing country and not by the exporting country.

L. H. WOOLSEY.

RESTATEMENT OF THE LAW OF NEUTRALITY IN MARITIME WAR

In February, 1928, Senator Borah introduced a Senate Resolution reading as follows:[1]

> Whereas the rules of maritime law in time of war as codified at the Second Hague Conference and in the Declaration of London were in important respects departed from during the late war; and
>
> Whereas it is important as a condition of the limitation of armaments and of the orderly conduct of international relations that the rules of law as developed in the course of centuries be not left in doubt or uncertainty; and
>
> Whereas the present chaotic state of maritime law—leaving the seas subject to no definite rules save that of force and commerce to no ultimate protection save that of battle fleets—constitutes an incentive for great naval armaments; therefore be it
>
> Resolved, That the Senate of the United States believes:
>
> First. That there should be a restatement and recodification of the rules of law governing the conduct of belligerents and neutrals in war at sea.

[1] S. Res. 157, 70th Cong. 1st sess.

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> Second. That the leading maritime powers of the world owe it to the cause of the limitation of armaments and of peace to bring about such restatement and recodification of maritime law.
>
> Third. That such restatement and recodification should be brought about if practically possible prior to the meeting of the Conference on Limitation of Armaments in 1931.

This resolution has a long and significant background. It has its origin in the differences which arose between the United States and Great Britain during the period 1914–1917, as to the respective rights of belligerents and neutrals in maritime war, culminating finally in the breakdown of the Geneva Conference of 1926, among Great Britain, the United States and Japan, for the limitation of naval armaments. It would be most unfortunate if the difference of views as to rules of law were to become irreconcilable; and it is doubtless to prevent such an outcome that the Borah resolution was introduced. The resolution is likely to be debated, and probably adopted, in connection with the Naval Appropriation bill to come before the December session of Congress.

Since the Armed Neutralities of 1780 and 1800, in which neutral nations first sought armed organized protection for their rights, steady progress had been made by international agreement in limiting belligerent claims to interfere with neutral rights, and in enabling neutrals to escape ruination from wars in which they had no part or interest. The *Encyclopedia Britannica* correctly remarked:

> Neutrality is the most progressive branch of modern international law. . . . The rapid changes it is undergoing are in fact bringing the state-system of the modern world nearer to the realization of the dream of many great writers and thinkers, of a community of nations just as much governed by legal methods as any community of civilized men.

To this desirable end the United States has, from the beginning of its history, made the most commendable contributions, forever identified with the names of Washington and Jefferson. These contributions arose from resistance to British encroachments on neutral rights in the wars of 1793, when Britain undertook to prevent American commerce from reaching France, on the alleged ground that France was a peculiarly reprehensible nation, that the French Government had taken over control of the food supply, and that the entire population was engaged in war. The inference was that all foodstuffs sent to France would thus have a military or combatant destination. That argument Jefferson unequivocally denied. He maintained that "reason and usage" had "established that, when two nations go to war, those who choose to live in peace retain their natural right to pursue their agriculture, manufactures and other ordinary vocations," and "to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual," subject to the restriction "of not furnishing to either party implements merely of war," commonly known as contraband, nor of carrying "anything whatever to a place blockaded."

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When the British argument was repeated in 1916, with the substitution of Germany for France, it was not resisted as effectively as Jefferson had resisted it, over a hundred years before. The nineteenth and twentieth centuries had been marked by a steady advance in restraining belligerent claims and giving neutrals an established legal status, much along Jeffersonian lines. The decisions of Lord Stowell and of Marshall had made important contributions to this end; as had later the Declaration of Paris, the two Hague Conferences, and the confirmation of existing law embodied in the Declaration of London.

International relations still contemplate the possibility of war. International law, through the development of centuries, has worked out a fairly definite compromise between the two conflicting and irreconcilable claims of the belligerent to stop all trade with his enemies, and of the neutral to continue freely to trade with both belligerents. That compromise, like all adjustments, is founded not on logic but on agreement. Such agreement is the law governing their reciprocal relations, and it cannot legally be departed from by either party. It is built around the principle that the neutral may not furnish direct *military* aid to either belligerent, but that other trade is free. That principle underlies the rules governing the legal disability of neutrals to trade in contraband or to violate lawful blockades. Subject to these limitations, the neutral may freely trade with either or both belligerents in non-contraband goods and in goods "conditionally contraband" not destined for the military forces of the enemy state; and, of course, there never was any prohibition against trading with neutrals, though those neutrals, in turn, might possibly sell to belligerents.

Unhappily, this elaborate structure of the law of neutrality which protected non-combatants against starvation, and protected neutrals in their right to trade in non-military goods even with belligerents, was seriously impaired by the belligerents during the late war. Goods destined to neutral ports were freely captured on the allegation that they would or might ultimately reach enemy territory; neutral ships were compelled to stop in British or Allied ports; neutral countries were rationed; "measures of blockade" without legal support were enforced; a newly created doctrine of "retaliation" on neutrals was invented; the so-called doctrine of continuous voyage was extended beyond recognition; nearly every useful commodity was made contraband; the important category of goods "conditionally contraband" was in 1916 wiped out, resulting finally in the practical abrogation of the elementary and time-honored distinction between combatants and non-combatants.

Contrary to common experience after former wars, there was a disposition after the late war not to revive the issues created by these measures. Their fundamental nature, however, soon disclosed their inescapability. The claims of American shippers and ship-owners, who had during the period of American neutrality suffered from the application of these belligerent measures, and the proposal of an American naval program, necessitated renewed

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consideration for the legal issues involved. Neither the American claims nor the Naval Conference of 1926 helped to allay the differences, but on the contrary the irreconcilability of view would seem thereby to have been emphasized. The executive agreement of May 19, 1927, covering the American neutrality claims, commented upon in this JOURNAL (Vol. 21, p. 764), while professedly designed to promote concord by providing for the settlement of the claims, has in terms perpetuated differences of the gravest character, for it reserves "the right of each Government to maintain in the future such position as it may deem appropriate with respect to the legality or illegality under international law of measures such as those giving rise to claims" covered by the agreement. It thus reserves to the alleged violator of law the "right" to renew his attacks, and to the other party the right to resist. This does not tend to make for fruitful concord in naval policy or program, a conclusion confirmed by the outcome of the Geneva Conference of 1926. There Great Britain insisted upon a large fleet of light cruisers, on the allegation that this was necessary for "defensive" purposes, to protect her commerce and hence her food supplies in time of war. But it has been doubted whether this reflected the entire case. As long as there is no battle fleet superior to Great Britain's, the danger to her communications would seem to lie in submarines, and the defense against these, in the absence of strict limitation in numbers or size, lies not in cruisers, but in destroyers. An occasional raider can hardly explain the demand for a preponderance of cruiser tonnage. A more correct explanation is probably that advanced by Lord Wemyss in the British Parliament (November 11, 1927) to the effect that a large cruiser fleet is needed not merely to protect commerce between Great Britain and other nations, but to prevent commerce between other nations and Great Britain's enemies, apparently regardless of the rights of neutrals. Inasmuch as the United States contemplates its normal position as that of a non-belligerent, it is evident that the United States has an interest in the maintenance of the rules of law, and in opposing claims based on interest alone. At all events, the doubts professedly cast upon the existence of rules of law governing the relations between belligerents and neutrals since 1917, create confusion and uncertainty, and necessarily invite the contemplation of an inevitable resort to force to defend claims of right. The only alternative to the protection afforded by law is the protection secured by force. The present position would embarrass every attempt at disarmament, both on land and sea. The security of a belligerent which is obtained by claiming the right to dispose of neutral commerce as belligerent interest dictates is likely to prove unreliable and precarious, for it will encourage a general increase in naval armament, and the concomitant temptation to use it. More security is likely to be obtained from an international agreement as to the rules of law at sea, than from any ostensible or implicit assertion of the supremacy of interest over law.

This is the background and explanation of the Borah resolution. By its

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very terms, it states the issue clearly. Unless there is an agreement among the maritime Powers as to the rules governing their relations in the unhappy contingency of war, the Naval Conference to be called at Washington in 1931 is likely to repeat the experience at Geneva. Even those who favor a small American navy, or who do not believe that the American navy needs to be as large as Great Britain's, are deprived of their most effective argument by the refusal to agree upon rules of law. For the interests of future peace, therefore, an agreement is urgently required.

It has been contended, however, that the proposal of Senator Borah is inconsistent with the theory of the League of Nations, because it recognizes the possibility of future war and because it contemplates a status of neutrality. It is argued that the proposal to restate the law of neutrality is contrary to Articles XI and XVI of the Covenant of the League. It is said that "the provisions of the Covenant . . . constitute an attempt to realize President Wilson's statement that the day of neutrality is past" and that, apart from the United States, "all others of the Powers chiefly interested in using sea power—France, Great Britain, Italy and Japan—are committed to the Covenant." It is added that these nations "are committed to the attempt to say that a war is a matter of general interest, and that in cases of pronounced aggression no body of sea law is to restrain attempts to overcome the aggressor." The question is asked:

> Is the United States to maintain a contrary thesis? Are we to insist on behalf of ourselves and other states, that the old law of neutrality which gave us such difficulty during the war, must be observed in the future? If not, are we prepared to join in some recognition of common action which other states may take against the aggressor? Only in this latter case, which finds no statement in Senator Borah's resolution, can a fruitful collaboration of the leading maritime powers be envisaged. If the United States should insist on a continuation of the pre-war law of neutrality, while all other naval powers are insisting upon its revision in the light of covenant obligations, there would seem to be little basis for an international conference or for any attempt at recodification.[2]

To the writer, it would seem that the League of Nations cannot be aided by any continuation of the present doubt and uncertainty as to the rules of law. Nor is there evident any abandonment of the status of neutrality in principle. Not only have there been, since 1919, numerous treaties providing for neutrality, but that status is recognized by the Great Powers in the Hague Convention of 1923 on the rules of law governing the use of radio and aircraft in time of war, in decisions of the Permanent Court of International Justice, and in numerous recent agreements. Moreover, the Covenant itself contemplates wars and the possibility of war. It may often be impossible or inexpedient to characterize certain conflicts as cases of "pronounced aggression," even in the unprecedented event of unanimity among the European Powers represented in the Council, on so delicate and usually so com-

[2] Manley O. Hudson, in New York Times, March 11, 1928.

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plicated an issue. The League of Nations still provides plenty of opportunity for unprohibited war and the Locarno Treaties and the military alliances concluded in Europe since 1919 seem definitely to contemplate the permissibility of war. Out of these facts evidently arose the difficulty of some of the European Powers in assenting, without reservation, to the Kellogg proposal for the renunciation of war by treaty. It seems hardly likely that in the event of war all the nations will join the struggle. That being true, the non-belligerents must have a legal status. It seems impolitic to suggest or imply that wars will be sooner ended by converting local conflicts into wide and general wars. Moreover, the allegation that the United States hampers the cause of peace by its supposed non-committal attitude in the event of the application of Article XVI of the Covenant against an "aggressor," rests upon the supposition that the nations represented in the Council will be unanimous in determining the "aggressor." That condition seems to the writer to remove the allegation from the field of practical considerations; and if there were unanimity, it is doubtful whether it would become necessary to invoke Article XVI. The United States has never declined to admit the application of a legal blockade, and that would seem, in practice, to be far simpler to apply than the novel measures proposed by Article XVI. It is questionable whether Article XVI will ever come into force.

More dangerous, however, it is believed, is the suggestion that no law should stand in the way of the League's efforts to overcome "aggression." Any suggestion that the end justifies the means seems retrogressive. It is probably good policy that the use of arms should be made more difficult, and perhaps internationalization is one method; but that innovation presupposes so many fundamental changes in international relations, notably in the economic field, that the day of internationalized force, carrying out not national policies but international conclusions only, seems rather remote. But even internationalized force should be employed under definite rules, for order can hardly be achieved by the promotion of chaos. Impatience with law often accompanies a desire to reach an emotional goal, but that tendency, it is believed, rarely promotes human welfare. After all, it seems perilous to overthrow the experience of the past in an effort to grasp at moral straws. It would be unfortunate for the League if it were associated in the public mind with methods calculated to disregard settled law. If it is true that a new day has arrived, then certainly there should be no objection to recording its achievements in a new set of rules which would command the support of all interested governments. But even that requires common counsel, and deliberate efforts to reach a general agreement. Presumably the United States would enter a conference in a coöperative spirit, willing to contemplate the possibility of useful and approved changes and modifications in the pre-war laws of neutrality. But such changes can hardly be imposed by one or two Powers alone.

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Yet the view that the insistence on the rights of neutrals is a recognition of the possibility of war in the traditional sense cannot be gainsaid. The evidence indicates, however, that the possibility of war is an important factor in the national policy of all the major Powers. In this policy, the League of Nations, in spite of Articles XI and XVI, appears to have made no material change. Possibly a League with larger powers and functions might do so. Whether the ratification of the proposed Kellogg treaties will achieve that result cannot yet be determined. It would seem that the only alternatives to the continued recognition of the rights of neutrals are either an international organization which alone shall have the power to authorize the use of force under all circumstances, or else the complete abolition of war. The United States can surrender its traditional neutral rights only to an international organization which shall centralize and control the use of force, a contingency constituting a veritable revolution in international relations. It will be recalled that Great Britain declined to accept the Geneva Protocol of 1924, which contemplated all sea power as an international police force. The abolition of war has, by virtue of the Kellogg proposals, entered the field of politics. The abolition of war would obviously terminate the status of neutrality. But until either of the two alternatives mentioned has been achieved, it seems most practical to rely for progress upon the strengthening of law as developed through the centuries for the government of international relations, with conventional changes and modifications as human welfare and circumstances require. It is to this practical end that the Borah resolution looks. In its proposed restoration and substitution of law for force, it should command general support.

EDWIN M. BORCHARD.

THE THIRD CONFERENCE OF TEACHERS OF INTERNATIONAL LAW

The Third Conference of Teachers of International Law met at the Carnegie Institution in Washington on Wednesday and Thursday, April 25–26, 1928. Inaugurated in 1914, on the initiative of the Carnegie Endowment for International Peace and the American Society of International Law,[1] and continued in 1925 on the initiative of the teachers themselves,[2] these meetings would seem now to have become a recognized means of cooperation among American teachers of international law in the advancement of their science.

The conferences have been devoted both to problems of instruction and to problems of research. At the Third Conference this year, after meetings of committees created by the Second Conference in 1925 and a plenary session to receive and act upon committee reports, the program consisted of two

[1] See Conference of 1914, Proceedings, pp. 1, 4.
[2] See Conference of 1925, Proceedings, p. 1.

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