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The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality

Georgios C. Petrochilos*

ABSTRACT

The law of neutrality applies among states engaged in war and third states seeking to maintain friendly relations with the belligerent states. While belligerent parties possess belligerent rights, including those in the Law of Prize, states deemed neutral must fulfill certain neutral duties. In exchange, neutral states enjoy the protection afforded to neutral parties by the law of neutrality.

The Article focuses on the state of affairs that triggers application of the law of neutrality. The law addressing this issue leaves many questions unanswered. This Article addresses the importance of the declaration of war by belligerent states in assessing whether the law of neutrality will apply to third states. The Article argues that state practice has established that the laws of war and neutrality are now conditioned on the existence of armed conflict, rather than official declarations of war. The Article concludes by adopting the concept of a "state of generalized hostilities" to accurately characterize state practice regarding the Laws of War and the status of third states as neutrals.

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I. INTRODUCTION

The law of neutrality is the regime regulating the relations between two or more states waging a war and the states wishing to retain friendly relations with the war-waging parties. It

therefore comprises the rules pertaining to the duties and rights of neutrals, and the powers the belligerents possess vis-à-vis neutrals in order to verify whether the latter comply with their neutral duties. These belligerent powers are mainly governed by the Law of Prize.¹

The above definition begs the question "what is war?" In common parlance, the term signifies an armed contention of some sort. In law, however, a *state of war* is a technical concept designating a particular state of affairs, the existence of which is apposite to the application of a special body of rules, the Laws of War.² This formula, however, does not spell out precisely what conditions comprise a state of war; this question remains open in the law as it stands. According to the classical state of war doctrine, a state of war exists if at least one of the parties to a conflict admits or declares it to exist. The determination of third states, or indeed, the other party to a conflict is largely irrelevant.³ The insufficiency of this unilateral and formalistic conception became clear in the practical application of the so-called *ius contra bello*. The prescription not to "resort to war" contained in the Kellogg-Briand Pact⁴ and the Covenant of the League of Nations⁵ may be, and has been, circumvented by a state actually initiating or partaking in hostilities while asserting that it did not intend to *create* a state of war.⁶ Despite these circumventions, the classical state of war doctrine persisted in the League of Nations' practice.⁷

Post-1945 developments in the law took account of these complexities and artificialities, which were a source of potential evasion of the law. The U.N. Charter reaffirmed the prohibition of war, already part of customary law,⁸ and restated it in an attempt to lift the ambiguities. Article 2(4) reads: "All Members will refrain in their international relations from the threat or use of

1. See 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 604-44 (1968) (discussing the Law of Prize in naval warfare).

2. *Id.*

3. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 398 (1963).

4. General Treaty for the Renunciation of War, Aug. 27, 1928, 94 L.N.T.S. 57; Cmd. 3410.

5. LEAGUE OF NATIONS COVENANT arts. 11, 16.

6. See *infra* note 202 and accompanying text.

7. See, e.g., *Reports and Resolutions on the Subject of Article 16 of the League of Nations Covenant*, League of Nations Doc. A.14.1927.V. (1927).

8. See BROWNLIE, *supra* note 3, at 109-112; 2 FRIEDRICH BERBER, LEHRBUCH DES VÖLKERRECHTS: KRIEGSRECHT 35 (1969); see also XXII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 462-64 (1948); Military and Paramilitary Activities (Merits) (Nicar. v. U.S.), 1986 I.C.J. 4, ¶¶ 187-92 [hereinafter *Nicaragua*].

force. . . ."⁹ The use of the phrase "state of war" as a term of art has also been abolished in the rules of warfare. The 1949 Geneva Conventions apply, according to a common Article 2, "to all cases of declared wars or any other armed conflict . . . even if the state of war is not recognised by one of [the parties]."¹⁰ Generally, it may be said that in the practice of states the legal principle relevant to the application of the whole corpus of the Law of Warfare (*ius in bello*) has become armed conflict.¹¹

The Laws of War have thus ceased to be entirely conditioned on the existence of a state of war. Despite the changes in the general legal framework, however, old problems persist and have become accentuated with regard to neutrality. Is the existence of a state of war, if such a state may still exist in law, a legal requirement of neutrality—or has it been replaced by the concept of armed conflict? Furthermore, what are the repercussions of outlawing the *use of force* on the war-dependent institution of neutrality? This Article proposes to address these persistent issues in the following fashion. First, the Article will examine them in the context of the written law. Second, it will briefly spell out the cases in which neutrality is still a lawful position as a necessary precursor to any analysis of state practice. Third, it will analyze critically the pertinent examples in state practice, relying predominately on primary sources. Finally, the Article will systematize the findings in state practice.

II. SOME SOURCES OF DOUBT WITH REGARD TO NEUTRALITY IN CURRENT INTERNATIONAL LAW

A. *The Lacuna in Written Law*

The consolidation of the customary rules of neutrality led to the codification of the law in the two Peace Conferences, in 1899 and 1907. The two 1907 Hague Conventions, namely "Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land,"¹² and "Convention (XIII) Concerning the Rights and Duties of Neutral Powers in

9. U.N. CHARTER art. 2, para. 4.

10. See, e.g., Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135. Cmd 550.

11. See the unequivocal Japanese official position to that effect in THE PRACTICE OF JAPAN IN INTERNATIONAL LAW: 1961-1970, para. 292 (Shigeru Oda & Hisashi Owada eds., 1982).

12. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention V), Oct. 18, 1907, 36 Stat. 2310.

Naval War"¹³ are significant in that they spell out detailed rules on neutral rights and duties,¹⁴ and therefore provide a starting point for analysis.

Both Conventions are silent on the main issue of this Article: the legal notions relevant to the application of the law of neutrality. Although the Conventions set forth rules that apply during "war," and as a result often refer to "war," the meaning of the term is not defined for the purpose of the Conventions. The texts adopted in the context of the Peace Conference as a whole, however, may provide some guidance. Convention III "Relative to the Opening of Hostilities" was adopted in the course of the same Peace Conference, and it stipulates that hostilities may not begin prior to an ultimatum or a declaration of war.¹⁵ Furthermore, Article 2 of Convention III contains a specific rule addressing the critical time that a state of war, *within the meaning of the said Convention*, becomes effective for neutral powers.¹⁶ It is against this background of regulated war that the Neutrality Conventions were conceived, which explains the fact that writers of that period never referred to any confusion on this point.¹⁷

Nonetheless, this does not settle the matter. Convention III purports to set forth the conditions for legitimate warfare, not the requirements for the application of neutrality. Neither the wording of Article 2 nor the spirit and economy of that Convention indicate that the law of neutrality is to apply only after a declaration of war.¹⁸ That is, the drafters of, and the parties to, the above Conventions did not intend to state that the law of neutrality may not apply in wars brought about by means other than a declaration of war or an *ultimatum*—although these were conceived as the lawful ways to initiate war.

Another point with respect to the neutrality Conventions is that they were conceived then as an *ab initio* codification of existing customary law.¹⁹ This signifies that the customary

13. Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague Convention XIII), Oct. 18, 1907, 36 Stat. 2415.

14. The 1928 Havana Convention on maritime neutrality reproduces substantially or verbatim the provisions of Hague Convention XIII. See Convention on Maritime Neutrality, Feb. 20, 1928, 135 L.N.T.S. 187.

15. Convention Relative to the Opening of Hostilities (Hague Convention III), Oct. 18, 1907, 36 Stat. 2259; see also Michel Voelkel, *Faut-il encore déclarer la guerre?*, 1991 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [A.F.D.I.] 7.

16. See *The Wirpi*, 12 I.L.R. 300 (Prize Ct., Hamburg, 1941).

17. See, e.g., WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 569-570 (J.B. Atlay ed., 6th ed. 1909).

18. Cf. Louis Renault, *Rapport sur l'Ouverture des Hostilités*, in 3 ACTES ET DOCUMENTS DE LA DEUXIÈME CONFÉRENCE DE LA PAIX 46, 49-50 (1907).

19. See *The Regolo Attilio and other vessels* (It., U.K., U.S. v. Sp.), 12 R.I.A.A. 3, 8 (*ad hoc* 1945); see also 6 RÉPERTOIRE DE LA PRATIQUE FRANÇAISE EN

international law of neutrality continues to exist and evolve for the process of codification is without prejudice to the existence and content of a customary norm.²⁰ It is to such developments in the law of neutrality as regards its conditions of application that this Article will turn. First, however, there are two further preliminary points that need to be made in order to delimit the domain of this Article.

B. *Commercial Relations between Individuals and Belligerent States*

A perusal of the Hague Neutrality Conventions indicates that the duties of neutrals constitute specific manifestations of two main principles: the principle of abstention from the conflict, and the principle of impartiality in the application of measures taken in matters of war. Both Conventions contain a common Article 7, however, which limits the duty of abstention incumbent on a neutral state by stipulating that a neutral power is not bound to prevent the export of arms supplies for the use of either belligerent.²¹ It is not within the ambit of this Article to explain the logic behind this provision, but the doubts expressed by learned writers about the expediency of preserving this rule²² have been affirmed by contemporary state practice: an essential manifestation of the observance of neutral duties is the discontinuance of military supplies to the belligerents.²³

C. *Neutrality under the U.N. Charter*²⁴

The premises of neutrality are in sharp conflict with the idea behind the creation of the U.N. Whereas neutrality guarantees peace to states individually through a stance of abstention, in the U.N. system peace is restored by collective action under the guidance of the Security Council. In the more traditional legal fashion of *vires*, neutrality logically presupposes independence—that is, the legal capacity to determine a state's own position with regard to questions of peace and war. United Nations

MATIÈRE DE DROIT INTERNATIONAL PUBLIC ¶ 1014 (Alexandre-Charles Kiss ed., 1969) (collection of official documents).

20. See *Nicaragua*, *supra* note 8, ¶¶ 177-82.

21. See *supra* notes 12 & 13 (citing Hague Conventions V and XIII).

22. See CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 301 (Corbett trans., 1957); WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 346-347 (1964).

23. See *infra* Parts III.A.1, III.B & III.C.1.

24. See John B. Whitton, *La Neutralité et la Société des Nations*, 17 R.C.A.D.I. 449 (1927-II) (discussing neutrality under the League of Nations Covenant); NICOLAS POLITIS, *LA NEUTRALITÉ ET LA PAIX* (1934) (Macken trans., 1935).

membership restricts a state's ability to make these decisions independently. This is made clear in Article 2(5) of the U.N. Charter, which provides for a duty of cooperation with the organisation.²⁵

This contradiction of principle, however, does not lead to a tacit abrogation or abolition of neutrality as an institution.²⁶ In the absence of any express reference to neutrality in the U.N. Charter,²⁷ any possible conflicts must be resolved with caution.²⁸ Although the issue merits separate analysis, it is sufficient for the purposes of this Article to state that neutrality is permissible in any case where there is no binding Security Council decision prescribing a certain course of conduct in the form of collective action. Neutrality must therefore not be excluded in case the Security Council does not designate an aggressor party, or does so but fails to prescribe collective action.²⁹ In this latter case, the nuance is that the conclusive determination of an aggressor by the Security Council³⁰ precludes the adoption of a neutral position to the extent that doing so involves the granting of rights or facilities to the aggressor party.³¹

It is only when the Security Council adopts a binding Resolution under Chapter VII, in which collective action is prescribed, that all member states are bound by Articles 2(5) and 25 to participate in such action, and not to take any measures to fetter its exercise.³² The enforcement action against Iraq, after its invasion of Kuwait, is a particularly interesting case study of collective action in relation to neutrality. Having issued economic sanctions,³³ with which the states have almost universally

25. See U.N. CHARTER art. 2, para. 5.

26. Initially, some commentators believed that it did. See, e.g., C.G. Dehn, *The Problem of Neutrality*, 31 TRANSACTIONS OF THE GROTIUS SOCIETY [T.G.S.] 139 (1946); N.P. Grieve, *The Present Position of 'Neutral States'*, 33 T.G.S. 99 (1948); ISIDRO FABELA, *LA NEUTRALITÉ* 145-161 (1949).

27. A French proposal to amend Article 2(5) to explicitly exclude the invocation of the status of permanent neutral as a valid reason for nonparticipation in collective action was not accepted. See J.A. Frowein, *Article 2*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 129, ¶ 1 (Brunno Simma et al. eds., 1994).

28. Cf. Hersch Lauterpacht, *The Limits of the Operation of the Laws of War*, 30 BRIT. Y.B. INT'L L. 206, 209 (1953).

29. This was the case during the Turkish invasion of Cyprus. See S.C. Res. 360, U.N. SCOR, 29th Sess., 1789th mtg., U.N. Doc. S/Res/360 (1974).

30. For the conclusiveness of such determination, see Delbrück, *Article 25*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 27, at 407-418.

31. See, e.g., Hague Convention XIII, *supra* note 13, arts. 17, 19 (regulating the admission of vessels in ports).

32. See U.N. CHARTER arts. 2, 25.

33. See S.C. Res. 660, U.N. SCOR, 46th Sess., 2932 mtg., U.N. Doc. S/Res/660 (1990).

complied,³⁴ the Security Council authorized, but did not require, collective action in support of Kuwait in Resolution 678.³⁵ Again, the question of the precise legal nature of the action actually undertaken merits separate examination.³⁶ Suffice it to observe that, as in the Korean War, action was not taken under Article 42, but on the initiative of member states under the authorization of the Security Council.³⁷ In both cases, member states acted lawfully, that is, with the consent of the Security Council, but they were not obliged to act in that manner.

A number of states officially declared that they would remain neutral, and observe the duties of neutrals. Switzerland did not allow the overflight of allied aircraft in its airspace,³⁸ nor did Jordan or India.³⁹ Furthermore, Iran stated that any aircraft that entered its airspace would be withheld "until the termination of hostilities."⁴⁰ These statements were in perfect accord with the law of neutrality as codified in the Hague Conventions.⁴¹ More importantly, perhaps, there is no evidence that this stance was not considered by the Allied Chief of Staff to be illegal. This would be a position in accord with the traditional law of neutrality.

Thus far, it has been established that neutrality exists under the U.N. Charter, and it subsists even in the presence of collective

34. For a repertory of national and supra-national implementing legislation, see, for example, European Economic Community Council Regulations 2340/90, 1990 O.J. (L213) 1; 3155/90, 1990 O.J. (L304) 1; 29 CAN. Y.B. INT'L L. 476-477 (1991) (Can.); 24 REVUE BELGE DE DROIT INTERNATIONAL [R.B.D.I.] 216-218 (1991) (Belg.) The U.S. documents are collected in THE KUWAIT/IRAQ SANCTIONS: UNITED STATES REGULATIONS IN AN INTERNATIONAL SETTING (Preston Brown ed., 1991).

35. See S.C. Res. 678, U.N. SCOR, U.N. Doc. S/Res/678 (1991).

36. The U.K.'s position was that it constituted action in collective self-defense. Under the Authority of the Security Council Resolution 678; see Statement of Prime Minister Major, 183 PARL. DEB., H.C. (6th ser.) 979-80 (1991).

37. See also CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 313 (1993); Statement, 25 NETH. Y. B. INT'L L. 442-45 (1994). For an analysis of neutrality in the Korean War, see Howard J. Taubenfeld, *International Actions and Neutrality*, 47 AM. J. INT'L L. 377 (1953).

38. See the relevant official documents and Statements in 1 SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT [S.Z.I.E.R.] 578-579 (1991). The situation with Switzerland is particularly complex, owing to the fact that it is not a member of the United Nations, and is guaranteed the status of permanent neutral. See also Dietrich Schindler, *Kollektive Sicherheit der Vereinten Nationen und daurende Neutralität der Schweiz*, 2 S.Z.I.E.R. 435 (1992); Daniel Thürer, Comment, *U.N. Enforcement Measures and Neutrality; the Case of Switzerland*, 30 ARCHIV DES VÖLKERRECHTS [A.V.R.] 63 (1992).

39. See Department of Defense Report, Appendix, 31 I.L.M. 612, 637-640 (1992); U.N. Doc. S/22099 (Jan. 17, 1991).

40. See U.N. Docs. S/22141 (Jan. 23, 1991), S/22163 (Jan. 28, 1991).

41. Articles 3, 8, 21, and 25 of Hague Convention XIII, *supra* note 13, consecrate the inviolability of neutral territory, which also extends to the airspace above. See also *supra* note 38.

action authorized, but not prescribed, by the Security Council. Neutrality has applied in such cases regardless of the fact that enforcement action pursuant to the U.N. Charter is not considered to result in a state of belligerency.⁴² This last finding, however, is only tentative at this point, and one must turn to contemporary state practice for further guidance.

III. REPRESENTATIVE EXAMPLES FROM THE RELEVANT STATE PRACTICE

In all the examples discussed below, the application of the law of neutrality was an essential aspect of the legal situation ensuing from the conflict. For the purposes of this Article, state practice comprised official statements, conduct, claims, and legislative acts.⁴³ Judicial decisions are also considered to the extent that they reflect the official position of the forum. Emphasis has been given to material that reflects a legal position, especially of the states particularly affected by the conflicts discussed.⁴⁴

A. *The Arab-Israeli Conflict*

The Arab-Israeli conflict spanned approximately thirty years, comprising periods of full-scale hostilities followed by lengthy intervals of political tension and isolated hostile incidents (low-intensity conflict). There are four periods of distinct persistent armed conflict, namely 1948-1949, 1955-1956, 1967, and 1973. Throughout the whole period of the conflict, neutrality was a recurring theme. There are two broad issues to be identified and distinguished for the purposes of analysis: (1) the position nonparticipant states adopted with regard to the war-waging parties, and (2) the assertion of belligerent rights by Egypt toward third states.

1. The Supply of Military Matériel to the Parties

It is significant to note at the outset that third party states generally avoided taking a precise legal position regarding the nature of the conflict, and classifying their position accordingly.

42. See, e.g., Barry Mawhinney, *Canadian Practice in International Law, At the Department of External Affairs 1990*, 29 CAN. Y.B. INT'L L. 454, 467 (1991).

43. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-1975).

44. Cf. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 4, 43-44 (Feb. 20).

For instance, Canada adopted a consistent policy of imposing restrictions on arms supplies during the periods of actual hostilities. These restrictions were part of Canada's general foreign policy and were not based on express grounds of neutrality.⁴⁵ The U.K.'s official position was that because armed hostilities had been acknowledged, arms supplies would not be discontinued. Mr. Selwyn Lloyd, Secretary of State of the Foreign and Commonwealth Office, stated in 1956 that "*over the past five years [the United Kingdom has] managed to keep a fair balance*" in arms supplies.⁴⁶ France was the major arms supplier to Israel in the 1950s,⁴⁷ and a number of East European countries supplied arms, mainly to the Arab belligerents, throughout the years of conflict.⁴⁸ By way of contrast, the official position of the Federal Republic of Germany is interesting. The Arab League protested an agreement entitling Israel to pecuniary compensation for World War Two, stating that the 1948 war was still in progress. *Bundeskanzler* Adenauer conceded that the Federal Republic was subject to the duties of neutrals, and stated that the terms of the agreement precluded Israel from using the funds towards the procurement of military supplies.⁴⁹ It was thus a significant policy change when France⁵⁰ and the United Kingdom⁵¹ decided to observe strict neutrality during the period of actual hostilities in the later stages of the conflict in 1967 and 1973. The United States, not having supplied arms until 1966, adopted a formal position of neutrality in the course of the 1967 war,⁵² but did not maintain that position in the 1973 war.⁵³

45. See STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, *THE ARMS TRADE WITH THE THIRD WORLD* 287 (1971) [hereinafter SIPRI].

46. *Middle East*, 550 PARL. DEB., H.C. 2146 (Mar. 28 1956) (emphasis added). Compare the Swiss practice in early World War Two as reflected in the documents collected in 4 RÉPERTOIRE SUISSE DE DROIT INTERNATIONAL PUBLIC 2252-53 (Paul Guggenheim et al. eds., 1975).

47. See SIPRI, *supra* note 45, at 530-31.

48. MICHAEL CARVER, *WAR SINCE 1945*, 240 (1980).

49. See *Völkerrechtliche Praxis der Bundesrepublik Deutschland in den Jahren 1949 bis 1955*, 23 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 175, 283-84 (1963), confirming an earlier statement reprinted in *Völkerrechtliche Praxis der BRD im Jahren 1956*, 18 ZAÖRV 691, 724 (1957).

50. See the documents collected by Jean Charpentier, *Pratique Française concernant le Droit International Public*, [1967] A.F.D.I. 892; [1968] A.F.D.I. 892-896; [1969] A.F.D.I. 893-894.

51. See SIPRI, *supra* note 45, at 515, 524.

52. See *The Situation in the Near East*, 56 DEP'T ST. BULL., June 26, 1967, at 949.

53. Patrick M. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249, 301 (1976).

The application of the law of neutrality may justifiably be described as unsatisfactory due to its inconsistencies. Be that as it may, this Article is concerned with a more formal aspect of the law of neutrality. Despite the inconsistency the evidence presents from a substantive point of view, a certain useful pattern of conduct is apparent so far, to the effect that neutrality is a permissible policy toward parties involved in actual hostilities. One argument against this assertion is based on the fact that a Tripartite Declaration by France, the United States, and the United Kingdom⁵⁴ limiting arms supplies to the Middle East was made in 1950, when actual hostilities were not in progress. There is nothing in that agreement, however, to suggest it was prompted by a sense of legal duty, that is, a duty imposed by neutrality, rather than the mere political preference that hostilities not occur again.

This proposition must now be tested in contradistinction with state practice in respect to the invocation of a state of belligerency by Egypt, as the purported source of "active legitimation" for belligerent measures taken by her against vessels flying the flag of a third party state.

2. Prize Action in the Suez Canal

Although the existence of a state of war was an essential argument advanced by the Egyptian government to justify the exercise of visit, search, and seizure on vessels flying the flag of third party states (and their cargoes), the legality of these measures was not dependent solely on rules of neutrality. The Suez Canal is subject to a special régime consecrated by the 1888 Constantinople Convention,⁵⁵ which binds Egypt as successor to the Ottoman Empire.⁵⁶ The Constantinople Convention provides very limited exceptions when freedom of navigation in the Suez Canal may be limited "in time[s] of peace as in time[s] of war,"⁵⁷ and imposes additional conditions for interfering with that freedom, beyond those imposed by the law of neutrality.⁵⁸

54. See *Tripartite Declaration Regarding Security in the Near East*, 22 DEP'T ST. BULL. 886 (May 25, 1950).

55. Convention Respecting the Free Navigation of the Suez Canal, Oct. 29, 1888, 171 Consol. T.S. 241.

56. Declaration made by the Government of Egypt on the Suez Canal and the Arrangements for its Operation, Apr. 24, 1957, arts. 1, 3(a), 265 U.N.T.S. 300.

57. See Convention Respecting the Free Navigation of the Suez Canal, *supra* note 55, arts. I, X.

58. See also Ruth Lapidot, *The Suez Canal, the Gulf of Suez, and the 1979 Treaty of Peace between Egypt and Israel*, in Festschrift für Rudolf Bindschedler 617 (Emmanuel Diez et al. eds., 1980); Richard R. Baxter, *The Law of International Waterways* 216 (1964); Yves Van der Mensbrughe,

Egypt declared war on Israel on May 14, 1948.⁵⁹ On the same day, Egypt closed the Suez Canal to all Israeli ships, issued lists of contraband, and instituted a Prize Court in Alexandria.⁶⁰ Pursuant to this legislation, the Egyptian authorities exercised the well-established right⁶¹ of visit, search, and seizure on all vessels flying the flag of third-party states that were en route to or coming from Israel, except Arab states. Egypt relied on the proclaimed state of war to justify these measures as lawful action to be tolerated by neutrals as a matter of neutral duty.⁶² Indeed, this justification is consonant with a strong view in continental European doctrine, according to which a declaration of war is a demonstration of the will to bring into force the Laws of War, which declaration therefore obligates third states to submit to belligerent rights.⁶³

As a preliminary matter, it should be observed that the Egyptian practice reflects the position that all third states were to be considered neutral, although at that stage no declarations of neutrality had been made. It is also significant that it was argued before the Prize Court on several occasions that these measures were not valid as belligerent action since Egypt did not recognize Israel to be a state, and war—in the technical sense—can only occur between states.⁶⁴ By implication, the Prize Court agreed that the *sedes materiae* of the validity of measures was the existence of a state of war when it held that: “The existence of a state of war or of neutrality in so far as non-belligerents are concerned cannot be discussed by the Court, for it is [its] duty to

LES GARANTIES DE NAVIGATION DANS LE CANAL DE SUEZ 76 (1960); Leo Gross, *Passage through the Suez Canal of Israel-bound Cargo and Israel Ships*, 51 AM. J. INT'L L. 530 (1957); HEINZ WAGNER, DER ARABISCH-ISRAELISCHE KONFLIKT IM VÖLKERRECHT 380 (1971).

59. Syria also declared war in 1948. Kuwait, Sudan, Algeria and Iraq declared war in 1967.

60. See Ahmed Safwat Bey, *The Egyptian Prize Court: Organization and Procedure*, 5 REVUE EGYPTIENNE DE DROIT INTERNATIONAL [R.E.D.I.] 28 (1949).

61. See *The Carthage* (Fr. v. It.), 11 R.I.A.A. 449; (Perm. Ct Arb. 1913), translated in *Carthage*, 7 AM. J. INT'L L. 623, 626 (1913).

62. See *supra* note 58.

63. See Dietrich Schindler, *1907 Hague Convention XIII Concerning The Rights and Duties of Neutral Powers in Naval Warfare*, in THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 211-12 (Natalino Ronzitti ed. 1988); Rudolf L. Bindschedler, *Frieden, Krieg und Neutralität im Völkerrecht der Gegenwart*, in 1 MULTITUDO LEGUM IUS UNUM 27, 37-38 (1973); Paul Guggenheim, *La Sécurité collective et le Problème de la Neutralité*, 2 S.J.I.R. 9 (1945); LOTHAR KOTZSH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW (XVII ÉTUDES D'HISTOIRE ÉCONOMIQUE, POLITIQUE ET SOCIALE) *passim* (1956); *infra* note 142.

64. See, e.g., OPPENHEIM'S INTERNATIONAL LAW: A TREATISE ¶ 56 (H. Lauterpacht ed., 7th ed. 1952).

apply the law without examining its legality."⁶⁵ Another, arguably less cogent, argument employed by the Prize Court to reject such objections was modeled on the principle of estoppel. In the case of *The Flying Trader*, the Prize Court observed that an objection based on nonrecognition of Israel by Egypt could not be made by subjects of a state that did recognize Israel as a state.⁶⁶ In international law, however, the fact of nonrecognition should not by itself constitute a compelling reason for the nonattribution of belligerent status.⁶⁷ Israeli courts did not encounter such difficulties in ascertaining the legal situation.⁶⁸

This Author shares the view that the legality of prize action in time of actual armed hostilities is not open to valid objection.⁶⁹ Even during the 1948-49 period of actual conflict, however, numerous governments protested the measures.⁷⁰ It must not be overlooked nonetheless that the protests did not clarify whether their contention was based upon an alleged violation of the Constantinople Convention or the insufficiency of the alleged state of war *tout court*.

The debate on the legality of Egypt's belligerent measures against neutral vessels becomes more interesting after the conclusion of the Armistice Agreement in 1949.⁷¹ Egypt maintained prize legislation in force⁷² and took action thereupon arguing that an armistice only suspends hostilities, and does not

65. The *Fjeld*, 7 I.L.R. 345, 347 (Prize Ct. of Alexandria, Egypt 1950).

66. The *Flying Trader*, 17 I.L.R. 440, 444-45 (Prize Ct. of Alexandria 1956) (Egypt).

67. For instance, the United States was described as being "at war" with the tribal Nation of the Cayuga Indians in a Treaty of Peace signed with the United Kingdom as Protecting Power of the said Nation, despite the fact that the Cayuga Indians were not a state in international law. See Treaty of Peace between Great Britain and the United States, Dec. 24, 1814, G.B.-U.S., art. IX, 63 Consol. T.S. 421, 429; *Cayuga Indians (G.B. v. U.S.)* 6 R.I.A.A. 173, 176 (1926).

68. See *Diab v. Attorney General*, 19 I.L.R. 550, 553 (Isr. S.Ct., sitting as Cr.A. 1952); see also *Yudsin v. Estate of Shanti*, (T.A. 1952), discussed in *Diab*, 19 I.L.R. at 555.

69. See, e.g. BAXTER, *supra* note 58, at 223-24.

70. See Complaint by Israel of Egyptian Restrictions on the Passage of Ships through the Suez Canal, 1951 U.N.Y.B. 298 (statement of Egyptian representative acknowledging presence of state protests during period of conflict) [hereinafter Egyptian Statement].

71. General Armistice Agreement, Feb. 24, 1949, Isr.-Egypt, 42 U.N.T.S. 252.

72. According to the *Conclusions du Gouvernement Egyptien*, 7 R.E.D.I. 235, 252 (1951), the measures of control had become significantly less stringent. The amended contraband list is discussed in Thomas D. Brown, Jr., *World War Prize Law Applied in a Limited War Situation: Egyptian Restrictions on Neutral Shipping with Israel*, 50 MINN. L. REV. 849, 858 (1966).

terminate a state of war.⁷³ Israel and several third states vigorously protested the continuation of prize action.⁷⁴ The most eloquent pronouncement against the legality of these measures came from the Security Council, on the grounds that the Armistice Agreement was: "[O]f a permanent character [and therefore] neither party [can] reasonably assert that it is actively a belligerent or require[s] to exercise the right of visit, search and seizure. . . ."⁷⁵

To appreciate the cogency of the conflicting arguments, two points must be distinguished. First, Egypt was probably correct under the traditional, and still valid law on Armistice Agreements, which stipulates that an armistice terminates hostilities, but not the state of war altogether.⁷⁶ Thus, the Hague Regulations Respecting the Laws and Customs of War on Land of 1907 stipulate that "an Armistice suspends military operations by mutual agreement."⁷⁷ Consistent national judicial decisions endorsing the lawfulness of the exercise of the right of visit, search, and seizure after the conclusion of an armistice⁷⁸ provide authority for the view that this treaty stipulation is evidence of customary law on the point. Nevertheless, as a matter of legal principle, the classification of an agreement is useful only to the extent that it corresponds to its essence. One must therefore focus upon the provisions of the particular armistice agreement, which may derogate from the principle that armistices do not terminate a state of war. The 1949 Agreement was by its terms "an indispensable step toward the liquidation of armed conflict and *the restoration of peace*,"⁷⁹ and under the terms of the 1949

73. See Egyptian Statement, *supra* note 70, at 294; see also The S.S. *Lea Lott*, 28 I.L.R. 652, 653 (U. Arab Republic Prize Ct. 1959).

74. See *Restrictions on Suez Traffic*, TIMES (London), Dec. 14, 1950, at 5; *Australian Protest to Egypt*, TIMES (London), July 2, 1951, at 5; *Egyptian Ministers' Declaration*, TIMES (London), Aug. 8, 1951, at 3.

75. S. Res. 2322, U.N. SCOR, 6th Sess., 558th mtg., at 10 (1951).

76. Cf. *S.S. Wimbledon* (Brit., Fr., It., Jap., v. Ger.), 1923 P.C.I.J. (ser. A) No. 1 at 35-42 (Aug. 17) (dissenting opinion of Judges Anzilotti and Huber).

77. Convention Concerning the Law and Customs of War on Land [Hague Convention IV], Oct. 18, 1907, art. 36, 205 Consol. T.S. 277, 295.

78. This is established in English law by two decisions of the Judicial Committee of the Privy Council. See *Schiffahrt-Treuhand v. Her Majesty's Procurator General*, 20 I.L.R. 667, 676 (P.C. 1953); *The Rannveig*, 1 I.L.R. 435, 436 (P.C. 1920). Contrast *The Santa Flavia*, 13 I.L.R. 406 (Fr., Conseil des Prises 1946); see also Manfred Lachs, *La nouvelle Fonction des Armistices contemporains*, in *HOMMAGE D'UNE GÉNÉRATION DE JURISTES AU PRÉSIDENT BASDEVANT* 319 (1960); Richard R. Baxter, *Armistices and other Forms of Cessation of Hostilities*, 149 R.C.A.D.I. 353 (1976-I); Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880 (1956).

79. General Armistice Agreement, *supra* note 71, art. I(4) (emphasis added).

Agreement this constituted a "principle" thereof.⁸⁰ While unlikely in principle, it cannot be excluded that such an instrument would in itself be sufficient to terminate the exercise of belligerent non-warlike rights.⁸¹

Nevertheless, the Armistice Agreement was certainly intended to constitute only an intermediate stage because the Egyptian government was not prepared to undertake negotiations toward the achievement of a final peace settlement. Indeed, it is not clear whether it was prepared to negotiate at all with Israel at high political levels; the Armistice Agreement was negotiated and concluded by military authorities of the two parties. The determination of whether Egypt was prepared to concede at that stage that the Armistice Agreement was a waiver of belligerent rights is affected by these considerations, which must be taken into account in the construction of the Armistice Agreement. Not insignificantly, a Treaty of Peace, providing expressly for the termination of the state of war, was finally concluded in 1979,⁸² whereas in an interim agreement of 1975 the parties agreed not to resort to a "military blockade" against each other.⁸³

It follows that if there was something in the Armistice Agreement that precluded Egypt from taking, or continuing in exercise of, prize action, it had to be found in the spirit rather than the express terms of the Armistice Agreement.⁸⁴ Even the 1951 Security Council Resolution condemned the pursuit of belligerent measures as an "abuse of the exercise of the right of visit, search and seizure."⁸⁵ Such a careful and specific reference to abuse of rights as the basis of illegality lends support to the argument that the conduct of Egypt was *prima facie* lawful; *only*

80. *Id.* art. I, opening para.

81. Thus, the 1953 Panmunjom Armistice, which contained opening provisions similar to the ones of the 1949 Rhodes Armistice Agreement, terminated all blockade action. See Agreement between the Commander-in-Chief, United Nations Command, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers concerning a Military Armistice in Korea, July 27, 1953, art. II(15), reprinted in 47 AM. J. INT'L L. Supp. 186 (1953).

82. Treaty of Peace between the State of Israel and the Arab Republic of Egypt, Egypt-Isr., Mar. 26, 1979, arts. II (1), VI (3) & Annex III, 18 I.L.M. 362 (1979).

83. Agreement on the Sinai and the Suez Canal, Sept. 4, 1975, Egypt-Isr., art. II, 14 I.L.M. 1450 (1975).

84. See Cablegram dated 12 June 1951 From the Chief of Staff of the Truce Supervision Organization addressed to the Secretary general, transmitting a report to the Security Council, U.N. Doc. S/2194 (1951) (stating that the Egyptian interference in the Canal was contrary to the spirit of the Armistice Agreement). The aforementioned document is described in 1951 U.N.Y.B. 293-94, U.N. Sales No. 1952.1.30.

85. S.C. Res. 2322, *supra* note 75, ¶ 7.

under the very specific circumstances could it be held illegal. Nonetheless, Egypt's bad faith is not to be asserted lightly,⁸⁶ nor is it necessary to pass judgment here.⁸⁷

In any event, Egypt maintained the measures in force, supporting them with the argument that the situation was one of a latent state of war.⁸⁸ The issue was a recurrent source of strong debate, inside and outside of the Security Council.⁸⁹ Israel considered the matter of such importance that it gave rise to her denouncement of the Armistice Agreement.⁹⁰

The crux of state practice regarding the extremely complicated situation in the Suez Canal is that the protest of third states, all presumed "neutral" by Egypt, and who acted as neutral parties, was principally directed against measures taken when no significant military operations were actually in progress. Third states did not abstractly protest the assertion of belligerency in the absence of armed confrontation. The essence of their protests was that Egypt hampered the free transit in the Suez Canal when no armed hostilities were in progress. From this, one is bound to infer that interference with neutral trade was impermissible in the absence of warlike operations. In other words, the validity of belligerency in the context of neutrality was not seriously objected to—to the extent that it was accompanied by actual important armed confrontation.

86. In this respect, it should be borne in mind that at no time did Egypt attempt to exercise belligerent rights on neutral vessels on the High Seas. See *The Inge Toft*, 31 I.L.R. 509, 518 (Egypt Prize Ct. 1964); see also *Naiune*, *Inge Toft*, 16 R.E.D.I. 118 (1960); Solomon Yahuda, *The Inge Toft Controversy*, 54 AM. J. INT'L L. 398 (1960).

87. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 42-56 (1988); see also ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE POLITICAL ORGANS OF THE UNITED NATIONS* 213-216 (1965); André Gervais, *Les Armistices palestinien, coréen et indochinois et leurs Enseignements*, 1956 A.F.D.I. 97. Professor Stone has taken the interesting position that "the insistence of maintaining the state of belligerency constituted in effect a continuing declaration of war." JULIUS STONE, *THE MIDDLE-EAST UNDER CEASE-FIRE* 4 (1967).

88. See Statements of Egypt to the Security Council described in *The Palestine Question, Complaints considered by the Security Council, Statements of Egypt to the Security Council*, 1954 U.N.Y.B. 62, at 63, U.N. Sales No. 1955.I.25.

89. See, e.g., 1965 BRITISH PRACTICE IN INTERNATIONAL LAW 85 (E. Lauterpacht, ed.); see also *Question Concerning the Middle East*, 1959 U.N.Y.B. 34, 35-36, U.N. Sales No. 60.I.1; Charles Rousseau, *Chronique des Faits internationaux*, 63 R.G.D.I.P. 515-517 (1959); 64 R.G.D.I.P. 621-622 (1960); 71 R.G.D.I.P. 186 (1967). A useful work of a more descriptive character is ISTVAN S. POGANY, *THE SECURITY COUNCIL AND THE ARAB-ISRAELI CONFLICT* (1984).

90. See the relevant documents in I ROSALYN HIGGINS, *UNITED NATIONS PEACEKEEPING 1946-1967: THE MIDDLE EAST* 109-117 (1969).

B. *The Kashmir War of 1965*⁹¹

The 1965 war commenced with sporadic fighting in May 1965, which gradually escalated and ultimately led to a radio announcement by the Pakistani President on September 6, 1965, in which he stated: "We are at war."⁹² The Pakistani authorities considered the announcement to be a formal declaration of war⁹³ and proceeded to issue an Executive Order containing an extensive list of contraband of war.⁹⁴ Prize Courts were established, and a limited number of cargoes were seized as enemy goods,⁹⁵ owing to the short duration of the clash.⁹⁶ Some belonged to subjects of neutral states, although the term is employed here merely to designate nonparticipant states, since only Ceylon (as it then was) officially proclaimed and observed neutrality.⁹⁷ No solemn protests against those measures were monitored during the short period of the war,⁹⁸ but precisely because of the brevity of the clash, it is unsafe to infer general acquiescence from this stance. Moreover, it is not clear whether the arms sales restrictions that the United States and United Kingdom imposed⁹⁹ resulted from a perceived legal duty, separate and distinct from policy considerations. Thus, there is no

91. The 1971 three-week war between India and Pakistan did not raise any concrete problems relating to neutrality. See Philippe Bretton, *De quelques Problèmes du Droit de la Guerre dans le Conflit indo-pakistanaï*, 1972 A.F.D.I. 201, 206-09.

92. Charles Rousseau, *Chronique des faits internationaux*, 70 R.G.D.I.P. 179-80 (1996). See generally the "chronology" contained in the judgment of Kerr, J. in *Dalmia Diary Industries v. National Bank of Pakistan*, [1978] Lloyd's Rep. 223, at 271 (Q.B.).

93. Cf. *Government of Pakistan v. R.S.N. Co., Ltd.*, 40 I.L.R. 472 (Pak. High Ct. 1965); *In re Reference No. 1 of 1965*, 53 I.L.R. 613, 614-15, 623 (1979) (W. Pak. High Ct. 1966). However, an arbitrator later found that the President's speech was not addressed to India and did not, moreover, purport to be a declaration of war. *Dalmia Cement Ltd. v. National Bank of Pakistan*, 67 I.L.R. 611 (1984), reprinted in 3 VINCENT COUSSIRAT-COUSTÈRE & PIERRE EISENMANN, *RÉPERTOIRE DE LA JURISPRUDENCE ARBITRALE INTERNATIONALE* § 3511 (1991) (Int'l Comm. Arb.); see paras. 8-10 of the preliminary award.

94. See Proclamation as to Contraband of War (Pakistan), Sept. 9, 1965, XVII-6 THE ALL PAKISTAN LEGAL DECISIONS 437 (1965).

95. See *Ship Lines may face Claims*, TIMES (London), Oct. 4, 1965, at 10; *Indian Tea Dispute goes to Dacca Court*, TIMES (London), Oct. 8, 1965, at 19.

96. The war was terminated by the Final Declaration of the Conference of Tashkent, Jan. 10, 1966, India-Pak., 70 R.G.D.I.P. 188 (1966). The contraband legislation had, however, been relaxed by December 1965.

97. Note that the Security Council had not designated the aggressor party. See generally *Questions Relating to Asia and the Far East*, 1965 U.N.Y.B. 159, Sales No. 66.I.1.

98. But see 1 BRITISH PRACTICE IN INTERNATIONAL LAW 188 (E. Lauterpacht ed. 1965)

99. See SIPRI, *supra* note 45, at 58, 484-85.

evidence that the conflict was generally regarded as "war" by third states, at least for the purposes of neutrality.

The appreciation of the Indian position requires caution. Although India too exercised prize action,¹⁰⁰ India did not declare war or admit its existence. Later, however, India officially contested the lawfulness of Pakistan's reliance on a state of war for the latter's prize action on the grounds that declaring war was itself a manifestation of aggression incompatible with the U.N. Charter.¹⁰¹ The logical conclusion and practical effect of the Indian position would be a blanket denial of the application of the law of neutrality in undeclared wars.¹⁰² With hindsight, however, it is a tenable assumption that India's position was intended to serve as an *ex post facto* justification for her extensive attacks on third states' shipping on the High Seas¹⁰³ rather than a general statement on law.

Similarly, since the conflict had escalated well before any Pakistani official declaration of war,¹⁰⁴ one presumes that the Pakistani declaration was issued for no apparent reason other than to secure the lawfulness of measures intended to cripple its opponent's external trade. The legal manifestation of this phenomenon is the enactment of exhaustive lists of contraband items.¹⁰⁵ In that sense, the supposed Pakistani declaration of war, if such indeed it was, served as a tool of strategy that purported to invoke the application of the rules of neutrality, and Prize Law in particular. This conclusion is perhaps corroborated by the repetition of the same pattern of conduct by both states in the 1971 war.¹⁰⁶

100. See *supra* note 98.

101. See LORD MCNAIR & A.D. WATTS, *THE LEGAL EFFECTS OF WAR* 457 (1966) (quoting Indian statement in the Security Council).

102. Cf. SURYA P. SHARMA, *THE INDO-PAKISTAN MARITIME CONFLICT: A LEGAL APPRAISAL* 87 (1970) (quoting Indian Statement in the Security Council).

103. On such attacks, see D.P. O'Connell, *Limited War at Sea since 1945*, in *RESTRAINTS ON WAR* 123, 129 (Michael Howard ed., 1979).

104. See CARVER, *supra* note 48, 223-25.

105. See *supra* note 94. One gets the impression that there is a general tendency of absorption of the notion of contraband by a broader notion of "unneutral service." Cf. *infra* Part III.C.2. This is perhaps a follow-up of World War Two practice of both the Allied and the Axis Powers. See, e.g., Dietrich Schindler, *Aspects contemporains de la Neutralité*, 121 R.C.A.D.I. 219, 235 (1967-II).

106. See *Belligerent Interference With Neutral Commerce*, 66 AM. J. INT'L L. 386-387 (1972) (excerpting Pakistan's and India's proclamation of contraband, respectively).

C. *The Iran-Iraq War, 1980-88*¹⁰⁷

The eight-year conflict between Iran and Iraq¹⁰⁸ gave new impetus to neutrality as a valid and useful legal concept. Although war was never officially declared, this was, it will be recalled, a long and onerous conflict featuring fierce fighting. In the absence of a Security Council Resolution limiting the alternatives of third states, they remained essentially free to determine their own position. It is worth noting, however, that the Security Council recommended, in its first Resolution after fighting began, that third states "refrain from any act which may lead to a further escalation and widening of the conflict."¹⁰⁹ Thus, it may not be ruled out that neutrality was actually one of the positions envisaged and recommended by the Security Council in that instance. Furthermore, it was a general preference of the world community that fighting be confined to the parties already engaged,¹¹⁰ and the flow of oil through the important waterway of the Persian Gulf not be hindered. These concerns must be borne in mind in the examination of the position of third states.

1. The Position Third States Adopted, with Special Reference to Supplies of Arms and Other Military Equipment¹¹¹

The expeditious fashion and unequivocal terms in which important world players adopted a neutral position in the conflict

107. For an analysis of the position of various states, and official documents, see *THE IRAN-IRAQ WAR (1980-1988) AND THE LAW OF NAVAL WARFARE* (Andrea De Guttry & Natalino Ronzitti, eds., 1993) [hereinafter *IRAN-IRAQ WAR*].

108. Following tension throughout the year, full-scale fighting broke out after a major Iraqi attack on several fronts on September 21, 1980. See *Iran-Iraq*, 27 *KEESING'S REC. OF WORLD EVENTS* 31005, 31006 (1981). A U.N.-sponsored cease-fire was accepted by both parties in 1988. For Iraq's acceptance of the cease-fire, see *Letter dated 6 August 1988 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*, U.N. Doc. S/20092 (1988). For Iran's acceptance of the cease-fire, see *Letter dated 7 August 1988 from the Minister of the Islamic Republic of Iran Addressed to the Secretary-General*, U.N. Doc. S/20094 (1988). For the Security Council's endorsement of the cease-fire, see *Note for the President of the Security Council*, U.N. Doc. S/20096 (1988).

109. S.C. Res. 479, U.N. SCOR, ¶ 3, U.N. Doc. S/Res./479 (1980).

110. Cf. *The Community at the United Nations, 1981-9* BULL. OF THE EUR. COMMUNITIES 75, 75-78 (statements of the Presidency of the Council of Ministers of the European Community in the Security Council).

111. The meaning of the term "military equipment" varied from state to state. See SIR RICHARD SCOTT, REPORT OF THE INQUIRY INTO EXPORTS OF DEFENCE EQUIPMENT AND DUAL-USE GOODS TO IRAQ, AND RELATED PROSECUTIONS 154 *passim* (1996).

is impressive.¹¹² The United States,¹¹³ Soviet Union,¹¹⁴ and China,¹¹⁵ all formally characterized the conflict as war and stated that they would observe a "strict" attitude of neutrality. The United Kingdom drafted its position in somewhat milder, yet unequivocal, terms: "[The United Kingdom is] neutral in the war between Iran and Iraq."¹¹⁶ As a matter of abstention attendant upon neutrality, execution of all outstanding contractual obligations that would impair this position, notably contracts for the sale of "lethal equipment"¹¹⁷ and for the training of military personnel¹¹⁸ were prohibited. France was the only permanent member of the Security Council not to proclaim neutrality¹¹⁹ and to honor obligations to provide military equipment to Iraq.¹²⁰ Belgium and Italy also refrained at this initial stage from adopting an official neutral position.¹²¹

The terminology employed in formal statements gradually changed, however. For example, the United Kingdom later affirmed its "impartial" position in the "conflict."¹²² Similar terms finally appeared in European Community¹²³ and Security

112. Some Arab states, such as Jordan and Kuwait, openly aligned with Iraq. See *Iran-Iraq*, 27 KESING'S REC. OF WORLD EVENTS 31005, 31009-31010 (1981).

113. See *Iran-Iraq Conflict: President's Statement*, DEP'T ST. BULL., Nov. 1980, at 53, 61; see also *Conflict in Iran and Iraq*, *id.* at 52; *Review of Developments in the Middle East*, DEP'T ST. BULL. Mar. 1986, at 39, 41; *U.S. to Extend Protection to Neutral Ships in Persian Gulf*, DEP'T ST. BULL., July 1988, at 61.

114. See *Iran-Iraq*, 27 KESING'S REC. OF WORLD EVENTS 31005, 31011 (1981)

115. See Statements of China to the Security Council, Mtg. 2546 (June 6, 1984) described in *Asia and the Pacific, Iran-Iraq Conflict, Security Council Action (June)*, 1984 U.N.Y.B. 234, U.N. Sales No. E.87.I.1.

116. Statement of the Secretary of State, Foreign and Commonwealth Office, Dec. 22, 1982, 34 PARL. DEB., H.C. 608-609 (1982); see 20 PARL. DEB., H.C. 297 (1982). Compare the British position with the Australian position in *Law of the Sea*, 10 AUSTRALIAN Y.B. INT'L L. 414 (1981-1983).

117. For the official position of various states in that regard, see statements of the respective states in 53 BRIT. Y.B. INT'L L. 559 (1982). See also 54 BRIT. Y.B. INT'L L. (1983); 118 PARL. DEB., H.C. 483 (1987). Cf. *Iran-Iraq War*, DEPT. ST. BULL. Sept. 1982, at 59 (announcing the disapproval of sale of American Military equipment to either belligerent); 16 NETH. Y.B. INT'L L. 417 (1985); 25 CAN. Y.B. INT'L L. 459-460 (1987).

118. See 55 BRIT. Y.B. INT'L L. 597 (1984).

119. See 1982 A.F.D.I. 1095.

120. See [1981] A.F.D.I. 854; [1984] A.F.D.I. 952; [1988] A.F.D.I. 901.

121. See 19 R.B.D.I. 150-151 (1986); see also 7 IT. Y.B. INT'L L. 470-471 (1986-1987).

122. See *Neutrality, non-belligerency—legal notice of neutrality*, 56 BRIT. Y.B. INT'L L. 534 (1985); see also *Neutrality, non-belligerency—legal notice of neutrality—sea warfare*, 58 BRIT. Y.B. INT'L L. 638 (1987).

123. See *Political and Institutional Matters*, 1987-1 BULL. OF THE EUR. COMMUNITIES 62.

Council¹²⁴ decisions. This notwithstanding, one may agree with Dr. Christine Gray that no substantial change was intended insofar as substantive *duties* of neutrality were concerned.¹²⁵ What must be noted is that the formal adoption of a neutral position in a conflict involving large-scale hostilities was considered a permissible legal stance. In other words, the conditions for the application of neutrality were deemed fulfilled. From the Iran-Iraq war discussion, it is also important to note that, in the view of third parties, the adoption of a neutral stance was not considered a *requirement* flowing from the reality of the conflict. In other words, the evidence shows that neutrality was a lawful, or permissible, position, but not a mandatory one. Although it is not the task of lawyers to discover the political motives behind the major world players' unprecedented convergence of opinion, at least at the formal level, it is probable that the adoption of a neutral stance was prompted by the wish to protect oil cargoes destined for third states. To this issue one must now turn.

2. The Protection of Neutral Shipping in the Gulf¹²⁶

As will be recalled, a distinctive feature of the 1980-88 Gulf War was the indiscriminate attacks on ships in the vicinity, regardless of their state of registration and destination: the great majority of the more than four hundred vessels attacked were flying third states' flags.¹²⁷ These attacks upon commercial shipping were repeatedly condemned in Security Council Resolutions 552 (1984), 582 (1986), and 598 (1987).¹²⁸ The Resolutions do not explicitly refer to the specific rule of law prohibiting attacks on innocent commercial shipping of third states on the High Seas, perhaps because of the well-established

124. See, e.g., S.C. Res. 552, U.N. SCOR, ¶ 5 S/Res/552 (1984) (speaking of "states . . . no[n] parties to the hostilities"); see also *Statement of the Security Council President*, U.N. Doc. S/18610 (1987); S.C. Res. 620, U.N. SCOR, U.N. Doc. S/Res/620 (1986).

125. Christine Gray, *The British Position in Regard to the Gulf Conflict*, 37 INT'L & COMP. L.Q. 420, 421 (1988); Christine Gray, *The British Position in Regard to the Gulf Conflict: Part 2*, 40 INT'L & COMP. L.Q. 463 (1991).

126. See Eric David, *La Guerre du Golfe et le Droit International*, 20 R.B.D.I. 153 (1987).

127. For more details, see John H. McNeill, *Neutral Rights and Maritime Sanctions: The Effect of Two Gulf Wars*, 31 VA. J. INT'L L. 631, 631-32 (1991).

128. See S.C. Res. 552, U.N. SCOR, U.N. Doc. S/Res/552 (1984); S.C. Res. 582, U.N. SCOR, U.N. Doc. S/Res/582 (1986); S.C. Res. 598, U.N. SCOR, U.N. Doc. S/Res/598 (1987).

and customary nature of that rule.¹²⁹ Nonetheless, the freedom of navigation on the High Seas in the Persian Gulf was a predominant interest of third states and the international community generally.¹³⁰ Following the official adoption of a neutral position, important naval powers dependent on oil imports from the Gulf states deployed protection fleets in the Indian Ocean to protect the Strait of Hormuz oil route.¹³¹ Protection was originally afforded exclusively to vessels flying the national flag of the respective fleet, but the United States later went further to announce that it would provide protection to "neutral vessels" generally.¹³²

Although the "innocence" of the flag state would certainly be a prerequisite for patrolling action, which innocence the neutrality declarations thus purported to attribute,¹³³ the legal basis for the patrolling action itself is not entirely clear. The United Kingdom¹³⁴ and France¹³⁵ expressly invoked their right of self-defense, implying that the obligations under the U.N. Charter qualify, or even require, an entirely different legal basis for the exercise of traditional war-related rights. An alternative basis could arguably be provided by implied authorization embodied in the aforesaid Security Council Resolutions.¹³⁶ The position of the United States in this matter is ambiguous, not resting clearly on either possible ground.¹³⁷

In contrast, with regard to neutral duties, the evidence demonstrates that nonparticipant states acknowledged the

129. See *The Cysne* (Port. v. Ger.), 5 ANN. DIG. 487, 490 (1929-1930) (*ad hoc* arbitral award); see also Doenitz, XXII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL 558-59 (1948); Kaiyan Homi Kaikobad, *Self-Defence, Enforcement Action and the Gulf Wars, 1980-88 and 1990-91*, 62 BRIT. Y.B. INT'L L. 299, 327-333 (1992).

130. See, e.g., *Navigation—Libre Passage dans le Golfe Persique et le Droit D'ormuz*, [1981] A.F.D.I. 895 (Fr.); DEP'T ST. BULL., Dec. 1980, at 73; 9-1987 BULL. OF THE EUR. COMMUNITIES, at 74; see also *Report to Congress on Security Arrangements in the Persian Gulf*, 26 I.L.M. 1433, 1435 (1987) [hereinafter the Weinberger Report]; U.N. SCOR, 38th Sess., 2493d mtg., ¶ 3, U.N. Doc. S/Res/540 (1983).

131. 27 *Iran-Iraq*, KEESING'S REC. OF WORLD EVENTS 31005, 31011 (1981).

132. 34 KEESING'S REC. OF WORLD EVENTS 36169 (1988).

133. For instance, in a Communiqué on September 14, 1987, the Belgian Government advocated "*sa stricte neutralité*", 22 R.B.D.I. 427 (1989), after which it proceeded to a joint mine-sweeping operation with Italy and the Netherlands. See R.C.R. Sickmann, *Netherlands State Practice for the Parliamentary Year 1987-1988*, 20 NETH. Y.B. INT'L L. 137, 183 (1989); see also *IRAN-IRAQ WAR*, *supra* note 107, at 448.

134. See *United Kingdom Materials on International Law*, 57 BRIT. Y.B. INT'L L. 487, 583 (1986).

135. See *Libre Navigation dans le Golfe*, [1988] A.F.D.I. 964.

136. *Contra* CHINKIN, *supra* note 37, at 307-08.

137. See Weinberger Report, *supra* note 130, at 1454.

belligerents' right of visit and search. The legal justifications, however, were divergent. The Permanent Representative of the Netherlands to the U.N. aptly summarized the position of the majority of third states when he stated to the Security Council that "under International Law *belligerents* may take measures to restrict shipping to and from the ports of the other belligerents."¹³⁸ The United Kingdom's qualified position on the other hand acknowledged that:

[A] state *actively engaged in an armed conflict* . . . is entitled in exercise of its inherent right to *self-defense*, to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is *taking arms* to the other side in the conflict.¹³⁹

Evidently, the legal position of the United Kingdom has the effect of denying the validity of the laws of war and neutrality as the legal bases of *the right of visit and search*, considering this right to be an emanation or a facet of the right of self-defense.¹⁴⁰

The essential point, however, is that the majority of third states conceded that the law of neutrality applies when an armed conflict reaches certain proportions; or, in other words, the Gulf conflict constituted "war," at least for the purposes of neutrality. The acknowledgment that belligerent measures against neutrals are lawful in times of actual hostilities where war has not been declared must be stressed, for up to that time there had been learned scholarly opinion against it.¹⁴¹

There is also evidence that the belligerents did not contest that third states' vessels navigating the Gulf were in principle entitled to the safety that the law accords to neutral vessels. The consecration by the belligerents of "war" or "exclusion" zones, doubtful as their legality may be,¹⁴² signifies that neutrals' rights were not per se challenged. These zones constituted a pledge that merchant vessels therein would enjoy safety in passage—although

138. U.N. SCOR, 39th Sess., at 13, U.N. Doc. S/PV.2546 (1984) (emphasis added). Cf. *Netherlands State Practice*, 13 NETH. Y.B. INT'L L. 175, 259 (1982) (noting that the right to free navigation on seas is sometimes subject to restrictions when a coastal state is at war).

139. Statement of the Secretary, Foreign and Commonwealth Office, 127 PARL. DEB., H.C. 424 (1988) (emphasis added) (repeating an earlier statement from 90 PARL. DEB., H.C. 426 (1986)).

140. See Christopher Greenwood, Remarks, 83 ASIL PROC. 158, 159 (1988).

141. See, e.g., 2 WILHELM WENGLER, VÖLKERRECHT 1467 (1964); Schindler, *supra* note 105, at 293.

142. See generally W.J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CAN. Y.B. INT'L L. 91 (1986) (arguing for restraint in the usage of zone devices during wars); Ross Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, 37 INT'L & COMP. L.Q. 629 (1988) (arguing for respect for laws of humanity in war zones).

this pledge was not always respected. Because these zones were intended for general use,¹⁴³ one may assume that all nonparticipant states were entitled to the safety accorded to neutrals. This is also supported by a statement of the Iranian Ambassador to Belgium, who, on the occasion of an attack against a vessel flying the Belgian flag in 1985 condemned "*toute violation . . . du droit international telle que les attaques contre les navires neutres.*"¹⁴⁴ At that stage, however, Belgium had not proclaimed neutrality.¹⁴⁵

Further corroboration of the above findings is provided by the fact that the lawfulness of other measures taken by the belligerents was also assessed by the standards of neutrality. Such standards were applied to Iran's claim that nonparticipant states' vessels carrying petroleum to and from Kuwait were subject to attack,¹⁴⁶ since Kuwait (the state of destination, but not the state of the vessel) had forfeited—so the argument goes—its protection as a neutral by granting economic assistance which would eventually sustain Iraq's war effort.¹⁴⁷ These standards should also apply to Iraqi attacks on third states' ships carrying oil to and from Iran.

It must be remembered that few, if any, of the states that advocated a position of "strict neutrality" observed it fully.¹⁴⁸ On this premise, Ronzitti wrote that "[m]ost third states adopted a policy of non-belligerency rather than observing the stance of

143. See the statement of facts in *In re The Good Luck*, Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd., 3 All E.R. 1 (H.L.) (1991).

144. 20 R.B.D.I. 366 (1987).

145. See *supra* note 121.

146. It is a persistent question whether military action, be it lawful, against neutral vessels or territory, should be termed as 'belligerent reprisals' or not. Cf. *Coenca Frères v. État Allemand*, 7 TRIB. ARB. MIXTES 683 (1928) It is difficult to reconcile the prevailing view that action in self-defense may never constitute reprisals, see Derek W. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972), with current state practice, notably in the Gulf War, that belligerent action must in any event be justified on the basis of self-defense.

147. See 28 KEESING'S REC. OF WORLD EVENTS 31523 (1982); see also Iranian Law Regarding the Settlement of Disputes over War Prizes, Sept. 17, 1987, Art. 3(a), reprinted in D. Momtaz, *Commentary: Iran*, in IRAN-IRAQ WAR, *supra* note 107, 19, at 39; *Letter Dated 25 May 1984 from the Permanent Representative of the Islamic Republic of Iran to the United Nations*, 39th Sess., U. N. Doc. S/16585 (1984); *Text of the Enclosure Submitted by the Charge d'affaires of the Permanent Mission of the Islamic Republic of Iran to the United Nations*, 42d Sess., U.N. Doc. S/18557 (1986).

148. See, e.g., View of the European Community Member states, EUR. PARL. DEB. (350) 161 (1987). See generally 28 KEESING'S REC. OF WORLD EVENTS 31521-31522 (1982). According to the Scott Report, the United Kingdom observed the obligations she undertook. See SCOTT, *supra* note 111, at 336-37 & 367.

impartiality required by neutrality."¹⁴⁹ But state practice, as has been demonstrated, did not support the existence of any intermediate legal notion between belligerency and neutrality. Rather, the duties and rights of belligerents and third parties were stated in, and evaluated in accordance with, the classical standards of the law of neutrality. And, generally, it is not cogent to state that the law evolves in content or is plainly breached, as a distinct legal rule.

In conclusion, although an examination of the positions of the belligerents and third states shows that the existence of a formal state of war was far from certain,¹⁵⁰ this fact had no bearing at all on the application of the law of neutrality. Further, the conflict reasserted the need for neutrality as an institution providing protection for nonbelligerents' interests in areas of intense and protracted hostilities. It served as a test-bed for the feasibility and adaptability of traditional notions and rules to new circumstances, particularly the possible need for broadening the notion of "unneutral service" to cover commercial intercourse between third states that may ultimately result in strengthening the economy of the belligerents.

D. *The Conflict in the Falklands*

Following the Argentine invasion of the Falkland Islands, a British dependent territory, on April 1, 1982, and the failure of attempts to reach a mediated settlement, hostilities of considerable intensity broke out between Argentina and the United Kingdom. Fighting started in late April and involved the deployment of significant naval power, as well as infantry units. An Instrument of Surrender was signed by the two Military Commanders on June 14, 1982.¹⁵¹ Despite the fact that diplomatic relations between the two states had been severed throughout the conflict and the United Kingdom applied war-time legislation, it is clear that the United Kingdom considered itself *not* to be "at war" with Argentina at any point.¹⁵² This, however, proved to be irrelevant for the purposes of neutrality. Third states classified the situation as an armed conflict, allowing for, or necessitating the application of, the law of neutrality. This

149. See *supra* note 107.

150. See Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L.Q. 283, 293-94 (1987).

151. See 53 BRIT. Y.B. INT'L L. 526-27 (1982), for a reproduction of the instrument.

152. See Statement of Prime Minister Thatcher, 22 PARL. DEB., H.C. 616 (1982).

classification was also conceded by the United Kingdom,¹⁵³ allowing for, or necessitating the application of, the law of neutrality. In this connection, it must be borne in mind that the liberty of third states to determine their own position was unlimited, as the Security Council did not determine the aggressor party in Resolutions 502 (1982) and 505 (1982).¹⁵⁴

The attitude of Latin American states that were directly concerned by an armed conflict in their vicinity is most significant. Some of them lent their support to the Argentine claim as to the merits of the underlying territorial dispute, but very few openly supported Argentina's military action.¹⁵⁵ Others, while endorsing the Argentine claim to the islands, openly condemned the action.¹⁵⁶ Chile officially declared that it *would* observe neutrality, forbidding the United Kingdom fleet from using its port facilities in the area,¹⁵⁷ a position perfectly compatible with the rule evinced in Article 18 of Convention XIII.¹⁵⁸ Similar positions of neutrality were adopted by Brazil¹⁵⁹ and South Africa¹⁶⁰—states that also could have potentially been involved. The European Community member states, albeit without prejudice to the merits of the Argentine claim, adopted measures against it and put in place a blanket prohibition on all imports¹⁶¹ and a special prohibition on the export of arms.¹⁶²

153. See *United Kingdom Materials on International Law*, 53 BRIT. Y.B. INT'L L., 337, 519-20 & 538 (1982).

154. See S.C. Res. 502, U.N. SCOR, U.N. Doc. S/Res/502 (1982); S.C. Res. 505, U.N. SCOR, U.N. Doc. S/Res/505 (1982).

155. Only Panama and Nicaragua openly supported Argentina.

156. Among the states condemning Argentina's action were Colombia, Peru, Guatemala and Bolivia.

157. 28 KESING'S REC. OF WORLD EVENTS 31534 (1982); see also 1982 U.N.Y.B. 1331. A statement of the Chilean Ministry of Foreign Affairs dated April 2, 1982 reasserts Chile's "traditional compliance with the rules of International Law" in view of "the grave factual situation in the area." In the event, Chile lent a tanker to the British fleet. See *Task Force Ship owned by Chile*, TIMES (London), Apr. 29, 1982, at 6.

158. See Hague Convention XIII, *supra* note 13, art. 18.

159. 28 KESING'S REC. OF WORLD EVENTS 31534 (1982).

160. See *The Falkland Islands Dispute*, 8 S. AFR. Y.B. INT'L L. 265, 266 (1982).

161. See Council Regulation 877/82, 1982 O.J. (L102) 1.

162. See *Community Solidarity in the Falklands Conflict*, 1982-4 BULL. OF THE EUR. COMMUNITIES, at 7-8. For national implementing measures, see [1982] A.F.D.I. 1092-1094; [1983] A.F.D.I. 913 (Fr.); R.C.R. Sickmann, *Netherlands State Practice for the Parliamentary Year 1981-1982*, 14 NETH. Y.B. INT'L L. 245, 329-30 (1983).

Similar measures were also adopted by the United States,¹⁶³ which had initially sought to remain neutral.¹⁶⁴

The law of neutrality was also applied by a U.S. federal court in a case involving a Liberian vessel, which was hit by Argentine forces during the conflict. The court found accordingly the attack was in violation of the neutral status of the vessel and accordingly the Argentine state incurred liability toward the shipowners.¹⁶⁵

The example of the Falkland islands conflict clearly indicates the irrelevance of a formal state of war to the application of the law of neutrality. State practice seems to uphold the existence of armed conflict as a criterion of applicability provided the conflict is of a certain intensity and magnitude. It also indicates that the determination of the nature of the conflict by the belligerents is not conclusive nor binding on third states for the purposes of bringing about the régime of neutrality.

E. *Concluding Remarks on State Practice*

In modern state practice, the status of neutrality remains, in a number of respects, unclear. It has been demonstrated thus far that, despite the usefulness of neutrality as an institution in limiting the effects of warfare on third parties,¹⁶⁶ states extraneous to a conflict do not readily adopt a neutral position. State practice is therefore not entirely conclusive as to the mandatory or optional character of the law of neutrality, although the latter seems to be the better position. A clear lesson is provided, however, regarding the circumstances in which neutrality is applicable as a *permissible* legal status. The Author submits that modern state practice does not support the dependence of neutrality on a state of war brought about by a declaration of war or an assertion of belligerency, at least in the absence of actual and persistent organized armed confrontation. This applies to both neutral rights and duties. For reasons set forth below, however, this conclusion is insufficient. It must be elaborated and explained with the greatest possible degree of legal precision.

163. See *The South Atlantic Crisis: Background, Consequences, Documentation*, DEP'T ST. BULL., Oct. 1982, at 80.

164. See *An Ally not an Umpire*, TIMES (London), Apr. 12, 1982, at 7.

165. See *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 423-24 (2d Cir. 1987).

166. See O'Connell, *supra* note 103, at 130.

IV. THE RELEVANCE OF WAR AND ARMED CONFLICT TO NEUTRALITY PROPER OR THE REQUISITES OF NEUTRALITY

It has been well demonstrated that legal implications constitute a major policy consideration in matters of war.¹⁶⁷ As described in the analysis of state practice above, the application of the law of neutrality in particular has entered the considerations of waging war itself. Thus, the Pakistani declaration of war (and possibly the Egyptian assertion of belligerency) was intended to trigger the application of the Law of Prize, which would permit the attainment, *through legal means*, of the important strategic aim of severely limiting the opponent's external trade. Nonetheless, two *desiderata* must be taken into account. First, the objective nature of legal rules, a corollary of their regulatory role, must impose limits upon considerations of strategy or policy in the application of the law. Second, obligations of good faith bearing upon the belligerent parties are particularly acute when their actions have important repercussions on the rights and obligations of third parties. It should therefore be a concern of the analysis to eliminate the uncertainty that continues to surround the relation between neutrality and the generic concept of war with a view to minimizing the potential for abusive application of the law of neutrality. The methodology of the exercise will be deductive. Although any systematic exposition of the requirements of neutrality as evinced in state practice must start with the concepts of "armed conflict" and "state of war" traditionally utilized by publicists, these concepts must not impose undue restraints. Generally, the determination of the meaning and the requirements of a legal norm must be a function of the purpose of the norm,¹⁶⁸ not of set legal categories and concepts. For such concepts are useful only to convey the essence of the law, not to restrict it.

A. *The Requirement of Actual Fighting*

State practice has demonstrated that in cases where the existence of a state of war was uncertain (*e.g.*, the Gulf War) or even denied (*e.g.*, the Falklands Conflict) the law of neutrality

167. See generally D.P. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 16-26 (1975) (discussing the interaction of law and naval policy).

168. The *locus classicus* is 1 RUDOLPH VON JHERING, *DER ZWECK IM RECHT* 433 (1877).

nonetheless applied. The application of this law was never intended to constitute a recognition of belligerency, whether apposite to all purposes or restricted to the law of neutrality. Neutrality and state of war have thus been dissociated.

The examples discussed above demonstrate that neutrality is dependent upon the existence of actual fighting. Although this last statement will be qualified below,¹⁶⁹ it is accurate to say that actual fighting is the first requirement for the application of neutrality law. The condition of actual fighting would seem to result from the role neutrality continues to play as a means to dissuade belligerents from the continuation of their armed struggle. The absence of support for the belligerents is not merely a sign of lenity, but of the fact that the international community refrains from encouraging belligerency, or more generally, war as a means of dispute settlement. The most persuasive means of dissuasion in this connection would be the discontinuance of military supplies to the belligerents.¹⁷⁰

Moreover, without support the battlefield will inevitably be localized, and the parties eventually exhausted, as seems to have been the case in the Iran-Iraq war. The proposition that such aims are furthered by the institution of neutrality is supported by a Resolution of the *Institut de Droit International* on the issue of nonintervention in civil wars.¹⁷¹ Although it is not settled whether neutrality applies in such conflicts, the duties of third states as codified in this resolution are similar, if not identical, to the duties of neutrals in international conflicts.¹⁷² Significantly, those duties arise according to Article 1(1) of the resolution in case of "any armed conflict."¹⁷³

Thus, the application of neutrality may provide a "standstill," which would permit the fulfillment of the political conditions necessary for the Security Council to adopt the appropriate measures under Chapter VII of the U.N. Charter. Along the same line of reasoning, it has correctly been suggested that the observance of neutrality is a *duty* when the Security Council adopts no binding decision and a third state is unable to identify the aggressor.¹⁷⁴ Finally, the mission of neutral powers—as

169. See *infra* Part IV.C.

170. See 4 PHILIP C. JESSUP, *NEUTRALITY, ITS HISTORY, ECONOMICS AND LAW: TODAY AND TOMORROW* 212 (1936).

171. See Resolution of the *Institut de Droit International* on the Principle of Non-Intervention in Civil Wars, 56 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* [ANN. I.D.I.] 544 (1975: Wiesbaden Session).

172. *Id.* art. 2.

173. *Id.* art 1(1).

174. See D.W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 180 (1958); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 205 (1948); see also *supra* Part III.C.

disinterested parties in the conflict—is notable both on the diplomatic¹⁷⁵ and humanitarian levels.¹⁷⁶

The above considerations lead to the conclusion that the concept of armed conflict, very much in the sense of the Geneva Conventions on the Law of Warfare, is indeed relevant to neutrality as a prerequisite for its application. In other words, neutrality, as an institution that serves to prevent escalation, seeks to regulate not a state of war in the abstract, but actual armed conflict. It will be recalled that despite the fact that Greece has considered a “technical state of war” to exist between itself and Albania for over fifty-five years,¹⁷⁷ Greece has never required any state to observe neutrality towards the parties.

This is not to suggest, however, that neutrality may apply in all armed conflicts without further qualification. In contrast with the Laws of Warfare, neutrality does not exclusively serve humanitarian imperatives, which must be respected regardless of the scope of the conflict.¹⁷⁸ The observance of neutral duties is a severe limitation of state sovereignty that is not to be lightly asserted or presumed. Similar considerations have prevailed in the drafting of the Resolution of the *Institut* on the effect of war on treaties. Article 1 reads:

For the purposes of the Resolution, the term “armed conflict” means a state of war or an international armed conflict including armed operations which *by their nature and extent* are likely to have consequences on the application of treaties . . . regardless of a formal declaration of war or other determination by either of the parties.¹⁷⁹

175. See RICHARD LATTER & DIETRICH SCHINDLER, THE FUTURE OF NEUTRALITY IN EUROPE 23-24 (The Wilton Park Papers 41, 1991).

176. For illustrations of such missions, see Articles 109 *et seq.* of the Convention Relative to the Treatment of Prisoners of War, *supra* note 10.

177. See The Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 29 (Apr. 9, 1949); Memorial of Albania (U.K. v. Alb.), 1949 I.C.J. Pleadings (2 Corfu Channel) 48-49; see also J. Spiropoulos, *Sur l'Existence de l'Etat de Guerre entre la Grèce et l'Albanie*, 1 REVUE HELLÉNIQUE DE DROIT INT'L 370 (1948). The Friendship and Cooperation Treaty signed in March 1996 does not necessarily entail, or imply, the termination of the state of war. See Press Release of the Greek Embassy in London, Apr. 3, 1996.

178. Cf. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 33 (Jean S. Pictet, ed. 1952).

179. Resolution of the *Institut de Droit International* on the Effect of War on Treaties, 61-I ANN. I.D.I. 206 (1985: Helsinki Session) (emphasis added). An earlier Draft Resolution required that the conflict be “of sufficient gravity.” 59-II ANN. L.D. 1, 206 (1981: Dijon Session).

The existence of armed hostilities, which constitute the notion of armed conflict, is therefore an essential, but not sufficient, requirement.¹⁸⁰

B. *The Notion of the "State of Generalized Hostilities"*

In state practice, the application of neutrality depends upon certain characteristics of the conflict. These characteristics may be fairly encapsulated in a concept of "generalized state of hostilities." This term corresponds in substance to the frequently employed term "war in the material sense," which describes a state of affairs involving persistent organized fighting regardless of whether war has been declared.¹⁸¹ In other words, it is the *condition initiated and preserved* by persistent organized fighting—as distinct from the mere occurrence of fighting, which constitutes an armed conflict.¹⁸² The term preferred here, however, is more useful because it does not allude to the disputed and ambiguous concept of the state of war, which is, as has been discussed, irrelevant for the purposes of neutrality.

It will be remarked that if the opinion is followed that such a concept as "state of war" does indeed exist, is of general relevance, and may *only* be an objective one, (*i.e.*, determined by recourse to facts)¹⁸³ the same practical result is obtained as far as the law of neutrality is concerned. Professor Brownlie in particular, adopting an objective conception of the concept of war, comes to the conclusion that: "The law of neutrality with its far-reaching effects on international relations should only be brought into operation when the hostilities have a degree of permanence and a scope which necessitate regulation of the relations of the belligerents and third states."¹⁸⁴

Granting the merits of an objective conception of the state of war, the notion of a state of generalized hostilities has been adopted here because it is not within the ambit of this work to examine whether such an objective concept is current in state

180. *But see* Dietrich Schindler, *State of War, Belligerency, Armed Conflict*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 3, 15 (Antonio Cassese ed., 1979).

181. *See* KOTZSH, *supra* note 63.

182. Compare the terminology used in *Duties of States in the Event of the Outbreak of Hostilities*, G.A. Res. 378(V), U.N. GAOR, 5th Sess., 308th plen. mtg. (1950).

183. *See, e.g.*, HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 27 (Robert W. Tucker ed., 2d ed. 1966); INGRID DETTER DE LUPIS, *THE LAW OF WAR* 23-24 (1987); Richard R. Baxter, *The Definition of War*, 16 R.E.D.I. 1 (1960); Thomas Baty, *Abuse of Terms: 'Recognition' 'War'*, 30 AM. J. INT'L L. 377, 381 (1936).

184. BROWNLIE, *supra* note 3, at 401, 396.

practice and appropriate for all purposes.¹⁸⁵ It should not be ignored, however, that a declaration of war may be decisive for purposes other than neutrality.¹⁸⁶ Once it is established that Brownlie's above-quoted policy-indication corresponds to the essence of the law as it currently stands, which is the contention of this Article, it is unnecessary for the purposes of this Article to ask what the true nature of the concept of the state of war is.

A state of generalized hostilities, in the context of an international armed conflict, is brought about by the participation of state forces. More precisely, there is a requirement that the operations be conducted under the auspices of state authority, which establishes a state's responsibility therefor.¹⁸⁷ Potential participation of paramilitary forces would not therefore *eo ipso* deprive the conflict of the character of an international armed conflict in which neutrality may apply. As to the characteristics of the conflict itself, there is definitely a requirement that the conflict be of a certain magnitude. This magnitude is a function of a number of elements: persistence of fighting over time, intensity of fighting, number of forces participating, span of the theater of operations, and so forth. Every conflict, however, as a factual situation, is a *unicum*. In any given case, the above elements will complement each other in quasi-infinite combinations. No exact proportions of one or another element may be a priori required. For this reason, every case must be judged on its own merits.

State practice—as far as it has been possible to research—supports the case-by-case nature of the determination of whether a given conflict justifies the application of neutrality. During the

185. It seems, however, that the notion of "war" in a material sense is gaining currency in practice. In at least 22 Agreements concluded by the European Communities there is a standard term allowing for derogation "in times of war." See, e.g., Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, art. 42(c), 1978 O.J. (L 269) 2; Sixth International Tin Agreement, art. 48(5), 1982 O.J. (L 342) 3; Agreement between the European Economic Community and European Atomic Energy Community Trade and Commercial and Economic Cooperation Agreement, art. 16(2), 1990 O.J. (L 68) 3; see also S.C. Res. 242, U.N. SCOR, U.N. Doc S/Res/242 (1967) (discussing the "inadmissibility of acquisition of territory by war").

186. See *infra* note 216.

187. Cf. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, paras. 69-77 (May 24, 1980). See the jurisprudence on Art. I of the European Convention on Human Rights: *Loizidou v. Turkey* (Merits), 1996-VI Eur. Ct. H.R. 2216, 2232 (Dec. 18, 1996); *Chrysostomos v. Turkey*; *Papachrysostomou v. Turkey*, Apps. Nos. 15299/89, 15300/89, 86-A Eur. Comm'n H.R. Dec. & Rep. 4, paras. 96-99 (1993); *Loizidou v. Turkey*, App. No. 15318/89 (Preliminary Objections), 20 Eur. H.R. Rep. (ser. A) 99, para. 62 (1994); *Cyprus v. Turkey*, App. No. 8007/77, 13 Eur. Comm'n H.R. Dec. & Rep. 85, paras. 18-26 (1978); *Cyprus v. Turkey*, Apps. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125, paras. 8-10 (1975).

brief boundary skirmish between Peru and Ecuador in early 1995, both states mustered considerable forces in the very confined area of the clash,¹⁸⁸ but the actual conflict did not exceed a few days, and it resulted in limited casualties.¹⁸⁹ The Ecuadorian president spoke of "war,"¹⁹⁰ but no state is reported to have declared neutrality or to have observed the duties of neutrals. The same is true of the 1965 Indo-Pakistani conflict, a localized and brief conflict featuring nonetheless the employment of important contingents of forces and intense fighting, which conflict did not in the opinion of third states call for the application of neutrality.¹⁹¹ In the Falklands conflict, however, which was very localized and involved the employment of limited force, some directly concerned states declared that they would remain neutral.¹⁹²

It follows that if a certain consistency is to be ascertained from the various responses of the international community, one must look to the characteristics of each conflict as a whole, and to its potential repercussions. One thing that is already clear is that distinctions between "total," "regional," "limited," or other types of war¹⁹³ are irrelevant to neutrality as a matter of law, except to the extent that they may explain or indicate the different positions of various states as a matter of international relations. More importantly, it seems justified to state that third states may make their own assessment of whether the conflict necessitates the application of the law of neutrality. Indisputable as it is that the determination of a state of war by the warring parties would be conclusive *inter partes*,¹⁹⁴ state practice demonstrates that such a determination is not binding on third states, who may wish to adopt their own position with regard to a given conflict. Scholars who retain the concept of "material state of war" as relevant for neutrality express this idea in similar terms.¹⁹⁵ It should not be

188. See James Brooke, *Ecuador and Peru again Skirmish over an old disputed Border*, N.Y. TIMES, Jan. 29, 1995, at A6; James Brooke, *Ecuador downs Peruvian Helicopter in Border Clash*, N.Y. TIMES, Jan. 30, 1995, at A6..

189. *Peru, Ecuador Clash*, JANE'S DEFENCE WEEKLY, Feb. 4, 1995, available in 1995 WL 14357174; Julio Cesar Villaverde, *Ecuador, Peru, Exchange treaty ending conflict*, Reuters World Serv., Feb. 17, 1995; available in LEXIS, News Library, ARCNEWS File; James Brooke, *On Peru Border Strife is a yearly Event*, N.Y. TIMES, Feb. 1, 1995, at A3.

190. *Ecuador Asks for U.S. Intervention*, UPI, Feb. 24, 1995, available in LEXIS, News Library, ARCNEWS File.

191. See *supra* Part III.B.

192. See *supra* Part III.D.

193. See RAYMOND ARON, *PAIX ET GUERRE ENTRE LES NATIONS* 157 (8th ed., 1984).

194. See BROWNLIE, *supra* note 3, at 396.

195. See, e.g., Robert W. Tucker, *The Law of War and Neutrality at Sea*, XLX INT'L L. ST. 200 (1955); Robert W. Tucker, *The Interpretation of War under Present*

thought, however, that the requirements for the application of neutrality should be reduced to a determination by the international community that neutrality should apply.¹⁹⁶ Such circular reasoning renders the law devoid of any normativeness and predictability, and must therefore not be upheld.

Again, the Falklands conflict is particularly instructive. The states that considered that the application of neutrality necessary for their interests made their determination of the severity of the conflict independently and irrespective of the determinations made by the belligerents; in fact, the belligerents did not consider it necessary to bring about a formal state of war. There is thus an element of relativity or functionality in the application of neutrality. This observation or note of caution does not, as will be demonstrated further, in principle deprive the position advanced here of its merits. For the purposes of neutrality, the relevant inquiry is a factual one, the assessment of which does not exclusively belong to the belligerent parties. For such a concept, similar to that of armed conflict, allows relatively limited leeway for abuse of the law. It is on this basis that, for instance, the censorship of Egypt's prize action by the Security Council must be understood.

C. *The Relevance of the Intentions of the Belligerents*

For authors who take the position that a state of war is brought about only if one of the parties has that intention,¹⁹⁷ the application of the whole corpus of the Laws of War, and consequently of the law of neutrality, depends upon the intentions of the belligerents. Moreover, there are authors who concur in the result, adopting the view that a declaration of war or an assertion of belligerency is conclusive for the application of neutrality.¹⁹⁸ At the outset, it should be recalled that state practice, where a declaration of war is a rarity, suggests clearly that neither the existence nor the absence of a declaration is conclusive. As a principle, its existence is beside the point: if

International Law, 4 INT'L L.Q. 11 (1951). Cf. Research in International Law of the Harvard Law School, Comment on the Draft Convention on Rights and Duties of Neutral States in Naval and Aerial Warfare, 33 AM. J. INT'L L. Supp. 209, 211 (1939).

196. See MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 113 (1994).

197. See, e.g., Arnold McNair, *The Meaning of War, and the Relation of War to Reprisals*, 11 T.G.S. 29 (1926); McNAIR & WATTS, *supra* note 101, at 2; CHARLES ROUSSEAU, *LE DROIT DES CONFLITS ARMÉS* 7, 371 (1983); Werner Meng, *War*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 282, 282-90 (Rudolf Bernhardt ed., 1982).

198. See *supra* notes 63 & 141.

hostilities of a certain magnitude take place, the existence of a declaration or an assertion of war is neither detrimental nor advantageous in the context of neutrality. This is not to suggest, however, that the intentions of the belligerents are devoid of any value.

1. The Contexts in which the Intentions of the Belligerents Become Relevant

There are two issues to be discussed. The Falklands conflict exemplifies the first: it is the only case in which third parties declared neutrality *before* the commencement of fighting, while the U.K. expeditionary force was on its way to the islands. The third states' attitude illustrates that neutrality may be proclaimed at the stage of "preparatory acts" (*Vorbereitseinhandlung*), with a view to an armed conflict that is imminent. Evidently, the declarant states evaluated the situation taking into account the intentions of the parties, as manifested by physical acts and statements. Nevertheless, it must not be thought that an unequivocal manifestation of intentions to proceed to military operations on a large scale is an independent and sufficient condition for the application of the law of neutrality. Although it will suffice for the *adoption* of a neutral position, the *maintenance* of this position depends upon the definitive action upon these intentions. Further, in the context of a clash that is already in progress, military necessity dictates that constancy in fighting is an unrealistic requirement for the definition of a state of generalized hostilities. In this context also, the various statements and acts of the belligerents may be taken into account as evidence of the intentions of the belligerents in order to predict the course the conflict will take in the future.

The second issue is related to an academic view that Professor Verdross was a major proponent of—that a declaration of war is the only sufficient requirement for the law of neutrality to apply, on the grounds that the status of neutral imposes serious limitations on state sovereignty and should therefore not be an option unless the situation is grave enough.¹⁹⁹ His premise was apparently that a declaration of war is a sign of "earnestness" on the part of the declarant that warrants the application of the law of neutrality. This point fails to fully account for the relevant state practice. First, it is difficult to see why considerations of "earnestness" or certainty should be decisive or even pertinent if neutrality, as has been demonstrated, is an optional status.

199. See ALFRED VERDROSS, *DIE IMMERWÄHRENDE NEUTRALITÄT ÖSTERREICHS* 50-53 (1978) (citing Bindschedler, *supra* note 63).

Second, it is worthwhile recalling, in addition to the Pakistani declaration of war (which was in all probability intended solely to legitimize its exercise of prize jurisdiction),²⁰⁰ the two Sino-Japanese wars of the 1930s. In these conflicts both belligerents formally refrained from classifying their long and onerous conflicts as wars to avoid the application of rules of international law detrimental to their war aims, particularly sanctions by the League of Nations. China in particular sought to avoid the application of the U.S. Neutrality Laws.²⁰¹

Although one may be tempted to explain away these extreme cases as patent abuses or evasions of law, which would save the theory, it should be remembered that it is practically difficult to establish the fact of abuse or evasion. A margin of appreciation will have to be conceded to a state manifesting its intentions in matters of war,²⁰² if only because a state is presumed to act lawfully.²⁰³ The greater difficulty arises perhaps from the fact that an abuse of rights is convincingly pronounced by a disinterested body, like a court of law, whereas the Security Council, if seized of such a matter, does not always qualify as such. Egypt, for example, maintained the legality of her prize action despite the fact that the Security Council unequivocally refuted the pertinence of Egypt's arguments that a state of war existed. Certainly, Egypt would not disregard a court's pronouncement to the same effect as readily. The problem is, however, that the International Court of Justice and other international tribunals do not often preside over cases of that sort,²⁰⁴ and then only *ex post facto*.

One may object to the above on the grounds that if the determination of the parties is conclusive, the failure to apply the

200. See *supra* notes 88-90 and accompanying text.

201. See BROWNLIE, *supra* note 3, at 387-389; CHARLES G. FENWICK, INTERNATIONAL LAW 643-44 (4th ed., 1965). For a contemporaneous source, see the discussions in LEAGUE OF NATIONS O.J. Spec. Supp. 177, at 22 (1937).

202. Compare the relevant case-law of the European Commission and Court of Human Rights on Article 15 of the European Convention on Human Rights. See Greek Case, 1969 Y.B. Eur. Conv. on H.R., at 1 (Eur. Comm'n on H.R.); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), at 4(1976); see also the ruling of the European Court of Justice on Article 225 of the European Economic Community Treaty in Case C-120/94 R, Commission v. Hellenic Republic (Order), 1994 E.C.R. I-3037; Opinion of Jacobs A.G. [published separately], June 6, 1994, paras. 50 *et seq.*

203. Compare the dictum of the International Court of Justice in the Rights of Passage over the Indian Territory (Portugal v. India), 1957 I.C.J. 125, 142 (Nov. 26) (Preliminary Objections): "a text emanating from a Government must, in principle, be interpreted as producing, and as intended to produce effects in accordance with existing law and not in violation of it."

204. See J.G. Merrills, *The Optional Clause Revisited*, 64 BRIT. Y.B. INT'L L. 1977, 232-34 (1993).

law of neutrality should not pose a practical problem. One could argue that a state may still adopt the measures it would have adopted had it been formally neutral in the context of the law of peace. The results, however, are unsatisfactory. The duties of neutrality are complemented by guarantees of inviolability of the neutral state,²⁰⁵ and such assurances cannot be obtained in general international law except by way of neutrality. This concept is particularly exemplified by the Falklands conflict. Moreover, unless neutrality applies, the state concerned would have no lawful alternative but to honor outstanding contracts with the belligerents.

Therefore, the argument that a declaration of war or an assertion of belligerency is always decisive does not hold true. The value of a declaration of war when followed by actual fighting, is that it is conducive to legal certainty, as it allows a predetermination of the magnitude of the conflict. Moreover, a declaration may be evaluated in the context of an objective determination as an element in the consideration of the magnitude of an existing conflict.

2. Irrelevance of a Declaration of War?

A possible argument against the position outlined above would be based on the view that a state of war brought about by such means is in principle illegal in itself.²⁰⁶ For purposes of this analysis, the most relevant argument is that, since the use of force is prohibited except in self defense, the aggressor state would, by declaring war, confer upon itself new (belligerent) rights. As a result, the law would allow a state to profit from its own wrongdoing—*ex iniuria non oritur ius*.

Admittedly, the construction has the advantage of logical and systemic consistency in that it attempts to fit neutrality and war into a broader picture of international law. It does, however,

205. See Hague Convention V, *supra* note 12, arts. 1-3.

206. See Elihu Lauterpacht, *The Legal Irrelevance of the 'State of War'*, 62 ASIL PROC. 58 (1968); NATHAN FEINBERG, THE LEGALITY OF A 'STATE OF WAR' AFTER THE CESSATION OF HOSTILITIES (1961), reprinted in STUDIES IN INTERNATIONAL LAW, at 74 (1979); Quincy Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT'L L. 365 (1953). This doctrinal opinion is reflected in, or followed by, the ruling of an Israel Court. See *Jiday v. Chief Executive Officer of Haifa*, 22 I.L.R. 698 (S. Ct. Isr. 1955). But see Richard R. Baxter, *The Legal Consequences of the Unlawful Use of Force under the Charter*, 62 ASIL PROC. 68 (1968); JULIUS STONE, OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES (1974). Professor Scelle takes a most interesting, but wider, view on the matter. Georges Scelle, *Quelques Réflexions sur l'Abolition de la Compétence de Guerre*, 58 R.G.D.I.P. 5 (1954). Contra JULIUS STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION (1958).

invite some observations. The thesis of this Article is that for the purposes of neutrality war is essentially a *fact*,²⁰⁷ whereas the proponents of the theory that a declaration of war is irrelevant limit their objections to a state of war brought about by a declaration or assertion of belligerency by the aggressor.²⁰⁸ The conflict is therefore limited to the case where a state of generalized hostilities would come into being anyway—the aggressor declaring war prior to or after the state of generalized hostilities comes into being. With regard to that case, it will be observed with respect, that this theory overlooks the difference between material illegality and opposability. Although logic dictates that there will necessarily be at least one aggressor party acting unlawfully, the unlawfulness is not *opposable* by the party choosing to remain neutral. Neutrality by definition implies that the right to pass judgment on legality is eschewed. In this sense, the party, which (*ex hypothesi* validly under the U.N. Charter) chooses to remain neutral, acquiesces in the illegality of the aggressor. Conversely, if a third party refuses to submit to prize action by one belligerent on the ground that such action is the unlawful fruit of aggression, this would be a perfectly lawful position, but not a position of neutrality.

Thus, it may be concluded that the intentions of the parties, in whatever form they are expressed, are not binding as such on third parties for the purposes of the law of neutrality. A declaration of war will therefore not oblige third parties to observe neutrality.²⁰⁹ Furthermore, and despite the dispositive or optional character of neutrality,²¹⁰ a state may not lawfully choose to observe neutrality in a “hostilities-free war.”²¹¹

V. CONCLUSION

This Article has addressed the question of the meaning of war in the particular context of neutrality, and has attempted to provide a sober analysis of the law pertaining to the application of the law of neutrality. The analysis of state practice has led to the conclusion that the state of affairs decisive for neutrality consists in actual fighting of a certain intensity and magnitude between

207. Cf. the Turkish Indemnity case (Russia v. Turkey), 20 R.G.D.I.P. 19, 21 (1913) (Perm. Ct. Arb'n) (“[L]a guerre, fait international au premier chef . . .”).

208. A declaration of war by the party acting in self-defense is arguably permissible, or at least not detrimental to the innocence of that party.

209. See *supra* Parts III.A.2 & III.B.

210. Cf. SCHWARZENBERGER, *supra* note 1, at 70.

211. *Contra* JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES AND WAR LAW 313 (1959).

forces of (at least) two state entities—whereupon third states may lawfully adopt a neutral position, even if the belligerents clearly indicate that they do not consider themselves to be in a state of war. Conversely, no formal assertion of belligerency is requested of a belligerent party involved in such a situation for the exercise of belligerent rights against third parties. These findings were then systematically exposed in light of the concepts of “armed conflict” and “state of war.” It has been argued that, whereas the former concept is insufficient by itself, the latter, although perhaps not altogether in desuetude in state practice,²¹² is irrelevant.

The doctrinal approach in this Article consisted in adopting the factual concept of a “state of generalized hostilities,” which best corresponds to what is believed to be the correct interpretation of state practice. It should not, however, be thought that this concept is entirely original. As has been stated, it is based on the concept of armed conflict, and has more than certain affinities to the concept of the state of war in the “material” or “objective” sense. The employment of a different and specific notion is prompted not by some undue eclecticism of the Author, but by the fact that this Article cannot make a wider claim to settle all issues related to the state of war, as the unreserved adoption of a certain conception of the principles of state of war and armed conflict would imply. Moreover, it is founded on the wider premise that the generic notion of “war” may acquire different meanings so as to accommodate the specific purposes of the law applicable in a given case.²¹³ As so often in law generally, the answer to the question of the meaning of something depends on why the question is asked in the first place. For instance, the rich case law of national courts demonstrates that the existence of a state of war may be relevant or irrelevant to the construction of a given agreement²¹⁴ or

212. See Greenwood, *supra* note 150.

213. See STONE, *supra* note 211 at 312; FRITZ GROB, *THE RELATIVITY OF WAR AND PEACE* 198-224 (1949); L.C. Green, *Armed Conflict, War, and Self-Defence*, 6 A.V.R. 387 (1956-57); HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 190 (1992)

214. From the various national cases a representative mix is as follows. Cases dealing with the interpretation of contractual terms in commercial contracts: *Époux Bordier v. Époux Lorilleux*, 40 I.L.R. 434 (Cass. Civ. 1960) (Fr.); *In re Grotrian*, [1955] 1 Ch. 501; *Arab Bank Ltd. v. Barclays Bank (Dominion, Colonial and Overseas)*, [1954] 2 All E.R. 226 (H.L.), *affirming* [1953] 2 All E.R. 263 (C.A.); *Ruffy-Arnell and Baumann Aviation Co., Ltd. v. The King*, [1922] 1 K.B. 599; *Ertel Bieber & Co. v. Rio Tinto Co. et al.*; [1918] 1 App. Cas. 260; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] 1 App. Cas. 32 (Eng.).

statute.²¹⁵

It is further believed that the introduction of the concept of the state of generalized hostilities accommodates the interests of all concerned parties to a conflict. An important question is whether the belligerents or third parties should enjoy exclusivity

Cases dealing with the interpretation of contractual terms ("war risks") in insurance contracts: *Western Reserve Life Insurance Co. v. Meadows*, 256 S.W.2d 674 (Tex. Civ. App. 1953); *Jackson v. North America Insurance Society of Virginia*, 183 S.E.2d 160 (Va. 1971); *Borysoglebski v. Continental Insurance Co.*, 14 I.L.M. 78 (N.D. Ill. 1974); *Shneiderman v. Metropolitan Casualty Co. of New York*, 220 N.Y.S.2d 947 (Sup. Ct. 1961); *Stankus v. New York Life Ins. Co.*, 44 N.E.2d 687 (Mass. 1942); *Thomas v. Metropolitan Life Ins. Co.*, 131 A.2d 600 (Pa. 1957); *West v. Palmetto State Life Ins. Co.*, 25 S.E.2d 475 (S.C. 1943); *Pan American World Airways Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974); *New York Life Ins. Co. v. Durham*, 166 F.2d 874 (10th Cir. 1948); *Marissal v. Mutuelle Générale Française Accidents*, 1950 D. Jur. 577 (Cass. Civ.); *La Paternelle-Vie v. Mellec*, 1951 D. Jur., Somm. 21 (Cass. Civ.); *The Kervel*, 48 I.L.R. 469 (Trib. Comm. Nantes 1966) (Fr.); *Papadimitriou v. Henderson*, [1989] All E.R. 908 (K.B.); *Union Castle Mail Steamship Co. Ltd. v. U.K. Mutual War Risks Assoc. Ltd.*, [1958] 1 All E.R. 431 (Q.B.); *Atlantic Maritime Co. v. Gibbon*, [1953] 2 All E.R. 1086 (C.A.); *Driefontein Consolidated Gold Mines Ltd. v. Janson*, [1900] 2 Q.B. 339 (Eng.).

Cases dealing with the interpretation of charter-parties: *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantam Steamship Co., Ltd.*, [1939] 2 K.B. 544 (C.A.), *affirming* [1938] 3 All E.R. 80 (K.B.); *Spanish Government v. North of England Steamship Co., Ltd.*, 54 T.L.R. 852 (1938) (K.B.); *Andrea Esposito v. Samuel Wilson Bowden*, 119 E.R. 1430 (1911) (C.A.); *Geipel v. Smith*, 7 Q.B. 404 (1872) (Eng.); *Navios Corporation v. The Ulysses II*, 161 F. Supp 932, *aff'd* 260 F.2d 959 (4th Cir. 1958).

215. Cases dealing with the interpretation of rules of military discipline: *Robb v. U.S.*, 456 F.2d 768 (Ct. Cl. 1972); *Broussard v. Patton*, 466 F.2d 816 (9th Cir. 1972); *U.S. v. Bancroft*, 20 I.L.R. 586 (1953); *Military Prosecutor v. Bakir*, 48 I.L.R. 478 (Military Ct. Ramallah 1970) (Isr.); *In re Zabita*, 5 Ann. Dig. 491 (1929-30) (S. Ct. Lith. 1929).

Cases on the interpretation of Criminal Statutes: *U.S. v. Sobbel*, 314 F.2d 314 (2d Cir. 1963), *cert. denied*, 374 U.S. 857 (1963); *War in Korea Case*, 20 I.L.R. 591 (Ct. App. Paris 1953) (Fr.).

Cases dealing with Emergency Legislation: *Marcus Clark & Co. Ltd. v. The Commonwealth*, 20 I.L.R. 594 (H.C. Austl. 1952); *Australian Communist Party v. The Commonwealth*, 20 I.L.R. 592 (H.C. Austl. 1951); *Re Guyot*, 48 I.L.R. 467 (Conseil d'Etat 1966) (Fr.).

Cases interpreting Enemy Legislation: *In re Extradition of D'Amico*, 177 F. Supp 648 (S.D. N.Y. 1959); *Rex v. Bottrill*, [1947] K.B. 41; *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* [1946] 1 All E.R. 36 (H.L.).

See also Conseil d'Etat, Judgment of Dec. 16, 1953, *Dame Veuve Nguyen Ba Chinh et autres, Lebon 553* (administrative liability).

Cases where the determination of the legal situation by the Government is conclusive and binding on the judiciary include: *Mansur Ali v. Arodhendu Shekhar Chattarjee*, 71 I.L.R. 708 (Sup. Ct. 1968) (Pak.); *Jubran v. U.S.*, 255 F.2d 81 (5th Cir. 1958); *U.S. v. Bussoz*, 218 F.2d 683 (9th Cir. 1955); *The Eastern Carrying Ins. Co. v. The National Benefit Life and Property Assurance Co. (Ltd.)*, 35 T.L.R. 292 (1919) (K.B.); *Silberwacht v. Attorney-General*, 20 I.L.R. 153 (Dist. Ct. Tel-Aviv 1953). See generally A.B. Lyons, *The Conclusiveness of the Foreign Office Certificate*, 23 BRIT. Y.B. INT'L L. 240 (1946).

in the assessment of the state of affairs—in other words, whether the legal determination of the situation by the former or the latter should be conclusive and binding on the other. This Article suggests, in accordance with state practice and consistently with the premises already stated, that neither enjoys exclusivity. In so far as the belligerents are concerned, the purpose of the corpus of the Laws of War is invariably to impose limits on their conduct, and it would be repugnant to legal logic to render the obligations of third states dependent solely on the conduct of the parties whose actions the law seeks to regulate.

Nevertheless, if a detournement of the law may be effected by both the warring and third parties, the leeway of both must be limited to the extent possible. The introduction of the factual concept of a state of generalized hostilities is appropriate to that end. For such a state of affairs, based on the concept of armed conflict, is more readily ascertainable and leaves less room for ambiguity. It is conducive to legal security and promotes a sense of objectivity in the law, which are aims to be advanced by legal norms.²¹⁶

216. Cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* 1950 I.C.J. 65, 74; *Asylum (Col. v. Peru)*, 1950 I.C.J. 266, 274-75; *The Anglo-Norwegian Fisheries (U.K. v. Nor.)* 1951 I.C.J. 116, 132; *Nottebohm (Liecht. v. Guat.)*, 1955 I.C.J. 4, 21-23.
