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FACULTY OF LAW
DEPARTMENT OF PUBLIC LAW

Has the state of war been made redundant by the UN Charter regime on the use of force

LLM Minor Dissertation (International Law)

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DSHSTE001

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[Abstract: This dissertation will examine whether the concept of war is still relevant and necessary despite the introduction of the modern concept of international armed conflict. It will prove that a state of war is compatible with modern international law and that characterizing a conflict as war has some irrefutable advantages.]

Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws (International Law) in approved courses and a minor dissertation/research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

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Stella Dshurina

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24. 702 words

Dedication

To Boris, you are terribly missed

University of Cape Town

I have learned throughout my life [...] chiefly through my mistakes and pursuits of false assumptions, not by my exposure to founts of wisdom and knowledge.

Igor Stravinsky

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I. Introduction

Does war still exist according to international law? On the one hand, the answer is obviously in the affirmative – hostilities including the use of force between states do take place and rules of international law regulating them do exist. Less obvious, however, is whether a state of war as a condition creating legal consequences not only for the parties involved, but also for other states, is still legally relevant. While there have been many conflicts since 1945, few of them have been characterized as ‘war’ and no declarations of war have been made.¹ Hence, there is a tendency to avoid the term ‘war’ on the ground that it is ‘arcane’ and largely superseded by the term ‘international armed conflict’.² Moreover, it has been claimed that a state of war is incompatible with the UN Charter and therefore can no longer exist under international law so that a qualification of a conflict as ‘war’ as opposed to ‘armed conflict’ would have no legal consequences.³

This dissertation will examine whether the concept of war is still relevant and necessary despite the introduction of the modern concept of international armed conflict. In the course of answering it, three further questions need to be posed. First, is it compatible with the UN Charter to continue to invoke the concept of ‘war’? Second, what are the consequences of recognizing a state of war as a contemporary legal concept? Finally, are there any norms in international law which are applicable in a state of war only?⁴

War gives rise to, modifies or suspends certain rights and duties between belligerents and neutral states and affects both their nationals and trade. In addition, although not relevant to the issues discussed in this dissertation, war activates important

¹ C Greenwood ‘The Concept of War in Modern International Law’, in: Greenwood, *C Essays on War in International Law* (2006) London: Cameron May, 33-60 at 33.

² Y Dinstein *War, Aggression and Self-Defence* 4thed (2005) Cambridge University Press, at xii (From the introduction to the first edition).

³ Greenwood (note 1) at 33.

⁴ Cf KJ Partsch ‘Armed Conflict’ in: *Max Planck Encyclopedia of Public International Law*, band 3: Use of Force War and Neutrality Peace Treaties (A-M), (1982) Amsterdam, New York: North-Holland, 25-28 at 27.

rules of municipal law of every state.⁵ Nonetheless, there is no explicit definition of war, even though international instruments such as the Covenant of the League of Nations and the Kellogg-Briand Pact make provisions regarding 'war'.⁶

The first chapter addresses the complex topic of defining war. The efforts to interdict war will be discussed as well.

The second chapter will discuss whether the state of war is permissible under contemporary international law. It will be argued that war continues to be recognized as a legal concept under modern international law.

The third chapter will examine whether classifying a particular conflict as 'war' has any legal significance and the practical relevance of this issue. It has been claimed that important bodies of international law such as the law of neutrality depend on the existence of a state of war.⁷ In addition, the discussion about the significance of a state of war necessarily includes the questions about the use and threat of force in article 2(4) of the UN Charter which are of fundamental importance.⁸

Hence, the examination of these issues is far from being of a purely academic nature.

⁵ As found in *Ertel Bieber and Co v Rio Tinto Co Ltd* [1918] AC 260 by the House of Lords, no subject is allowed to enter into a contract and to do anything which may be detrimental to the interests of his country. The continued existence of contractual relations with a subject of an alien state is assumed to be beneficial for the enemy state's trade and commerce and hence deemed to be of detrimental character. – *ibid* at 273-274 and 277.

⁶ J Stone *Legal Controls of International Conflict* (1959) London at 304.

⁷ L Oppenheim *International Law: A Treatise* 7thed (1948) Lauterpacht, H (ed) London: Longmans at 655, § 295.

⁸ Greenwood (note 1) at 34.

II. Chapter I: definition of war and legal instruments limiting the recourse to war

It is undoubtedly hard for a layman to understand that not every case of fighting is ‘war’ in the legal sense. Legal thinking, however, found it difficult if not impossible, to establish a legal definition of war.⁹ Hence, there is no binding definition of war set out in any international legal instrument. Nonetheless, for the purposes of this dissertation, the attempts to define war will be examined.

1. Definition of war

There have been numerous scholarly attempts to depict the practice of states and to articulate the immensely complex idea of war.¹⁰

According to Oppenheim, ‘[w]ar is a contention between two or more states through their armed forces for the purpose of overpowering each other and imposing conditions of peace according to the victor’s wish.’¹¹

However, this definition has several flaws. First, it does not cover two types of war: states that do not share a common border may declare war and apply the laws of war without being engaged in actual hostilities, ie without bringing a contention between their armed forces. It is further possible that a state, although being at war with another state, may decide to withdraw its forces and then there will be no further contention between the armed forces.¹² Second, the definition does not differentiate between war and *status mixtus*¹³. States might engage their armed forces in a contention, but might not be willing to declare war. In this case and according to this definition, these states would then either

⁹ AK Kuhn ‘Should International Law Recognise an Intermediate Status between War and Peace?’ (1954) 48 *American Journal of International Law* 98 at 98-99.

¹⁰ Dinstein (note 2) at 4-5.

¹¹ Oppenheim (note 7) at 202 (§ 54). However, it has been argued by Detter that the last few words of Oppenheim’s definition indicate that it must be obsolete because a victor is no longer free to impose any conditions that he wishes. Moreover, Deter alleges that the concept of war could not depend on its consequences. – I Detter *The Law of War* (2000) Cambridge University Press at 7.

¹² G Schwarzenberger *The Frontiers of International Law* (1962) London: Stevens at 249.

¹³ The term ‘*status mixtus*’ refers to an intermediate status between war and peace – Dinstein (note 2) at 15; see also Kuhn (note 9).

be in a state of war against their will or the subjective element of *animus belligerendi*¹⁴ must be introduced into the definition.¹⁵

According to Kelsen, the intention of waging war in order to impose conditions of peace upon the attacked state should not be inserted into the definition of war.¹⁶ The attacked state will most probably only have the intention to defend itself and the war might end without the one belligerent obtaining victory over the other. For instance, in maritime war a belligerent may limit its military actions to mere coast defence and although these actions would satisfy the requirements of a state of war within the meaning of international law, they may be carried out with the intention of exhausting the enemy and not reaching victory over him.¹⁷ In any event, war might be terminated without the conclusion of a peace treaty.¹⁸ There have been cases where a peace treaty could not be concluded either because one of the belligerents ceased to exist as a result of the war or because its territory was annexed to one of the victor states or because it was dismembered and new states established instead.¹⁹

These issues highlight the main problems of any attempt to define war. Next, an examination of the different standpoints of a definition of war from a more historic perspective will be undertaken.

War has been under consideration since time immemorial. As a form of self-help, it served both as a means for enforcement of the law in the form of a sanction against a

¹⁴ *Animus belligerendi* refers to the intention to wage war – K Skubiszewski ‘Peace and War’ in: *Max Planck Encyclopedia of Public International Law*, band 4: Use of Force War and Neutrality Peace Treaties (N-Z), (1982) Amsterdam, New York: North-Holland, 74-78 at 75.

¹⁵ Schwarzenberger (note 12) at 249.

¹⁶ H Kelsen *Principles of International Law* (2003) Clark, New Jersey: Lawbook Exchange at 31-32.

¹⁷ *Ibid.*

¹⁸ As was the case on 2 July 1921 when the Congress of the United States issued a resolution stating that ‘the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved 6 April 1917, is hereby declared at an end.’ This resolution was approved by the President on 2 July 1921. Similarly, on 19 October 1951 the state of war between the United States and Germany, which came into existence by the joint resolution of 11 December 1941, was declared terminated. – as cited in Kelsen (note 16) at 68 and 69 respectively.

¹⁹ Kelsen (note 16) at 69.

wrong and as a means of changing the law.²⁰ Before World War I, the definition of war was based on a factual manifestation including the use of force with the objective to impose one's will on one's opponent and overpower them.²¹ However, after 1919 not all 'wars' conformed to this definition. For example, post-World War I 'wars' did not necessarily include armed force. Although war was declared between the Latin American states and the German Reich in World War II, no active hostilities took place.²² In addition, cases occurred where confiscation of enemy property, occupation or economic warfare continued even after the cessation of hostilities.²³ Therefore, the classical definition of war – if such existed – was no longer able to distinguish war from other hostile measures short of war such as blockade or punitive action.²⁴

Two main schools of thought can be distinguished. The subjective school emphasized the intention of the states in conflict. A core notion of the subjective school (also called 'state of war doctrine'²⁵) was the intention to wage war (*animus belligerendi*).²⁶ Hence, war existed if one of the parties decided to regard the situation as war.²⁷ The intention or *animus belligerendi* could be manifested by a declaration of war or inferred from the circumstances. At least one of the parties to the conflict had to regard the situation as war. If all parties refused to consider the fighting as war, it could not be deemed to be war under international law.²⁸ The attitude of third states was, however, not decisive.²⁹

This view is best summarized by Lord McNair:

²⁰ W Meng 'War' in: *Max Planck Encyclopedia of Public International Law*, band 4: Use of Force War and Neutrality Peace Treaties (N-Z), (1982) Amsterdam, New York: North-Holland, 282-290 at 282.

²¹ *Ibid* at 283.

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ JA Cohan 'Legal War: When Does It Exist, and When Does It End?' (2003-2004) 27 *Hastings International & Comparative Law Review* 221 at 254.

²⁶ Skubiszewski (note 14) at 75-76.

²⁷ Greenwood (note 1) at 36.

²⁸ Skubiszewski (note 14) at 75.

²⁹ *Ibid*.

*A state of war arises in International Law (a) at the moment, if any, specified in a declaration of war; or (b) if none is specified, then immediately upon the communication of a declaration of war; or (c) upon the commission of an act of force, under the authority of a State, which is done animobelligerendi, or which, being done sine animobelligerendi but by way of reprisals or intervention, the other State elects to regard as creating a state of war, either by repelling force by force or in some other way; retroactive effect being given to this election, so that the state of war arises on the commission of the first act of force.*³⁰

In contrast to the subjective school of thought, the proponents of the objective school relied on a definition based on objective criteria³¹ and hence de-emphasized the subjective view of the participants. In the words of Professor Kelsen:

*A state of war in the true and full sense of the term is brought about only by acts of war, that is to say, by the use of armed force... Consequently war is a specific action, not a status. From the point of view of international law, the most important fact is the resort to war, and that means resort to an action, not resort to a status. Some writers consider the intention to make war, the animus belligerendi, of the state or states involved in war as essential. Animus belligerendi means the intention to wage war. But this can only be the intention to perform acts of war, that is to say, to use armed force, with all the consequences international law attaches to the use of armed force.*³²

Others have proposed a hybrid construction of war using elements from both the ‘objective’ and ‘subjective’ theories. In their view, even though *animus belligerendi* is necessary for a ‘state of war’ to commence,

*...if acts of force are sufficiently serious and long continued, then, even if both sides disclaim any animus belligerendi and refuse to admit that a state of war has arisen between them, there comes a point at which the law must say to the parties, you are refusing to recognize the facts; your actions are of a kind which it is the policy of the law to characterize as war; and therefore, whatever you choose to say about it, you have in fact set up a state of things which in the eye of the law is a state of war.*³³

³⁰ ‘The Legal Meaning of War and the Relation of War to Reprisals,’ 11 *Grotius Society Transactions* 29 at 45 (1925) – as cited in MS McDougal & FP Feliciano ‘The Initiation of Coercion: A Multi-Temporal Analysis’ (1958) 52 *American Journal of International Law* 241 at 242.

³¹ Greenwood (note 1) at 36.

³² Kelsen (note 16) at 27.

³³ JL Brierly ‘International Law and Resort to Armed Force’ (1932) 4 *Cambridge Law Journal* 308 at 313.

Neither approach offers a satisfactory definition. On the one hand, the subjective test made the application of the rules of international law applicable solely in war times (such as the law of neutrality) dependent on the choice of the states concerned. Moreover, the subjective school led to an artificial separation between the state of war as a legal concept and the factual state of war in the sense of actual fighting.³⁴

On the other hand, the objective approach lacked established criteria to distinguish a state of war from other hostilities falling short of war due to the fact that there was no definition of war that was agreed upon by states and writers.³⁵ In addition, in the period between 1919 and 1945, no definition of war could be reconciled with state practice,³⁶ and declarations of war became a rarity.³⁷ Hence, even before 1945, there was no agreed definition of war.

Some scholars tried a different approach in the attempt to clarify the term 'war'. For instance, F Grob³⁸ rejected the notions of both a 'war in the legal sense' and a 'legal state of war' and suggested that not 'one over-all legal definition of war' is needed but rather a 'variety of legal definitions'. Each of them should be formulated in relation to 'the particular intent and purpose' of the specific 'rule of law on war' which happens to be under consideration at a given time. Hence, in this view, in order to determine whether a particular exercise of coercion amounts to 'war' one must specify a particular rule of law in relation to which the 'existence of war' will be affirmed or denied.³⁹ Whether a specific rule is applicable to the facts or not, depends on the rule's intent and purposes and is decided by interpretation. Thus, the main task in determining whether or not war exists is reduced to the 'interpretation' of legal technicality.⁴⁰

³⁴ Greenwood (note 1) at 37.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ As cited in McDougal & Feliciano (note 30) at 244.

³⁹ Ibid citing F Grob 'The Relativity of War and Peace' 189 (1949).

⁴⁰ Ibid.

This would lead to the determination of war in relation to a particular set of rules only, whereas it might not exist in relation to other rules. Hence, the effect of this ‘relativist’ approach would be that war would have different meanings for every situation⁴¹ and thus, the concept of war would be destroyed altogether.⁴² In addition, the term ‘war’ would become meaningless for legal purposes and the forms of armed violence between states even more diverse.⁴³

Thus, there is a complete lack of agreement with regard to a definition of war. For this reason, it has been suggested that no definition ‘serviceable for all purposes’ can be established.⁴⁴ Despite the lack of unanimity with respect to the meaning of the term ‘war’, a discussion of a ‘definition of war’ is a valuable aid to more effective regulation of this legal concept. The fact that there is no agreement on an exact definition is not necessarily an impediment to articulating legal norms regulating the resort to armed force.⁴⁵

Hence, numerous attempts have been made to restrict the right to wage war or to abolish the legal state of war altogether.

2. First attempts to limit the right to recourse to war

The quest to restrict recourse to war by international law is a twentieth century phenomenon.⁴⁶ Prior to 1919, it was held that war was an exercise of state sovereignty, and therefore could be invoked by states at will.⁴⁷

⁴¹ McNair contended that each separate use of the term ‘war’ required its own definition in the light of its particular purpose. - as quoted in *Dalmia Cement Ltd v National Bank of Pakistan* at 620; see also F Grob ‘The Relativity of War and Peace’ 189 (1949) as cited in Dinstein (note 2) at 15.

⁴² MM Whiteman *Digest of International Law*, vol 11 (1968) Washington: US Department of State at 6.

⁴³ Ibid.

⁴⁴ F Grob ‘The Relativity of War and Peace’ 189 (1949) as cited in Dinstein (note 2) at 15.

⁴⁵ Arguments by I Brownlie *International Law and the Use of Force by States* (1963) Oxford: Clarendon Press at 357 with regard to a definition of aggression.

⁴⁶ JG Merrills *Anatomy of International Law: A Study of the Role of International Law in the Contemporary World* (1981) London: Sweet & Maxwell at 72.

⁴⁷ Ibid.

a) Hague Conventions II and III

The first indication in the 20th century to limit the right to resort to force in international relations was in the Hague Conventions II and III of 1907.⁴⁸ The second Hague Convention on the Limitation of Employment of Force for Recovery of Contract Debts⁴⁹ of 1907, also called the Porter Convention after the American delegate who introduced it⁵⁰, represents the beginning of the attempts to limit the right of waging war as a legal instrument and as a legally recognized means of changing legal rights.⁵¹

This convention codified the Drago Doctrine (named after an Argentine Foreign Minister) stating that a public debt cannot be used to justify an armed intervention.⁵² However, the scope of the limitation on freedom of war imposed by this convention was very narrow. War was still permissible in the case that the debtor state refused to go to arbitration or to abide by the results from an arbitration process. The Convention was confined to contractual debts of foreign nationals who were represented by their governments and did not include inter-governmental loans.⁵³

In addition, article 1 of the third Hague Convention relative to the Opening of Hostilities⁵⁴ required ‘previous and explicit warning, in the form either of a declaration of war [...] or of an ultimatum with conditional declaration of war’ prior to the waging of hostilities.

⁴⁸ CD Wallace ‘Kellogg-Briand Pact (1928)’ in: *Max Planck Encyclopedia of Public International Law*, band 3: Use of Force War and Neutrality Peace Treaties (A-M), (1982) Amsterdam, New York: North-Holland, 236-239 at 236.

⁴⁹ (Hague, II); signed at the Hague on 18 October 1907, entered into force 26 January 1910, available at http://avalon.law.yale.edu/20th_century/hague072.asp (accessed 6 December 2011).

⁵⁰ Dinstein (note 2) at 79.

⁵¹ Oppenheim (note 7) at 179 (§ 52 et seq).

⁵² S Rosenne *The Perplexities of Modern International Law* (2004) Leiden, Boston: Martinus Nijhoff at 119; Dinstein (note 2) at 79.

⁵³ Dinstein (note 2) at 79.

⁵⁴ Convention (III) relative to the Opening of Hostilities, The Hague, 18 October 1907, available at <http://www.icrc.org/ihl.nsf/FULL/190?OpenDocument> (accessed 12 December 2011).

b) Covenant of the League of Nations⁵⁵

The preamble of the Covenant of the League of Nations admonished member states ‘not to resort to war’. The nearest the Covenant came to an abolition of war, however, was in article 10, which obliged member states to respect and preserve the territorial integrity and political independence of all members of the League against external aggression.⁵⁶ Combined with the preamble, article 10 could be construed as amounting to an obligation not to resort to war.⁵⁷ Moreover, article 11 (1) stated that any war or threat of war was a matter of concern of the whole League and included the idea of collective security.

However, other provisions undermined the purported ban on war.⁵⁸ Article 12 imposed merely a procedural delay by stipulating that

[t]he Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council.

Article 15 obliged states to submit all disputes to the Council which could make recommendations for the settlement of the dispute⁵⁹. According to article 15 (6), member states would not go to war with any party to the dispute which complied with the recommendations issued in a report by the Council. Waging war against a party which did not adhere to the recommendation was, however, not excluded.⁶⁰ Moreover, should the Council’s report not be unanimous, article 15 (7) reserved the right of members of the League ‘to take such action as they shall consider necessary for the maintenance of right

⁵⁵ League of Nations, Covenant of the League of Nations, 28 April 1919, available at: <http://www.unhcr.org/refworld/docid/3dd8b9854.html> (accessed 12 December 2011).

⁵⁶ Wallace (note 48) at 236-237.

⁵⁷ H McCoubrey & ND White *International Law and Armed Conflict* (1992) Aldershot: Dartmouth at 21.

⁵⁸ Ibid.

⁵⁹ Art 15 (4) Covenant of the League of Nations.

⁶⁰ Kelsen (note 16) at 40.

and justice.’ Finally, war was not forbidden if the conflict originated from domestic jurisdiction.⁶¹

Hence, articles 12 and 15 preserved the right of states to go to war and merely imposed some procedural requirements.⁶² The prohibition stipulated in article 10 was thus ‘totally undermined’⁶³. This was further affirmed by article 16 (1) which provided that, should any member of the League resort to war in contravention of articles 12, 13 and 15, it would *ipso facto* be deemed to have committed an act of war against all other members of the League.⁶⁴ A breach of article 10 was not included in article 16 (1).

Furthermore, the statement in article 16 (1) is arguably ‘nothing but a legal fiction’⁶⁵, which does not add anything to the obligation to undertake the sanctions listed in the same article.⁶⁶ And under article 16 (2), there was no obligation for the member states to resort to military action; the Council had only a power to make recommendations in this regard, which were not binding.⁶⁷

Hence, waging war seemed to be simply a question of procedural formalities. The Covenant of the League of Nations obliged states not to resort to war as long as the dispute was being considered by the League Council, but in the case of a failure of the Council to produce a settlement, the member states were entitled to take any action that they considered necessary. No provision in the Covenant imposed a substantive prohibition of

⁶¹ Art 15 (8) Covenant of the League of Nations.

⁶² McCoubrey & White (note 57) at 21.

⁶³ Ibid.

⁶⁴ Rosenne (note 52) at 120.

⁶⁵ Kelsen (note 16) at 41.

⁶⁶ These obligations include the severance of all trade or financial relations, the prohibition of all intercourse between the own and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the state which is in breach of the Covenant and the nationals of any other state, whether a member of the League or not – art 16 (1) Covenant of the League of Nations.

⁶⁷ Kelsen (note 16) at 41.

war.⁶⁸ Furthermore, the Covenant did not provide any adequate institutional mechanisms for the maintenance of peace and imposed only weak obligations on member states.⁶⁹

In addition, the Covenant lacked an authoritative machinery for determining breaches permitting states a wide discretion to determine when they were engaging in hostilities.⁷⁰ Accordingly, the Covenant of the League of Nations merely tried to control the use of force and the right to go to war, but did not prohibit the recourse to war.⁷¹

c) Geneva Protocol for the Pacific Settlement of International Disputes and Locarno Treaty

The first efforts to completely ban the resort to war were made in the early years of the League of Nations.⁷² In particular, the Geneva Protocol for the Pacific Settlement of International Disputes was adopted by the League during its 5th General Assembly on 2 October 1924⁷³. However, Britain failed to ratify the Protocol, so that it never came into force.

The Treaty of Locarno⁷⁴ also attempted to restrict war-making.⁷⁵ In article 2, Germany and Belgium, and also Germany and France, mutually undertook in no case to attack or

⁶⁸ McCoubrey & White (note 57) at 21; Kelsen (note 16) at 39.

⁶⁹ HU Scupin 'Peace, Historical Movements Towards' in: *Max Planck Encyclopedia of Public International Law*, band 4: Use of Force War and Neutrality Peace Treaties (N-Z), (1982) Amsterdam, New York: North-Holland, 78-86 at 84.

⁷⁰ Stone (note 6) at 300.

⁷¹ Rosenne (note 52) at 119.

⁷² Wallace (note 48) at 237.

⁷³ League of Nations, Protocol for the Pacific Settlement of International Disputes, 2 October 1924, available at: <http://www.unhcr.org/refworld/docid/40421a204.html> (accessed 12 December 12, 2011). Articles 2, art 4(6), 8, 10, 16 make reference to resort to war.

⁷⁴ Treaty of Mutual Guarantee, done at Locarno, 16 October 1925, Final Protocol of the Locarno Conference of the same Date and Collective Note to Germany dated London, 1 December 1925, regarding Article 16 of the Covenant of the League of Nations, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%2054/volume-I-1292-English.pdf> (accessed 12 December 2011).

⁷⁵ TM Franck *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) Cambridge University Press at 10.

invade each other or resort to war against each other.⁷⁶ More significantly, all contracting parties⁷⁷ were obliged to provide immediate help to a party against which ‘a flagrant violation of Article 2 of the Treaty or of a flagrant breach of Articles 42 or 43 of the Treaty of Versailles’ has been directed by one of the contracting parties.⁷⁸ However, Germany withdrew from the Pact in 1936.⁷⁹

The influence of the regime created by the League was further undermined by the failure of the United States to become a member, the late joining of the Soviet Union in 1934, and Germany, Italy and Japan withdrawing from it, in 1933 and 1937 respectively. As a result, the League was not strong enough to prevent the Second World War and its own collapse.⁸⁰

d) Kellogg-Briand Pact

Nevertheless, during the heyday of the League, in 1928 the Kellogg-Briand Pact (also called Pact of Paris)⁸¹ was signed, which made the first attempt to outlaw altogether recourse to war as an instrument of national policy.⁸² Prior to the Pact of Paris, war was admissible as a regular legal institution.⁸³ The Kellogg-Briand-Pact amended this state of law and rendered the resort to war as a legal remedy or a method of changing the law illegal. War was no longer a discretionary right of the states parties to the Pact.⁸⁴

In particular, article 1 of the Pact of Paris stated that the ‘parties condemn the recourse to war for the solution of international controversies and renounce it as an

⁷⁶ Art 2 of the Locarno Treaty.

⁷⁷ Germany, Belgium, France, Britain and Italy.

⁷⁸ Art 4 (3) of the Locarno Treaty.

⁷⁹ Franck (note 75) at 11.

⁸⁰ Rosenne (note 52) at 120.

⁸¹ Officially named General Treaty for the Renunciation of War as an Instrument of National Policy, signed at Paris, 27 August 1928; entered into force 25 July 1929, available at [http://www.cosmopolitikos.com/Documents/Kellogg-Briand%20Pact%20\(1928\).pdf](http://www.cosmopolitikos.com/Documents/Kellogg-Briand%20Pact%20(1928).pdf) (accessed 6 December 2011).

⁸² Rosenne (note 52) at 121.

⁸³ Oppenheim (note 7) at 196 (§ 521).

⁸⁴ Ibid.

instrument of national policy in their relations with one another'. War as an instrument of national policy referred to any war which was not started in self-defence or on behalf of the international community.⁸⁵ The renunciation of this type of war included two aspects – war as a legal instrument of self-help against an international wrong and war as an act of national sovereignty aimed at the change of existing rights.⁸⁶

The prohibition of war under the Kellogg-Briand Pact went further than the one under the Covenant of the League of Nations.⁸⁷ However, the Pact of Paris, like the Covenant, did not abolish the institution of war entirely.⁸⁸ Resort to war remained lawful in cases of self-defence, between signatories and non-signatories, against a signatory who had violated the Pact by resorting to war against its provisions and as a measure of collective action for the enforcement of existing obligations under other international instruments.⁸⁹ In addition, the Pact lacked any sanction mechanisms.⁹⁰ The preamble merely established that a state violating the Pact 'should be denied the benefits furnished by the Treaty'. The Kellogg-Briand Pact can thus not be considered as imposing a ban on war.⁹¹

In addition, because only war was condemned, but there was no agreed definition of war, states could engage in hostilities under some other name.⁹² This was the case in the Manchurian Affair (1931-32), the Italo-Ethiopian Affair (1935) and the Sino-Japanese Hostilities (1937-41).⁹³ The aim of waging a 'war in disguise' served to evade the duty to refrain from war as established by the Kellogg-Briand Pact and the UN Charter, and escape the condemnation of being the aggressor state.⁹⁴ As a result of the prohibition on the use of force in article 2 (4), after World War II states moved away from the traditional concept of

⁸⁵ Wallace (note 48) at 237.

⁸⁶ Oppenheim (note 7) at 182 (§ 52fh).

⁸⁷ Kelsen (note 16) at 42.

⁸⁸ Oppenheim (note 7) at 182-183 (§ 52fh).

⁸⁹ Ibid at 182-183 (§ 52fh).

⁹⁰ Wallace (note 48) at 237.

⁹¹ Scupin (note 69) at 84.

⁹² Stone (note 6) at 300.

⁹³ Ibid at 311; for the Italo-Ethiopian conflict – Brownlie (note 45) at 394-395.

⁹⁴ Meng (note 20) at 285.

war characterized by a formal declaration of war and a clear intent to engage in military action with another state, towards armed conflicts under the guise of police actions⁹⁵, limited acts of self-defence or humanitarian intervention not being referred to as war.⁹⁶

Moreover, the Pact of Paris did not prohibit all wars: defensive wars were still allowed.⁹⁷ Therefore, it did not abolish the institution of war. Hence, even after the Kellogg-Briand Pact war was still possible under international law.

e) Further international instruments

Other examples of efforts to interdict war can be found in article 2 of the inter-American Saavedra Lamas Treaty⁹⁸ forbidding the settlement of territorial questions by violence, and stating that member states would not recognize any territorial arrangement which is not obtained by pacific means, nor any occupation or acquisition of territories brought about by force of arms.⁹⁹ It did not provide any sanctions. In the case of non-compliance, the parties

⁹⁵ Police actions refer to actions by states imposing their will on other states for the purpose of law enforcement. An example of ‘international police’ practice is the Suez crisis of 1956, where Britain justified military action against Egypt by the need to protect the Suez Canal and to end the hostilities between Egypt and Israel. However, this concept is not accepted by the international community and hence does not constitute an institution of modern international law. Moreover, police action is undertaken by the competent organs of the UN (the Security Council and arguably the General Assembly, cf UN General Assembly Resolution from 3 November 1950, *Uniting for Peace*, A/RES/377 (V) A (1950) – Brownlie (note 45) at 344-345 and 333-334 for the competent organs.

⁹⁶ J Delbrück ‘War, Effect on Treaties’ in: *Max Planck Encyclopedia of Public International Law*, band 4: Use of Force War and Neutrality Peace Treaties (N-Z), (1982) Amsterdam, New York: North-Holland, 310-315 at 313. However, calling the action a ‘police action’ cannot deprive it of its character as war. – Kelsen (note 16) at 29.

⁹⁷ Wallace (note 48) at 237.

⁹⁸ Anti-War Treaty of Non-Aggression and Conciliation (also known as Saavedra Lamas Treaty named after the Argentine Minister of Foreign Affairs), signed by Argentina, Chile, Brazil, Mexico, Paraguay and Uruguay at Rio de Janeiro on 10 October 1933, League of Nations Treaty Series, vol. 163, 394-413, available at http://avalon.law.yale.edu/20th_century/intam01.asp (accessed 12 December 2011).

⁹⁹ Art II of the Anti-War Treaty of Non-Aggression and Conciliation.

committed themselves to ‘make every effort for the maintenance of peace’.¹⁰⁰ This treaty was replaced by the Bogotá Pact of 1948.¹⁰¹

Similarly, article 11 of the Montevideo Convention on Rights and Duties of States¹⁰² provided an obligation for the contracting states ‘not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure’.

Furthermore, the Declaration of Lima concerning the non-recognition of the acquisition of territory by the use of force¹⁰³ demonstrated as

a fundamental principle of the Public Law of America, that the occupation or acquisition of territory or any other modification or territorial or boundary arrangement obtained through conquest by force or by non-pacific means shall not be valid or have legal effect.

The Convention for the Maintenance, Preservation and Re-establishment of Peace¹⁰⁴ with the Additional Protocol relevant to Non-intervention confirmed that ‘no State has the right to intervene in the internal or external affairs of another’ one.¹⁰⁵ For this purpose, article I prohibited the direct or indirect intervention in the affairs of another party. This constituted an absolute agreement on non-intervention.¹⁰⁶ A significant aspect of

¹⁰⁰ Art III *ibid*.

¹⁰¹ Organization of American States, American Treaty on Pacific Settlement (‘Pact of Bogotá’), 30 April 1948, OAS, Treaty Series, No. 17 and 61, available at: <http://www.unhcr.org/refworld/docid/3de4a7024.html> (accessed 6 February 2012) – art 58.

¹⁰² Signed at the 7th International Conference of American States in Montevideo, Uruguay on 26 December 1933, entered into force 26 December 1934, available at <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897> (accessed 12 December 2011).

¹⁰³ Declaration of Non-Recognition of the Acquisition of Territory by Force, approved 22 December 1938, at the Eighth Pan American Conference at Lima, (1938-1939) 19 *International Conciliation* 186-187.

¹⁰⁴ Inter-American Conference for the Maintenance of Peace, Convention for the Maintenance, Preservation and Re-establishment of Peace from 23 December 1936, signed in Buenos Aires, (1937) 31 *American Journal of International Law* Supplement 53.

¹⁰⁵ Preamble to the Additional Protocol relative to Non-intervention from 23 December 1936, signed in Buenos Aires, 188 *LNTS* 9.

¹⁰⁶ CG Fenwick ‘Intervention: Individual and Collective’ (1945) 39 *American Journal of International Law* 645 at 656.

the Protocol was the absence of an American reservation, whereas a reservation was issued with regard to the Montevideo Convention.¹⁰⁷ This Protocol was regarded as the unequivocal renunciation by the United States of any intervention not aiming to protect lives and property of nationals.¹⁰⁸

Moreover, the Harvard Draft Convention on Rights and Duties of States in Case of Aggression from 1939¹⁰⁹ stipulated in article 4 (2) that situations created by an aggressor's use of armed force did not have any effect on sovereignty or other legal rights over territory.

However, despite the fact that numerous international instruments have been concluded and international organizations or institutes have passed several resolutions and (draft) conventions, war was not abolished by any of them. The instruments constituted 'evidence of general practice accepted as law'¹¹⁰. State practice between 1920 and 1945 showed that illegal resort to force as an instrument of national policy except for in the case of self-defence was condemned. In the few cases, where the rule was violated¹¹¹, it was usually alleged that no violation had occurred or justifications of the invasions have been made.¹¹² The state practice showed awareness of the *legal* nature of the stipulated obligations and could find further support in the Kellogg-Briand Pact and the Saavedra Lamas Pact. The four states not parties to the former – Bolivia, El Salvador, Uruguay and Argentina – were bound by the latter. Hence, with regard to the illegal use of force there

¹⁰⁷ Brownlie (note 45) at 97 and 99.

¹⁰⁸ Ibid at 99; Fenwick (note 106) at 656.

¹⁰⁹ Draft Convention on Rights and Duties of States in Case of Aggression (1939) *American Journal of International Law* 33 Special Supplement: Research in International Law (1939), 827-830.

¹¹⁰ Art 38 (1) (b).

¹¹¹ Such as the Munich Agreement (Munich Pact concluded in Munich on 29 September 1938, between Germany, Great Britain, France and Italy), available at <http://avalon.law.yale.edu/imt/munich1.asp> (accessed 6 February 2012) which permitted German annexation of the Sudetenland (Sudeten German territory) in western Czechoslovakia; the Second Italo-Ethiopian War of 1935-36 which violated art 10 of the Covenant of the League of Nations – Brownlie (note 45) at 110.

¹¹² Brownlie (note 45) at 110. The invasions of Denmark, Norway, Belgium, Denmark, Luxembourg, Greece and Yugoslavia were justified by Germany which claimed that it was acting in order to prevent the breach of the neutrality of those states by alleged plans of the forces of Great Britain and France for violating their neutrality. – Brownlie (note 45) note 3 at 110 and at 310-311.

was a constant and repeated practice accompanied by a sense of legal obligation¹¹³ which amounted to a customary rule of international law.¹¹⁴ However, as will be argued in Chapter II, war and illegal use of force are not necessarily synonymous concepts. Thus, there was no customary rule on the prohibition of all cases of war, nor was there a general agreement on the precise meaning of the term. On the contrary, certain degree of controversy in the deployment of the term in state practice was observed.

III. Chapter II: is war illegal?

1. UN Charter

War might well have been abolished with the adoption of the UN Charter¹¹⁵. Article 2 (4) states that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

The UN Charter goes beyond the Kellogg-Briand Pact and forbids not only the right to go to war but also right to resort to force¹¹⁶ except for in instances of article 51 and Chapter VII. Hence, according to the UN Charter, war is forbidden as a use of force against another state.¹¹⁷ However, the Charter avoids references to the term 'war' altogether.¹¹⁸ Merely the Preamble mentions as one of the purposes of the United Nations 'to save succeeding generations from the scourge of war'.

¹¹³ JL Brierly *The Law of Nations: An Introduction to the International Law of Peace* 6th ed (1963), Sir Humphrey Waldock (ed), Oxford: Clarendon Press at 59 et seq; Judge Read in *The Anglo-Norwegian Fisheries Case* (United Kingdom v. Norway), 18 December 1951, (1951) ICJ Reports 116 at 191: 'Customary international law is the generalization of the practice of States.'; MN Shaw *International Law* 5th ed (2003) Cambridge University Press at 70-71.

¹¹⁴ Brownlie (note 45) at 110-111.

¹¹⁵ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

¹¹⁶ Oppenheim (note 7) at 195 (§ 52k); Franck (note 75) at 20.

¹¹⁷ Kelsen (note 16) at 29; Dinstein (note 2) at 85: 'the language transcends war and covers also forcible measures "short of war"'. 'Article 2(4) applies to all force, regardless of whether or not it constitutes a technical state of war.' – P Malanczuk *Akehurst's Modern Introduction to International Law* 7th ed (1997) New York: Routledge at 309.

¹¹⁸ M Howard *Restraints on War* (1979) Oxford University Press, at 11; G von Glahn *Law Among Nations: An Introduction to Public International Law* 7th ed (1996) Boston: Allyn and Bacon at 558.

The UN Charter imposes upon member states also an obligation to settle their disputes by peaceful means.¹¹⁹ Additionally, it stipulates a positive duty for states to submit disputes to the Security Council in the case of failure to resolve the conflict by other means.¹²⁰

The Charter permits the use of force only in self-defense¹²¹ and as a UN enforcement action¹²². The logical consequence of this is that war in the sense of *both* parties to a dispute being entitled to lawfully use force is no longer possible. According to the Charter, one party would necessarily use force unlawfully.¹²³ By implication, no suspension of rules of peace would follow and no regime of rules of war would be invoked.¹²⁴

a) War as an extra-legal phenomenon

For centuries, war has been compared with natural disasters such as earthquakes and volcanic eruptions and expected to appear, like plagues, floods or fires in cyclical frequency.¹²⁵ Hence, it has been assumed that similarly to droughts and thunderbolts which cannot be forbidden, war cannot be interdicted by international law. Moreover, war has been seen as being ‘outside the range and control of law’, therefore neither legal nor illegal¹²⁶ or as a ‘category of events [...] incapable of legal control but entailing legal

¹¹⁹ Art 2 (3) and Chapter VI (articles 33-38) UN Charter.

¹²⁰ Art 37 UN Charter.

¹²¹ Art 51 UN Charter.

¹²² Under Chapter VII of the UN Charter.

¹²³ SC Neff *War and the Law of Nations A General History* (2003) Cambridge University Press at 335.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Dinstein (note 2) at 73 referring in notes 66 and 67 to the works of other scholars such as JL Brierly and A Nussbaum.

consequences'¹²⁷. It has been suggested furthermore that '[i]nternational law has [...] no alternative but to accept war'.¹²⁸

These views are based on the presumption that while it is possible to have rules governing the conduct of war (*jus in bello*), it is impossible to impose normative limitations on the unleashing of hostilities, so that there cannot be any real *jus ad bellum*.¹²⁹ International law cannot say when, but only how war is to be waged.¹³⁰

However, the assumption that war is 'a meta-juridical occurrence' is 'artificial' and 'delusive'.¹³¹ After all, war is not caused by nature, but by human beings. According to Dinstein, every form of human conduct is susceptible of regulation by legal norms and cannot be *a priori* excluded from the range of application of any actual or potential legal rules. The fact that international law is able to control the conduct of combatants (*jus in bello*) shows that it can also restrict the freedom of belligerents to wage war (*jus ad bellum*).¹³² Yet, from a jurisprudential point of view, is there any difference between imposing rules on the 'when' or 'how' of war?¹³³

Certainly, as Lauterpacht observes, international law does not establish war.¹³⁴ Likewise, domestic law does not establish murder or robbery.¹³⁵ However, there is a greater similarity between war and murder or robbery, all being forms of human conduct, than

¹²⁷ Q Wright 'Changes in the Conception of War' (1924) 18 *American Journal of International Law* 755 at 756.

¹²⁸ Dinstein (note 2) at 74 citing WE Hall.

¹²⁹ Dinstein (note 2) at 74. For a definition of *jus ad bellum* see text accompanying note 163; for a definition of *jus in bello* see text accompanying note 171.

¹³⁰ Dinstein (note 2) at 74 citing CA Pompe.

¹³¹ Dinstein (note 2) at 74.

¹³² *Ibid.*

¹³³ *Ibid* at 75.

¹³⁴ Oppenheim (note 7) at 202 (§ 54).

¹³⁵ Dinstein (note 2) at 75.

between war and droughts or floods. Murder and robbery can be forbidden by domestic law; similarly, war can be interdicted by international law.¹³⁶

The fact that war was for a long time a legitimate tool of national policy only means that during this time war was permitted and not that international law has a somehow inherent obstacle in its ability to pose a ban on the recourse to war.¹³⁷ Thus, war can be legal or illegal, but it cannot be extra-legal.¹³⁸

b) Is the concept of war compatible with the UN Charter?

Can a state of war be lawfully brought into existence under the UN Charter? Article 2 (4) prohibits the use and even the *threat* of force. Hence, any declaration of war, which implies a threat, even if it is not followed by armed hostilities, would violate this provision.¹³⁹ A declaration of war would at the very least amount to a breach of the peace within the meaning of article 39 UN Charter.¹⁴⁰

c) Definitions and language issues

Whenever the abolition of war or its illegality with respect of article 2 (4) is discussed, three terms are mainly used: war as a legal concept has become ‘obsolete’¹⁴¹, that it is ‘irrelevant’¹⁴² for the contemporary international law or that it has been made ‘redundant’¹⁴³ by the UN Charter. However, one should approach the use of these terms with caution.

¹³⁶ Ibid at 75.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ D Schindler ‘State of War, Belligerency, Armed Conflict’ in A Cassese (ed) *The New Humanitarian Law of Armed Conflict* (1979) Napoli: Editoriale scientifica at 3-20 at 17.

¹⁴⁰ And also violate the obligation under article 2 (3) UN Charter to settle disputes peacefully.

¹⁴¹ As used by RR Baxter ‘The Legal Consequences of the Unlawful Use of Force under the Charter’ (1968) 62 *American Society of International Law Proceedings* 68.

¹⁴² As used by E Lauterpacht ‘The Legal “Irrelevance” of a State of War’ (1968) 62 *American Society of International Law Proceedings* 58.

¹⁴³ Used in the topic of this minor dissertation.

The term ‘obsolete’ used with respect to war implies that ‘war’ as a term is no longer practiced or used or that it is out of date.¹⁴⁴ It comes from the Latin ‘*obsolētus*’, which is the past participle of ‘*obsolēscere*’ meaning ‘to grow old, to fall into disuse’.

The term ‘redundant’ means superfluous or excessive.¹⁴⁵ And finally, ‘irrelevant’ refers to being not relevant or pertinent to the case; not to the purpose or to something which does not apply.¹⁴⁶

Applied to the present topic, this would mean that ‘war’ as a concept is no longer in use (*obsolete*), is superfluous and exceeding what is necessary (*redundant*) because of the UN Charter, and not important, pertinent, or germane (*irrelevant*) to international law.

It will be argued that none of these contentions are true. Because terms have different meanings in different contexts, one should be more cautious when using them.

d) Theoretical observations

An arguably radical school of thought suggests that since the UN Charter has come into force, war has become legally obsolete.¹⁴⁷ States no longer have the ‘*legal power*’ to declare war.¹⁴⁸ If they nevertheless do so, this declaration would not be given any effect. While states may commit hostile acts against each other, these acts would constitute isolated incidents and not be part of a general condition of a state of war which puts aside the rules of peace.¹⁴⁹ In the words of Hans Kelsen, ‘war is a specific action, not a status’.¹⁵⁰

¹⁴⁴ The Oxford English Dictionary, prepared by JA Simpson and ESC Weiner, 2nded, Vol X: Moul-Ovum, Clarendon Press Oxford 1989 at 665.

¹⁴⁵ Ibid Vol XIII: Quemedro-Roaver, Clarendon Press Oxford 1989 at 439.

¹⁴⁶ Ibid Vol VIII: Interval-Looie, Clarendon Press Oxford 1989 at 95.

¹⁴⁷ Q Wright ‘The Outlawry of War and the Law of War’ (1953) 47 *American Journal of International Law* 365 at 365.

¹⁴⁸ Neff (note 123) at 336.

¹⁴⁹ Ibid. As Wright explains it, war ‘in the legal sense’ has been ‘outlawed’, i.e. international law no longer accepts that large-scale hostilities may constitute a ‘state of war’ with the consequence that the belligerents are legally equal. However, hostilities may still occur and they would constitute ‘war in the material sense’ for which the ‘laws of war’ would apply. – Wright (note 147) at 365.

This school of thought is premised on the subjective view of war.¹⁵¹ Implications of this line of thought include the proposition that belligerent rights, ie rights and legal privileges for states in war, are no longer applicable. Nor can the law of neutrality exist under contemporary international law.

The radical theory is contested by the moderate or pragmatist approach.¹⁵² It is rooted in the objective school of thought about war.¹⁵³ It claims that war cannot be merely abolished by a pronouncement. Any *de facto* use of armed forces would necessarily give rise to the laws of war as applicable between the belligerents and the laws of neutrality as relevant between the belligerents and the rest of the international community.¹⁵⁴ This position was supported by the ICJ in its Advisory Opinion on the legality of nuclear weapons.¹⁵⁵

In this advisory opinion, when determining which law is applicable in order to answer the question posed by the General Assembly on the legality of threat or use of nuclear weapons, the ICJ found that the protection of the International Covenant on Civil and Political Rights¹⁵⁶ did not cease in times of war¹⁵⁷. Hence, the right not arbitrarily to be deprived of one's life stipulated in article 6 applied also during hostilities. However, the

¹⁵⁰ Kelsen (note 16) at 27. This is also a reflection of the lack of unanimity with respect to a definition of war; see Chapter I 1.

¹⁵¹ Neff (note 123) at 337.

¹⁵² Referring to the views as radical and moderate or pragmatic is not without hesitation - Neff (note 123) at 335.

¹⁵³ *Ibid* at 337.

¹⁵⁴ *Ibid* at 338.

¹⁵⁵ *Legality of the Threat or use of Nuclear Weapons* (Advisory Opinion), 8 July 1996, (1996) ICJ Reports 226.

¹⁵⁶ International Covenant on Civil and Political Rights (CCPR) UN General Assembly, 16 December 1966, 999 UNTS 171, adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, entry into force on 23 March 1976, in accordance with art 49.

¹⁵⁷ Except by operation of Article 4 of the Covenant stipulating that certain provisions may be derogated from in a time of national emergency. - *Legality of the Threat or use of Nuclear Weapons* (1996) ICJ Reports 226 at para 25.

test of what is an arbitrary deprivation of life ought to be determined by the applicable *lex specialis*, namely, the law relevant in times of armed conflict.¹⁵⁸

Thus, the court referred to the *lex specialis* laws during armed conflict, which are different from the law applicable in peaceful times. This had been one of the most important characteristics of the old legal institution of war.¹⁵⁹

e) Is a declaration of war permissible under the UN Charter?

Under the Charter regime, the pertinent question to ask is **whether a declaration of war would be permissible as an act of self-defence by a state that has been attacked.** There are three possible answers. **First**, a declaration of war as a response to an armed attack is **permissible without any limitations.** **Second**, it is **permissible only if it is necessary and proportionate.** And **third**, a declaration of war is **always incompatible with the UN Charter.**¹⁶⁰

The weak point of the first contention claiming that a declaration of war as a response to an armed attack is permissible without any limitations is that it ignores the principles of proportionality and necessity. The right to resort to force in self-defence is always subject to the restrictions of proportionality and necessity.¹⁶¹ If the recourse to force is not reasonably proportionate and necessary relative to the seriousness of the attack, it would violate the *ius ad bellum*¹⁶², the rules of international law governing the legality of the use of force by states.¹⁶³ Hence, a state of war could only be created if this were a proportionate and necessary measure.¹⁶⁴

¹⁵⁸ Ibid at para 25.

¹⁵⁹ Neff (note 123) at 338.

¹⁶⁰ Schindler (note 139) at 17; Partsch (note 4) at 27.

¹⁶¹ Baxter (note 141) at 69; Brownlie (note 45) at 261.

¹⁶² C Greenwood 'The Relationship between *ius ad bellum* and *ius in bello*', in: C Greenwood *Essays on War in International Law* (2006) London: Cameron May, 13-31 at 16 and 22.

¹⁶³ Malanczuk (note 117) at 306.

¹⁶⁴ Greenwood (note 1) at 40.

Yet, it has been argued that this would hardly ever happen because it would be difficult for a declaration of war to be issued in self-defence and to fulfil the requirements of necessity and proportionality at the same time.¹⁶⁵ However, it is not unthinkable that a declaration of war could be a necessary and proportionate measure of self-defence¹⁶⁶, in some circumstances ‘[t]he right of self-defence is [...] a right to resort to war’.¹⁶⁷ Thus, (even if it would occur only seldom) it is possible that a conflict might justify the resort to war in self-defence.

There are several other arguments, however, asserting that a state of war is completely incompatible with the UN Charter.

In the view of Elihu Lauterpacht,

*the prohibition of the use of force excludes the possibility of the creation of a technical condition of war; and [...] the rights and duties of third parties in hostilities stem from their position as Members of the United Nations and not from a concept inextricably connected with a right to go to war now happily totally repudiated by the international community.*¹⁶⁸

Next, it has been argued that war should be incompatible with the UN Charter on the ground that if an aggressor is allowed to create a state of war, he would acquire rights both against neutral countries and the victim state, and this would mean that the aggressor would benefit from its own wrongful act.¹⁶⁹ However, this would also lead to armed forces of the aggressor state not being allowed to obtain status of prisoners of war and would not be protected by the other laws of war.¹⁷⁰ As a consequence, *jus in bello*, the law that

¹⁶⁵ E Lauterpacht (note 142) at 63-64; The force used in self-defence must be necessary and reasonably proportionate to the danger that is to be averted – von Glahn (note 118) at 562.

¹⁶⁶ Schindler (note 139) at 18.

¹⁶⁷ JL Kunz ‘Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations’ (1947) 41 *American Journal of International Law* 872 at 877; Dinstein (note 2) at 235.

¹⁶⁸ E Lauterpacht (note 142) at 68.

¹⁶⁹ Because the laws of war would apply in favour of the aggressor – Brownlie (note 45) at 406.

¹⁷⁰ Greenwood (note 1) at 39.

regulates the actual conduct of hostilities once the use of force has begun, would become entirely subordinate to *jus ad bellum*.¹⁷¹

In addition, this proposition can be challenged on humanitarian grounds.¹⁷² The Preamble to the First Protocol to the Geneva Conventions from 1977 provides that the provisions of the 1949 Geneva Conventions on the Protocol must be fully applied in all circumstances and to all persons protected by these instruments notwithstanding the nature or origin of the armed conflict or the causes given by the parties to the conflict.¹⁷³

However, it is widely accepted even by those arguing that an aggressor should not benefit from his wrongdoing that humanitarian law applies equally to all parties to a conflict.¹⁷⁴ Thus, there is uncertainty only with regard to the application of the parts of the laws of war that are not based on humanitarian considerations, such as the law of neutrality¹⁷⁵, whereas *jus in bello* remains applicable.¹⁷⁶

¹⁷¹ Malanczuk (note 117) at 306 and 342. The term ‘international humanitarian law applicable in armed conflicts’ is increasingly used for *ius in bello*. - Ibid at 306. Conversely, it can be argued that neither concept of them is logically dependent on the other and each one of them can operate independently from the other. – Greenwood (note 147) at 28.

¹⁷² Greenwood (note 1) at 40.

¹⁷³ Para 5 of the Preamble to Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, adopted on 8 June 1977 at Geneva, entered into force on 7 December 1978, available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=148076&file_id=197647 (accessed 12 December 2011). However, it must be noted that the Additional Protocol does not have the same legal effect as the four Geneva Conventions because the Protocol has fewer parties than the four Geneva Conventions (as of 2010, the Protocol had 170 as opposed to all 194 states in the world parties to the four Geneva Conventions – ICRC Annual Report 2010, available at <http://www.icrc.org/eng/assets/files/annual-report/> (accessed 16 February 2012) at 572 *et seq.* Some of the provisions (such as articles 48-57) reflect customary international law. However, even the provisions that have not yet have obtained the status of rules of customary international law (eg articles 35 (3) and 55) have influence on public opinion and the perceptions of states with regard to what is permissible in a conflict. – C Greenwood in D Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (1999) Oxford University Press at 127.

¹⁷⁴ H Lauterpacht ‘The Limits of the Operation of the Law of War’ (1953) 30 *British Yearbook of International Law* 206 at 212-213; E Lauterpacht (note 142) at 65. A non-application of humanitarian law to the aggressor would encourage non-observance of the laws of war. Often no authoritative determination of the aggressor in a conflict is made and in some cases both sides are equally responsible for the conflict. Hence, it is desirable that the laws of war are applicable to both sides. – Brownlie (note 45) at 407.

¹⁷⁵ Greenwood (note 1) at 40; see below Chapter III 3.

¹⁷⁶ In the words of Brownlie, it is ‘desirable’ that the laws of war based on humanitarian law ‘should be given the widest possible application’ – (note 45) at 400.

Finally, it has been claimed that SC Resolution 95 from 1 September 1951¹⁷⁷ underpins the proposition that a state of war is incompatible with the prohibition of threat or use of force in article 2 (4) of the UN Charter. However, the resolution merely provides that

since the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent or required to exercise a right of visit, search, and seizure for any legitimate purpose of self-defence.

The basis for the resolution was the Egyptian-Israeli debate over the legality of Egypt's actions against shipping passing through the Suez Canal to or from Israel. Egypt alleged that the measures constituted a lawful exercise of belligerent rights claiming that Israel and Egypt were at war. Israel contended that there was never a state of war between the two countries or even if there had been, it ended by the armistice in place since 1949 between the two countries.¹⁷⁸

The resolution was based on that armistice agreement, the rights of passage to the Suez Canal and the commencement of active hostilities since 1949. Even if the resolution did provide support for the view that a state of war and the exercise of belligerent rights after active hostilities have been suspended are incompatible with the Charter, it does not deliver persuasive evidence that a state of war can exist in the event that hostilities are still taking place.¹⁷⁹ The resolution is therefore not conclusive on the question whether a state of war can exist when the conflicting parties are still engaged in hostilities.¹⁸⁰

Another argument against the proposition which denies the possibility of war unconditionally is that an absolute incompatibility of a state of war with the UN Charter cannot be simply presumed. For example, the UN Charter itself permits certain forms of

¹⁷⁷ UN Security Council Resolution from 1 September 1951, S/RES/95 (1951) S/2322.

¹⁷⁸ Greenwood (note 1) at 38.

¹⁷⁹ Ibid at 39.

¹⁸⁰ Ibid.

use of force such as the legitimate self-defence in article 51 of the UN Charter and sanctions by the Security Council under Chapter VII.¹⁸¹

Moreover, state practice shows that states still consider a state of war to be an operating legal concept.¹⁸² References to a state of war in international instruments such as common article 2 to all Geneva Conventions of 1949, article 18 of the Hague Convention of 1954 and article 3 of the Definition of Aggression¹⁸³ confirm this state practice.

f) Cases since World War II in which the state of war has been claimed

Evidence that states still regard a state of war as legally possible is also provided by conflicts since 1945, in which some references to the state of war have been made. Some of the conflicts have been characterized as war either by the parties involved or by third states.

i. Arab-Israeli conflict

A state of war has been asserted in the Arab-Israeli conflict.¹⁸⁴ Since 1948, the Arab States have consistently maintained that a state of war existed between them and Israel.¹⁸⁵ There was, however, no formal declaration of war in the sense of the Third Hague Convention of 1907 since this would have naturally amounted to a formal recognition of the state of Israel.¹⁸⁶ Nevertheless, numerous statements were issued to different organs of the United Nations¹⁸⁷ accompanied by actions which made clear the position of the Arab states that

¹⁸¹ Meng (note 20) at 285.

¹⁸² Schindler (note 139) at 18.

¹⁸³ UN General Assembly Resolution 3314 (XXIX).

¹⁸⁴ Greenwood (note 162) at 18-19.

¹⁸⁵ With the exception of Egypt since 1979 – Greenwood (note 1) at 42.

¹⁸⁶ S Rosenne 'Directions for a Middle East Settlement – Some Underlying Legal problems' (1968) *Law and Contemporary Problems* 44 at 50; Rosenne (note 52) at 149; see also Brownlie (note 45) at 398.

¹⁸⁷ For example, cablegram of 15 May 1948 from the Secretary-General of the League of Arab States to the Secretary-General of the United Nations, 3 UN SCOR, Supp, May 1948, at 83, UN Doc S/745 (1948); cablegram of 16 May 1948 from the King of Transjordan to the Secretary-General of the United Nations, id at 90, UN Doc S/748 (1948); cablegram of 15 May 1948 from the Minister for Foreign Affairs of Egypt to the President of the Security Council, read into the record of the 292nd meeting of the Security Council on 15 May 1948. 3 UN SCOR, No 66, at 2-3, UN Doc S/743 (1948).

they regard themselves as being at war or in a state of belligerency with Israel.¹⁸⁸ In addition, rights of a belligerent against third states under the ‘traditional’ law of war have been invoked, especially the law of prize.¹⁸⁹ Thus, Egyptian courts took the view that the hostilities of 1948-49 amounted to a state of war between Egypt and Israel.¹⁹⁰ At that time, it was considered that only in the instance of an existing case of war could the rights of belligerents with respect to enemy or neutral ships and cargoes be exercised.¹⁹¹

Moreover, the SC resolution of 22 November 1967¹⁹² stipulated as one of the requirements for peace in the Middle East the ‘termination of all claims or states of belligerency’. While this might not have amounted to recognition of a state of war between the Arab States and Israel by the Security Council, it at least revealed an attitude towards a continued existence of a war as a legal condition.¹⁹³

ii. Korean War (1950-1953)

Neither the individual States participating in the enforcement action nor the UN as a whole referred to the invasion of South Korea by North Korea in 1950 as war in the ordinary legal

¹⁸⁸ Rosenne (note 185) at 50-51.

¹⁸⁹ E Lauterpacht (note 142) at 60. Prize law refers to captures made in exercise of belligerent rights which international law grants to states engaged in war and certain other entities recognized as having these rights (eg the party opposing the government in a civil war may be given such rights). No interference with foreign shipping in time of peace can be justified on the basis of prize law. – DHN Johnson ‘Prize Law’ in: *Max Planck Encyclopedia of Public International Law*, band 4: Use of Force War and Neutrality Peace Treaties (N-Z), (1982) Amsterdam, New York: North-Holland, 154-159 at 159.

¹⁹⁰ *The Fjeld* (1950) 17 ILR 345 (Prize Court Alexandria); *The Flying Trader* (1950) 17 ILR 440 (Prize Court Alexandria); *The Hoegh de Vries* (1950) 17 ILR 447 (Prize Court Alexandria); *The Talthybius* 17 ILR 448 (Prize Court Alexandria); *The Captain Manoi* (1963) 28 ILR 662 (United Arab Republic Prize Court); *The Lea Lott* (1963) 28 ILR 652 (United Arab Republic Prize Court); *The IngeToft* (1966) 31 ILR 509 (United Arab Republic Prize Court); and *The Astypalia* (1960) 31 ILR, 519 (United Arab Republic Prize Court). In these cases, the Egyptian Prize Court condemned goods in prize on the ground that they were of ‘enemy’ origin, destination or ownership. – E Lauterpacht (note 142) at 60 and note 5. The reasons for a state of war were not elaborated, it was merely stated that the state of war between the United Arab Republic and Israel still legally existed since the armistice agreement signed between the two parties on 24 February 1949, did end the state of war, but only imposed on the two parties the obligation not to commit new acts of aggression. – *The Lea Lott* at 653, or that the conflict possessed all elements necessary for a war within the framework of international law – *The Flying Trader* at 444.

¹⁹¹ Schindler (note 139) at 12.

¹⁹² SC Res 242 of 22 November 1967, available at <http://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136> (accessed 4 January, 2012).

¹⁹³ Greenwood (note 1) at 44.

sense of the term.¹⁹⁴ On the contrary, it was expressly stated that the hostilities did not constitute war. However, at the same time, it was recognized that for some purposes, the hostilities would be treated as if they constituted war.¹⁹⁵ As stated by Sir Hartley Shawcross, the Attorney-General, in the British House of Commons, on 20 November 1950, the law of treason ‘is as applicable to such a conflict as it is to an ordinary war between State and State’.¹⁹⁶ Despite the fact that no declaration of war was issued, the applicability of the rules of warfare was not challenged. Rather, both sides formally declared that they would abide by the provisions of the Geneva Convention relating to prisoners of war.¹⁹⁷

iii. Iraq-Iran war of 1980-1988

In this conflict, both Iran and Iraq claimed belligerent rights with regard to shipping in the Gulf. Furthermore, the UK government declared neutrality in the ‘war between Iraq and Iran’. The Ambassador of Iraq to the UK declared that ‘[s]o far Iraq has not declared officially a state of war with Iran, but actual state of war does exist even though diplomatic representation continues between the two countries.’¹⁹⁸ Hence, there is some evidence that these hostilities were treated as war by the parties.¹⁹⁹

¹⁹⁴ H Lauterpacht (note 174) at 221. However, some claims have been made that the conflict indeed constituted a war. – LC Green ‘The Nature of the “War” in Korea’ (1951) 4 *International Law Quarterly* 462 at 468.

¹⁹⁵ H Lauterpacht (note 174) at 222. Although some US cases (such as *Gagliormella v Metropolitan Life Ins Co*, 122 F. Supp. 246 (D.C. Mass. 1954); *Western Reserve Life Ins Co v Meadows*, 152 Tex. 559, 261 S.W.2d 554 (1953), cert. denied, 347 US. 928 (1954)) suggest that the hostilities in Korea constituted a war in the legal sense as well. – AK Pye ‘The Legal Status of the Korean Hostilities’ (1956) 45 *Georgetown Law Journal* 45 at 46 and footnotes 11 and 12; see also Green *ibid*.

¹⁹⁶ House of Commons Deb, vol 481, col 13 as cited in H Lauterpacht (note 174) at 222, note 1.

¹⁹⁷ H Lauterpacht (note 174) at 223; also declared by the UN Command in the Korean conflict – Cohan (note 25) at 276.

¹⁹⁸ As cited in Greenwood (note 1) at 45.

¹⁹⁹ *Ibid* at 45-46.

iv. Hostilities between India and Pakistan

The 1965 conflict between India and Pakistan was characterized as war by the latter.²⁰⁰ It claimed that on 6 September 1965, Indian troops crossed the boundary of Pakistan and attacked it. As a consequence, a declaration of war against India was made by the President of Pakistan. On 9 September 1965, the Government of Pakistan issued a proclamation as to war contraband.²⁰¹ Similarly to the Israeli-Egyptian conflict, Pakistan insisted on a state of war for reasons of seizing enemy and neutral property. As a result, Pakistan established a prize court whose operation was based on the assumption that there was a state of war between the two countries.²⁰² In the case of *Government of Pakistan v RSN and Others*, the Pakistan High Court of Dacca found that ‘the claimants [RSN Co Ltd] have failed to make out that the goods in question are not enemy properties’.²⁰³ However, India did not recognize a state of war and diplomatic relations between the two countries were not ceased.²⁰⁴

In *Dalmia Cement Ltd v National Bank of Pakistan*²⁰⁵ the arbitrator found that where there was doubt as to the existence of a state of war between members of the UN, it must be presumed *in dubio* that each state intended to act in accordance with its obligations under the Charter and not to resort to force.²⁰⁶ Hence, he came to the conclusion that the

²⁰⁰ Greenwood (note 1) at 44.

²⁰¹ *Government of Pakistan v RSN and Others* (High Court of Dacca, 28 October 1965) 40 ILR 472 at 473.

²⁰² *Government of Pakistan v RSN and Others* 40 ILR 472.

²⁰³ *Ibid* at 479-480. The goods were produced in enemy land, namely India, and were owned by companies, which were carrying out business in enemy territory. Therefore, the goods constituted enemy property and were thus liable to seizure by a belligerent. – *ibid* at 473 and 477.

²⁰⁴ Greenwood (note 1) at 44. This is an indication that, according to India, there was no state of war between the two countries.

²⁰⁵ 67 ILR 611 (International Chamber of Commerce, Arbitration Tribunal, Professor Pierre Lalive – Sole Arbitrator, 18 December 1976).

²⁰⁶ *Ibid* at 619-620.

Indian-Pakistani conflict did not constitute war.²⁰⁷ However, the arbitral award was granted on the assumption that it was still possible in legal terms to create a state of war.²⁰⁸

Despite the limitations in article 2 (4) UN Charter, the use of force by states has remained constant in international relations.²⁰⁹ Hence, state practice shows that states still consider war as a feature of international law²¹⁰ and regard it as not *per se* incompatible with the UN Charter.

2. Other justifications for the use of the term 'war'

a) Wars of national liberation

During the decolonization period, attempts were made to justify the use of force by states supporting wars of national liberation carried out by peoples exercising their right to self-determination.²¹¹

Under traditional international law, wars of national liberation were regarded as civil wars and thus constituted a domestic affair.²¹² Hence, third states could not interfere in the internal affairs of another state and, therefore, could not aid the people in their battle.²¹³

However, the pre-eminence of decolonization since 1960 resulted in the passage of numerous resolutions by the GA²¹⁴ with the result that such wars have come to be regarded

²⁰⁷ Ibid at 625.

²⁰⁸ See for example the arbitrator's comment with regard to the need to distinguish between wars and conflicts falling short of war at 621 (para 33).

²⁰⁹ L Moir *Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror* (2010) Oxford: Hart at 1.

²¹⁰ Brownlie (note 45) at 393.

²¹¹ Dinstein (note 2) at 68.

²¹² HJ Uibopuu 'Wars of National Liberation' in: *Max Planck Encyclopedia of Public International Law*, band 4: Use of Force War and Neutrality Peace Treaties (N-Z), (1982) Amsterdam, New York: North-Holland, 343-346 at 344.

²¹³ RE Gorelick 'Wars of National Liberation: Jus ad Bellum' (1979) 11 *Case Western Reserve Journal of International Law* 71 at 71.

as international conflicts. In addition, article 1 of the first Additional Protocol to the Geneva Conventions²¹⁵ defines in its paragraph 3 the scope of application of Additional Protocol I as conforming to common article 2 of the four Geneva Conventions. According to article 1 (4) of the Protocol ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination’ qualify as international conflicts.²¹⁶

Because article 2 (4) UN Charter prohibits the resort to force, several justifications for the legitimate use of force by liberation movements have been developed.

Under article 51 of the UN Charter, a right of self-defence against colonial domination has been advocated on the ground that if peoples are deprived of their right of self-determination, they would be entitled to resort to force in order to enforce that right.²¹⁷ However, colonialism does not necessarily involve an imminent threat or use of force.²¹⁸

Another view argues that colonialism in itself constituted an aggression *ab initio* since in the past, colonial regimes used to be installed by force and as long as the effects of that attack remained, so did the initial aggression.²¹⁹ However, this argument disregards both the fact that in the past forceful acquisition of land has been legal and that contemporary international norms cannot be applied retrospectively.²²⁰ Moreover, in the language of article 51 UN Charter, self-defence is allowed against an imminent attack, but

²¹⁴ Ibid at 92; for example UN General Assembly Resolution 1514 (XV), Declaration on Granting of Independence to Colonial Countries and Peoples 1960, Un Doc A/Res/15/1514 (1960); UN GA resolution from 13 December 1984, Policies of apartheid of the Government of South Africa, A/Res/39/72. A ‘declaration’ has, technically, the same legal force as any other resolution of the General Assembly. The term ‘declaration’ is used with respect to resolutions of a fundamental character and particular importance. – M Halberstam ‘The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed’ (2002-2003) 41 *Columbia Journal of Transnational Law* 573, note 20 at 575.

²¹⁵ Note 173.

²¹⁶ See note 173 about the limitations of relying on the First Additional protocol as evidence of general international legal rule.

²¹⁷ Uibopuu (note 212) at 344, see note 221 and accompanying text.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Gorelick (note 213) at 77-78.

force which occurred many years ago is not imminent. Colonialism in itself does not amount to an imminent use of force or an armed attack.²²¹

A third theory attributes to liberation movements a right *sui generis* to use self-defence which is deemed to arise from the condemnation of colonialism by the international community as expressed in instruments such as GA resolutions.²²² This ‘new *bellum justum* theory’ claims that wars of national liberation are not inconsistent with the purposes of the UN Charter which supposedly includes ‘a basic principle’ condemning all forms of colonialism since they are not directed against the territorial integrity of a state.²²³ Thus, article 2 (4) UN Charter should not be seen as applicable to force used by liberation movements.²²⁴

However, the UN Charter does not mention wars of national liberation as an exception to the prohibition of use of force. Allowing national liberation movements to employ force in attaining self-determination would weaken the general prohibition of use of force in article 2 (4) UN Charter and undermine the authority of the SC for the maintenance of peace and security.²²⁵ Moreover, the concept is open to abuse as long as there is no general agreement in the international community on an exact definition of self-

²²¹ Ibid at 74.

²²² UN GA Res 1514 (XV) stating that colonialism may ‘constitute a serious threat to the peace’; UN General Assembly Resolution 2105 from 20 December 1965, Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/218/68/IMG/NR021868.pdf?OpenElement> (accessed 21 January 2012) providing that ‘the continuation of colonial rule and the practice of apartheid [...] constitute a crime against humanity’; UN General Assembly Resolution 1654, The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/167/07/IMG/NR016707.pdf?OpenElement> (accessed 21 January 2012) stating that ‘further delay in the application of [Resolution 1514] is creating an increasingly dangerous situation in many parts of the world which may threaten international peace and security’.

²²³ Gorelick (note 213) at 82. The view of socialist states goes even further and purports to extend the idea of just war to any struggle aiming to eliminate Western influence so that it could be replaced with a socialist regime in post-colonial times – Uibopuu (note 212) at 344-345.

²²⁴ Gorelick (note 213) at 82.

²²⁵ Uibopuu (note 212) at 346.

determination.²²⁶ Hence, forcible self-help arguably contravenes norms of contemporary international law.²²⁷

Nevertheless, the UN GA Resolution on Friendly Relations²²⁸ and article 7 of the Definition of Aggression²²⁹ make an important step in legitimizing the resort to armed violence by liberation movements.

In particular, GA Resolution on Friendly Relations imposed a duty on every state to refrain from any forcible action which would deprive peoples of their right to self-determination, freedom and independence. Furthermore, every state is obliged to promote the realization of the principle of self-determination of peoples in accordance with the provisions of the Charter and to provide the United Nations with assistance in implementing this principle.

In addition, article 7 of the Definition of Aggression states that

Nothing in this Definition ... could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

²²⁶ The right to self-determination is one of the most controversial terms of international law. - Jan Klabbbers 'The Right to be Taken Seriously: Self-Determination in International Law' (2006) 28 *HRQ* 186 at 186. Moreover, international law does neither establish the scope nor the content of the principle, nor who constitutes a people and how to identify them. - VP Nanda 'Self-Determination Under International Law: Validity of Claims to Secede' (1981) 13 *Case Western Reserve Journal of International Law* 257 at 259 and 275-276.

²²⁷ *Corfu Channel Case* (United Kingdom v Albania); Assessment of Compensation, International Court of Justice (ICJ), 15 December 1949, (1949) ICJ Reports 4 at 35-36.

²²⁸ UN General Assembly Resolution 2625 (XXV) from 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN Doc A/8028 (1970).

²²⁹ UN General Assembly Resolution 3314 (XXIX) from 14 December 1974, Definition of Aggression, UN Doc A/9631 (1974).

Both international instruments refer only to peoples who had been forcibly denied the exercise of their right to self-determination and to the respective action against that forcible denial.²³⁰ However, the term ‘struggle’ is ambiguous – it can mean either armed struggle or peaceful struggle.²³¹ Hence, the exact nature of the struggle or resistance remains uncertain.

Furthermore, GA resolutions lack a consistent *opinio juris* of states with regard to whether peoples may assert their right to external self-determination by means of force.²³² For example, Resolution 2105 recognizing the legitimacy of the struggles of liberation movements²³³ was not adopted unanimously as was Resolution 1514 (XV)²³⁴ but rather faced the continuous resistance by Western states.²³⁵ Hence, the GA resolutions in question did not create legally binding rules.²³⁶ In addition, more recent resolutions²³⁷ do not mention the right to self-determination and the legitimacy of the struggle for self-determination of national liberation movements, because it would legitimize groups considered terrorists by some states. Instead, these resolutions condemn terrorist acts committed ‘wherever and by whomever’ and urge states to undertake various acts to combat terrorism.²³⁸

A key issue associated with the right to use force by national liberation movements is whether a third state can intervene actively in overthrowing the colonial power.²³⁹ GA

²³⁰ J Summers *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (2007) Leiden, Boston: Martinus Nijhoff at 376.

²³¹ C Gray *International Law and the Use of Force* 3rd ed (2008) Oxford University Press at 60.

²³² Uibopuu (note 212) at 345; Gorelick (note 213) at 83.

²³³ Para 10 of the Resolution (note) states that the GA ‘[r]ecognizes the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all States to provide material and moral assistance to the national liberation movements in colonial Territories’.

²³⁴ Uibopuu (note 212) at 345.

²³⁵ Gorelick (note 213) at 83.

²³⁶ Uibopuu (note 212) at 345; Gorelick (note 213) at 83.

²³⁷ The first GA Resolution not to mention the right to struggle is UN GA Resolution from 9 December 1994, Declaration on Measures to Eliminate International Terrorism, A/RES/49/60 (1994); followed by UN GA Resolution 50/53, A/RES/50/53 (1995), UN GA Resolution 51/210, A/RES/51/210 (1996); UN GA Resolution 52/165, A/RES/52/165 (1997); UN GA Resolution 53/108, A/RES/53/108 (1999); UN GA Resolution 55/158, A/RES/55/158 (2001).

²³⁸ Halberstam (note 214) at 576-577.

²³⁹ Dinstein (note 2) at 69.

resolutions call on states to provide all forms of moral and material assistance.²⁴⁰ For instance, GA Resolutions 3070²⁴¹ invites all states to provide ‘in conformity with the Charter of the United Nations and with relevant resolutions of the United Nations [...] moral, material and any other assistance’ to the national liberation movements in colonial territories.

Yet, the UN Charter’s purposes, set out in the Preamble, include the promotion of peace and security. Article 2 (3) and Chapter VI of the UN Charter require states to first try to settle a dispute peacefully. Accordingly, support by other states should be limited to humanitarian and non-military assistance.²⁴²

b) Humanitarian intervention

The concept of humanitarian intervention allows states to intervene militarily on the territory of another state for the purpose of averting great humanitarian crisis or catastrophe²⁴³ and protecting the life and liberty of the citizens of the latter state which is unwilling or unable to do so itself.²⁴⁴ However, humanitarian intervention continues to be a controversial concept and nothing in the UN Charter substantiates a unilateral right of one state to forcefully intervene in the domestic affairs of another under the guise of securing the implementation of human rights.²⁴⁵ Hence, humanitarian intervention would appear to be contrary to the prohibition of the threat or use of force in article 2 (4) UN Charter.

²⁴⁰ For example GA Resolutions 2105 (XX), 2160 (XX), 2465 (XXIII), 2649 (XXV), 2734 (XXV), 2787 (XXVI), 3070 (XXVIII), 3163 (XXVIII), 3421 (XXX), 31/29, 31/33, 32/10, 32/154.

²⁴¹ UN General Assembly Resolution 3070 (XXVIII) from 30 November 1973, The importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/281/42/IMG/NR028142.pdf?OpenElement> (accessed 23 January 2012) - para 3.

²⁴² Summers (note 230) at 230.

²⁴³ H Duffy *The “War on Terror” and the Framework of International Law* (2005) Cambridge University Press at 179.

²⁴⁴ U Beyerlin ‘Humanitarian Intervention’, in: *Max Planck Encyclopedia of Public International Law*, band 3: Use of Force War and Neutrality Peace Treaties (A-M), (1982) Amsterdam, New York: North-Holland, 211-215 at 211.

²⁴⁵ Dinstein (note 2) at 71.

Proponents of humanitarian intervention assert, however, that the use of armed force in this particular situation is not directed against ‘the territorial integrity or political independence’ of the target state,²⁴⁶ that an exception to the prohibition of article 2 (4) should be made whether on moral grounds or based on state practice or political considerations.²⁴⁷ Yet, under the UN Charter any use of force is prohibited, except in self-defence under article 51 UN Charter or as a UN enforcement measure authorized by the Security Council under Chapter VII.²⁴⁸ Hence, neither of the exceptions to the prohibition stipulated in article 2 (4) UN Charter can be used to justify unilateral humanitarian intervention.²⁴⁹

In addition, the International Law Commission Draft Articles on State Responsibility²⁵⁰ imposed a ban upon the use of force as a counter-measure against international wrongs.²⁵¹ This view is supported by the International Court of Justice in the *Nicaragua case*, where it held that unilateral resort to military force to ensure respect for human rights, although permitted under article 40 and 41 of the ILC Draft articles²⁵², was

²⁴⁶ Beyerlin (note 243) at 212.

²⁴⁷ FR Tesón *Humanitarian Intervention: An Inquiry into Law and Morality* 3rd ed (2005) Ardsley, NY: Transnational at 189.

²⁴⁸ This is a more restrictive or narrow interpretation of art 2 (4). It takes into account the conjunctive phrase in art 2 (4) ‘or any other manner inconsistent with the purposes of the UN Charter.’ The first and foremost purpose is stipulated in art 1 (1) and includes the maintenance of peace and security and the taking of ‘effective collective measures for the prevention and removal of threats to the peace’. The first paragraph of the Preamble enshrines the determination ‘to save succeeding generations from the scourge of war’. Finally, art 2 (3) prescribes the peaceful settlement of disputes. Against this background, this view alleges that any use of inter-state force is banned, unless explicitly allowed by the UN Charter. – Dinstein at 87-88. This interpretation is also consistent with the generic history of art 2 (4) and with para 7 of the preamble which provides that armed force shall not be used, save in the common interest. However, there is also a broader interpretation suggesting that only force directed against the territorial integrity and political independence of states is prohibited. This view amounts to a restrictive application of the prohibition on the use of force. – A Randelzhofer ‘Use of Force’ in: *Max Planck Encyclopedia of Public International Law*, band 4: Use of Force War and Neutrality Peace Treaties (N-Z), (1982) Amsterdam, New York: North-Holland, 265-275 at 270.

²⁴⁹ Beyerlin (note 244) at 212.

²⁵⁰ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1,

²⁵¹ Art 50 Draft Articles on State Responsibility; Duffy (note 243) at 182.

²⁵² Draft Articles on State Responsibility:

Article 40 Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

not an acceptable measure in the context of the *Nicaragua case*.²⁵³ Rather, it remained the exclusive responsibility of the Security Council to legitimize coercive measures, despite any defects the UN might suffer from.²⁵⁴

Even if considerable international practice and *opinio juris* in favour of a right of humanitarian intervention existed²⁵⁵ so as to constitute a norm of customary international law,²⁵⁶ this would still not be enough to override the ban on use of force, which is a rule of *jus cogens*.²⁵⁷ A customary rule allowing unilateral intervention is insufficient to override article 2 (4) UN Charter.²⁵⁸ Moreover, deficiencies of the UN Charter, in particular those of

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation.

Article 41 Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

²⁵³ ‘while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect’ – *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), (1986), 27 June 1986, ICJ Reports 14 at para 268.

²⁵⁴ ‘whatever be the present defects in international organization’ – *Corfu Channel Case*, (1949) ICJ Reports 4 at 29.

²⁵⁵ Eg India’s intervention in East Pakistan in 1971, Vietnam’s intervention in Cambodia in 1978, Tanzania’s intervention in Uganda in 1979, the intervention of North Iraq by Italy, the UK, France, the Netherlands and the US in 1991 – M Byers *War Law: International law and Armed Conflict* (2005) London: Atlantic Books at 92 and Duffy (note 243) at 180.

²⁵⁶ However state practice has rather indicated insufficient support for a right of humanitarian intervention. – McCoubrey & White (note 57) at 117; I Brownlie ‘The United Nations Charter and the Use of Force, 1945-1985’ in: A Cassese *The Current Legal Regulation of the Use of Force* (1986) Boston: Martinus Nijhoff, 491-504 at 500. This was the case, for example, in Kosovo. Russia, China, India, Namibia, Belarus, Ukraine, Iran, Thailand, Indonesia and South Africa were against the intervention, whereas the UK and Belgium tried to justify the war on the basis of legal right to unilateral humanitarian intervention. It has been argued that SC Resolution 1244 retroactively authorized the war, however, this argument ignores the fact that the UN Charter desires rather a positive than a negative authorization by the SC. Moreover, the Kosovo crisis did not effectively change the law in favour of a right of unilateral humanitarian intervention since an occasional violation of international law does not change the rules of international law as found by the court in the Nicaragua case. – Byers (note 255) at 101-102. In addition, it is unclear whether a customary right of humanitarian intervention existed even in the pre-Charter period. And there is not enough evidence that such a customary right exists in today’s state practice. – Beyerlin (note 244) at 213.

²⁵⁷ Byers (note 255) at 100.

²⁵⁸ *Ibid* at 99-100. According to Dinstein, a *jus cogens* norm could be amended or superseded in the same way in which the original norm was established – through treaty or general custom - (note 2) at 102.

Chapter VII, could not allow states to fall back on an allegedly existing customary rule permitting humanitarian intervention.²⁵⁹

Advocates of human intervention further assert that the UN Charter also aims at achieving respect for human rights and fundamental freedoms. In this context, they emphasize the importance of the Genocide Convention.²⁶⁰

According to article 2 of the Genocide Convention²⁶¹, genocide is one of the listed acts committed with the intention to ‘destroy, in whole or in part, a national, ethnical, racial or religious group’. The acts include killing members of the group and deliberately inflicting on the group such conditions of life so as to cause its physical destruction in whole or in part and others.

Yet, it is unclear what remedies are available to a state which desires to preclude or terminate genocide taking place on foreign soil.²⁶² Article VIII of the Genocide Convention stipulates that ‘[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide [...]’.

Article IX of the Genocide Convention sets forth the compulsory jurisdiction of the International Court of Justice for disputes with regard to the interpretation, application and the fulfillment of the Convention. Hence, no state has the right to act alone or together with other like-minded states in an attempt to bring genocide in another country to an end.²⁶³ Moreover, the competent organs to address the situation authoritatively and to decide which measures are appropriate are the Security Council and the International Court of Justice.

²⁵⁹ Byers (note 255) at 100.

²⁶⁰ Dinstein (note 2) at 71.

²⁶¹ UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948, entered into force on 12 January 1951, A/RES/260.

²⁶² Dinstein (note 2) at 72.

²⁶³ Dinstein (note 2) at 73.

Thus, there is no ‘general licence’ for states to use force in a unilateral humanitarian intervention.²⁶⁴

IV. Chapter III: Consequences of a state of war

In the past, the state of war implied full-scale hostilities, loss of lives and resources. Once recognized as such, a state of war led under international law to the application of the laws of war to the hostilities between the belligerent states, non-hostile relations between the states in conflict such as trade or diplomatic and treaty relations were terminated or suspended, relations between the belligerents and third states became regulated by the laws of neutrality and the obligations of the conflicting states to the international community were affected.²⁶⁵

This Chapter will examine whether the legal consequences of a state of war under the modern law of armed conflict are still the same and whether it matters that a particular conflict is treated as war or not.

1. The Laws of War

It has been claimed that with regard to the application of the laws of war, it makes little, if no difference, whether a conflict is characterized as war. Common article 2 of the four Geneva Conventions of 1949 stipulates that the Conventions apply to all cases of declared war and any other armed conflict between the contracting states even if the state of war is not recognized by one of them.²⁶⁶

²⁶⁴ Ibid.

²⁶⁵ Brownlie (note 45) at 27; Greenwood (note) at 46-47.

²⁶⁶ International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, available at: <http://www.unhcr.org/refworld/docid/3ae6b3694.html>; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85, available at: <http://www.unhcr.org/refworld/docid/3ae6b37927.html>; *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <http://www.unhcr.org/refworld/docid/3ae6b36c8.html>; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <http://www.unhcr.org/refworld/docid/3ae6b36d2.html> (accessed 5 January 2012).

Hence, the same body of rules will apply to the conduct of hostilities regardless of whether they are recognized as war or not. A declaration of war, on the other hand, would be significant in the case when there are no actual hostilities taking place²⁶⁷ and thus no armed conflict which would mean that the Geneva Conventions would not be applicable. If, however, one state declares war on another without undertaking any actual fighting, the Geneva Conventions will be brought into operation.²⁶⁸

The existence of war²⁶⁹ would provide guidance as to the stages of a conflict in which the laws of war apply. The term ‘armed conflict’ used in the Geneva Conventions of 1949 is not very precise. It might not include unopposed invasion or ‘peaceful’ occupation although an extension of the applicability of the laws of war in this case would be desirable.²⁷⁰ For this purpose, Danish courts found that the Hague Regulations were applicable to the German occupation of Denmark after 1943 at the time when Danish resistance movement commenced.²⁷¹

A state of war would furthermore give more certainty of the status of military operations carried out according to the authoritative decision of an organ of the United Nations. Then such operations have to a certain extent an anomalous status. If they could be characterized as war, the laws of war would be applicable to them. Accordingly, in the instance of the Korean conflict, the UN Command as well as both North Korea and the People’s Republic of China acknowledged the applicability of the Geneva Conventions of 1949 and the rules of warfare.²⁷²

²⁶⁷ For example, Lithuania maintained a state of war for seven years after the Polish occupation of Vilna in 1920 although no actual hostilities were taking place. In 1940, Albania declared war on Greece and the state of war was claimed by Greece even after the end of World War II; no hostilities were taking place. – Brownlie (note 45) at 384 and 392 respectively.

²⁶⁸ Greenwood (note 1) at 47-48; Oppenheim (note 7) at 369 (§ 126) and note 6 at 369.

²⁶⁹ Although there is no set definition of war, if it could be agreed in a particular case that war existed, doing so would be useful.

²⁷⁰ Brownlie (note 45) at 399-400.

²⁷¹ Brownlie (note 45) at 400.

²⁷² Brownlie (note 45) at 400.

It has also been suggested that some rules regarding economic warfare should apply only if a conflict is characterized as war.²⁷³ However, as far as economic measures which have been taken by one party to an armed conflict against the other one are concerned, state practice does not support the view that such measures would only be lawful if the conflict is being referred to as war.²⁷⁴ There have been several examples since 1965 when parties have adopted economic sanctions without any reference to war.²⁷⁵ Moreover, sanctions have also been deployed in disputes in which no party has yet used force.²⁷⁶ Hence, rules of economic warfare are not restricted to conflicts characterized as war.

2. Non-hostile relations between the combatant states

In the traditional view, the outbreak of war would automatically lead to the abrogation or suspension of diplomatic, commercial and treaty relations between the belligerents.²⁷⁷ This was not the case for hostilities falling short of war. Thus, it has been argued that characterizing a conflict as war was significant because it led to the rupture of the peaceful relations between the hostile states.²⁷⁸

It is likely that a state of war would result in a rupture of diplomatic relations. If a conflict is treated as war, it is more likely that it is on a large scale.²⁷⁹ Hence, it is hard to

²⁷³ Partsch (note 4) at 27; K Zemanek 'Economic in: *Max Planck Encyclopedia of Public International Law*, band 3: Use of Force War and Neutrality Peace Treaties (A-M), (1982) Amsterdam, New York: North-Holland, 158-163 at 158.

²⁷⁴ Greenwood (note 1) at 48.

²⁷⁵ For example, the sanctions by the UK in the Falklands conflict.

²⁷⁶ Greenwood (note 1) at 48. The Arbitral Tribunal in the *Air Services Agreement case* (France v. United States (1978) 54 *ILR* 303 (established by the Compromis of 11 July 1978; Riphagen, President; Ehrlich and Reuter, Arbitrators) found that a state is permitted to use countermeasures against an infringement of its rights by another state even if this would amount to an act otherwise prohibited by international law, provided that the retaliation is proportionate to the breach and within the limits of the law on armed force. – C Greenwood 'The U.S.-French Air Services Arbitration' (1979) 37 *The Cambridge Law Journal* 233 at 237.

²⁷⁷ Oppenheim (note 7) at 301 (§ 97).

²⁷⁸ Greenwood (note 1) at 49.

²⁷⁹ *Ibid.*

imagine that the parties would wish to maintain relations whose severance is less serious than the resort to war.²⁸⁰

However, the traditional view that war suspended all treaties between the belligerents has been abandoned.²⁸¹

Even during World War II, (although an extremely special situation because of its atypical magnitude), evidence suggests that many fewer treaties were suspended than one might expect.²⁸² With respect to American practice, there is no conclusive evidence that the United States regarded any treaty as terminated by World War II.²⁸³ Similarly, France shared the view, at least with regard to multilateral treaties, that in case the war had any effect on treaties, it was the effect of suspension, not termination.²⁸⁴

Article 73 of the Vienna Convention on the Law of Treaties²⁸⁵ provides that the provisions of the Convention shall not prejudice any question with regard to a treaty that may arise from the outbreak of hostilities between states.

²⁸⁰ Greenwood (note 1) at 50. Hence, in *Dalmia Cement Ltd v National Bank of Pakistan* the arbitrator held that the fact that India and Pakistan maintained diplomatic and other relations was evidence repudiating an alleged intention of the parties to create a state of war.

²⁸¹ Oppenheim (note 7) at 302 (§ 99).

²⁸² Memorandum by the Secretariat of the International Law Commission 'The effect of armed conflict on treaties: an examination of practice and doctrine' from its fifty-seventh session, Geneva, 2 May-3 June 2005, and 4 July-5 August 2005, A/CN.4/550 at 48.

²⁸³ *Ibid.* In 1951, the District Court of Appeal, California found in *In re Meyer's Estate*, 107 Cal. App. 2d 799, 805 (1951), 3 December 1951, that whether war has the effect of annulling any stipulations of a treaty depends upon their intrinsic character. The court held that '[i]n the absence of express words to that effect, it is difficult to infer that it was the purpose of the contracting parties to withdraw the privilege of individuals to inherit, which was not incompatible with hostilities, and which the war had not disturbed.' (*ibid* at 809). In 1947, the United States Supreme Court held in *Clark v. Allen* 331 US 503 (1947), 9 June 1947, that the Second World War did not abrogate a treaty granting certain reciprocal inheritance rights to American and German nationals regarding property situated in the other country. The Court applied a test of compatibility with national policy and concluded that provisions guaranteeing reciprocal inheritance rights would not be incompatible and that the treaty should be upheld. Similarly, in 1948 the Supreme Court of California held in *In re Knutzen's Estate*, 31 Cal. 2d 573, 191 F.2d 747 (1948), that the Treaty of 1923 between the United States and Germany for reciprocal inheritance was still in force and not abrogated or suspended by the outbreak of the Second World War.

²⁸⁴ Memorandum by the Secretariat of the International Law Commission (note 282) at 48.

²⁸⁵ Vienna Convention on the Law of Treaties, 1155 United Nations Treaty Series 331, (23 May 1969).

The ILC Draft articles on the effects of armed conflicts on treaties²⁸⁶ stipulate in article 3 that

[t]he existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties:

- (a) as between States parties to the conflict;*
- (b) as between a State party to the conflict and a State that is not.*

Article 2 (a) of the ILC Draft articles is in accord with article 2 of the Resolution of the Institut de Droit International on the Effects of Armed Conflicts on Treaties from 1985.²⁸⁷ Treaties can only be suspended in the exercise of rights of individual or collective self-defence in accordance with the UN Charter insofar as the operation of the treaty in question is incompatible with the exercise of the right to self-defence.²⁸⁸ Article 7 provides for the continued operation during armed conflict of certain types of treaties listed in the annex²⁸⁹. Basis for the continued operation is their subject matter.

²⁸⁶ Adopted by the International Law Commission at its 63rd session in 2011, submitted to the General Assembly as part of the Commission's report about that session (A/66/10).

²⁸⁷ Adopted at its Helsinki session in 1985, available at http://www.idi-il.org/idiE/resolutionsE/1985_hel_03_en.PDF (accessed 6 January 2012). See also art 5 and 6 of the Resolution of the Institut de Droit International on The Effects of Armed Conflicts on Treaties from 1985.

²⁸⁸ Art 14 of the ILC Draft articles on the effects of armed conflicts on treaties.

²⁸⁹ Annex of the ILC Draft articles on the effects of armed conflicts on treaties:

Indicative list of treaties referred to in article 7

- (a) Treaties on the law of armed conflict, including treaties on international humanitarian law;
- (b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;
- (c) Multilateral law-making treaties;
- (d) Treaties on international criminal justice;
- (e) Treaties of friendship, commerce and navigation and agreements concerning private rights;
- (f) Treaties for the international protection of human rights;
- (g) Treaties relating to the international protection of the environment;
- (h) Treaties relating to international watercourses and related installations and facilities;
- (i) Treaties relating to aquifers and related installations and facilities;
- (j) Treaties which are constituent instruments of international organizations;
- (k) Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;
- (l) Treaties relating to diplomatic and consular relations.

In addition, a treaty would remain operative, if it expressly provides so²⁹⁰, which is also foreseen in article 3 of the Resolution of the Institut de Droit International on The Effects of Armed Conflicts on Treaties.

An interesting comment was made by Malanczuk as to the view that armed conflict does not *ipso facto* terminate treaties. He argued that the rule has not changed, but rather the nature of the treaties to which the rule applies.²⁹¹ While it was accurate to claim that war ended all treaties between belligerent states in times when most treaties were essentially bilateral contracts, the nature of treaties changed and many treaties became multilateral, law-making treaties, to which not only belligerents but also neutrals were parties.²⁹²

While Malanczuk's contention is debatable, the modern view is clear: the existence of an armed conflict does not *ipso facto* put an end to or suspend existing agreements.²⁹³

With regard to economic relations between belligerents during war times, there seems to be no established rule in international law which precludes parties to an armed conflict from trading with one another.²⁹⁴ However, it used to be common practice.²⁹⁵ As a matter of practice, it is likely that states whose relations have deteriorated to the point that at least one of them proclaims war would wish to break off peaceful relations which is a less serious measure than the resort to force.²⁹⁶

²⁹⁰ Art 4 of the ILC Draft articles on the effects of armed conflicts on treaties.

²⁹¹ Malanczuk (note 117) at 145-46.

²⁹² Ibid.

²⁹³ Yet a number of them may indeed lapse or be suspended on account of their nature, commercial treaties for instance.

²⁹⁴ Greenwood (note 1) at 49.

²⁹⁵ Oppenheim (note 7) at 318-321 (§ 101); Schindler (note 139) at 13.

²⁹⁶ Greenwood (note 1) at 49-50.

3. Law of Neutrality

The term neutrality refers to the legal status of a state which does not participate in a war that has been waged by other states.²⁹⁷ Thus, a neutral is ‘a state which during the existence of a war is not a belligerent in that war’.²⁹⁸ Under general international law, a state is generally not obliged to remain neutral but can rather enter the war on either side.²⁹⁹

Neutrality creates rights and duties between the impartial³⁰⁰ state and the belligerents.³⁰¹ States have to refrain from giving aid to the belligerents or furnishing any military supply.³⁰² Neutral states are obliged to prevent passage of foreign troops or aircraft on their territory or of prolonged stay of the army of the belligerent states in their territorial waters.³⁰³ Activities of nationals of neutral states including carriage of contraband or breach of blockade are rendered unlawful by international law and punishable by the belligerent against whom they are directed.³⁰⁴

The law of neutrality is based on two closely linked rationales: the principles of non-participation and non-discrimination. In particular, the first pillar refers to the desire to guarantee the neutral state that it will suffer minimal injury by reason of the war, whereas the second seeks to ensure that the neutral state will indeed remain neutral and will not assist one of the belligerents against the other.³⁰⁵

²⁹⁷ RL Bindschedler ‘Neutrality, Concept and General Rules’ in: *Max Planck Encyclopedia of Public International Law* band 4: Use of Force War and Neutrality Peace Treaties (N-Z), (1982) Amsterdam, New York: North-Holland, 9-14 at 9-10.

²⁹⁸ Art 1 (c) of the Harvard Research Draft Convention of 1939 on Rights and Duties of Neutral States in Naval and Aerial War, (1939) 33 *American Journal of International Law* Supplement 167.

²⁹⁹ Bindschedler (note 297) at 10.

³⁰⁰ For stylistic convenience, the terms ‘neutrality’ and ‘impartiality’ are used interchangeably.

³⁰¹ Oppenheim (note 7) at 653 (§ 293).

³⁰² Baxter (note 141) at 72.

³⁰³ Oppenheim (note 7) at 656 (§ 296).

³⁰⁴ Oppenheim (note 7) at 656 (§ 296).

³⁰⁵ Dinstein (note 2) at 25. Cf articles 4-5 of the Harvard Research Draft Convention of 1939 on Rights and Duties of Neutral States in Naval and Aerial War, (1939) 33 *American Journal of International Law* Supplement 167 at 176.

The law of neutrality is for a great part customary international law.³⁰⁶ It is partially codified in the Paris Declaration on sea warfare of 1856³⁰⁷, the Hague Convention V³⁰⁸ and XIII³⁰⁹ and the Helsinki Act of 1975³¹⁰. In addition, the four Geneva Conventions of 1949 also contain provisions relating to neutrality.³¹¹

Generally, neutrality is contrary to the principle of collective security in article 2 (5) of the UN Charter.³¹² This is the result of the cumulative effect of article 2 (5) (in which member states undertake to assist the United Nations in any action it takes in accordance with the Charter), article 25 (in which member states agree to accept and carry out the decisions of the Security Council in accordance with the Charter) and the provisions of

³⁰⁶ Bindschedler (note 297) at 10; Castrén 'The Present Law of Neutrality' Helsinki 1954, at 440-441 as cited in Whiteman (note 42) at 176.

³⁰⁷ Paris Declaration Respecting Maritime Law of 16 April 1856, available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1053&chapter=141128&layout=html&Itemid=27 (accessed 9 January 2012). The Declaration enunciated four principles, among others the principle that a neutral flag protects goods of an enemy, except for contraband; and that neutral goods, with the exception of contraband of war, cannot be captured when under the enemy's flag.

³⁰⁸ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, available at: <http://www.unhcr.org/refworld/docid/3ddca4e14.html> (accessed 9 January 2012). Art 1 states that 'the territory of the neutral Powers is inviolable'. Art 2 provides that belligerents are not allowed to send troops, munitions of war or supplies through neutral territory. In addition, neutrals must not allow such acts to occur on their territories (art 5).

³⁰⁹ Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907, available at <http://www.icrc.org/ihl.nsf/FULL/240?OpenDocument> (accessed 9 January 2012). For example, art 1 states that belligerents have to 'respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, ... constitute a violation of neutrality'. Art 5 forbids belligerents to use neutral ports and waters as a base of naval operations against their adversaries. Moreover, the Hague Convention XIII bans any supply of warships, ammunition or war materials by the neutral state to a belligerent (art 6). According to art 8, a neutral state is obliged to employ all necessary means to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to engage in hostile operations against a belligerent; b) prevent the departure from its jurisdiction of any vessel intended to engage in hostile operations, which had been adapted entirely or partly within its jurisdiction for use in war.

³¹⁰ The Final Act of the Conference on Security and Cooperation in Europe, adopted at Helsinki on 1 August 1975, 14 *ILM* 1292. Under Article I of 1. (a) Declaration on Principles Guiding Relations between Participating States, states have the right to neutrality.

³¹¹ Note 266. Each of the four Geneva Conventions of 1949 makes numerous references to 'neutrals' and 'neutral Powers' – for example, arts 4, 8, 10, 11, 27, 37, 43 of the First Geneva Convention; Second Geneva Convention – arts 5, 8, 10, 11, 15-17, 21, 25, 31, 32; Third Geneva Convention – arts 4, 8, 10, 11, 109-111, 114-116, 122, 123; Fourth Geneva Convention – arts 4, 9, 11, 12, 15, 24, 25, 36, 61, 132, 140.

³¹² H Kelsen *The Law of the United Nations* (1951) London at 10; JF Lalive 'International Organization and Neutrality' (1947) 24 *British Yearbook of International Law* 72.

Chapter VII of the Charter with regard to enforcement actions.³¹³ These provisions are supplemented by article 49 which provides that the members of the United Nations ‘shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council’ and article 103 of the UN Charter which provides that all obligations undertaken under the Charter have precedence over any other international obligations.

Therefore, if the Security Council has exercised its powers under article 39 of the Charter, third states may not remain neutral. Hence, the neutrality issue is only relevant when the SC has not taken action under article 39³¹⁴ or when the determination of the aggressor is made by the General Assembly in the form of a recommendation which may be ignored.³¹⁵

An initial issue that needs to be considered is whether neutrality is incompatible with the UN Charter. It has been suggested that the rules regulating the behaviour of neutrals come into operation only in the case of the existence of a state of war.³¹⁶ If war has ceased to exist as a legal institution, neutrality, whose applicability is assumingly dependent on the existence of a state of war, will necessarily have become obsolete as well³¹⁷ or at least considerably restricted.³¹⁸ However, as discussed herein, war is still a possible legal condition even after the adoption of the UN Charter. Hence, the concept of neutrality is not obsolete. Neutrality is also possible in disputes between non-member states of the UN.³¹⁹

³¹³ PM Norton ‘Between the Ideology and the Reality: The Shadow of the Law of Neutrality’ (1976) 17 *Harvard International Law Journal* 249, note 7 at 251; Oppenheim (note 7) at 647 (§ 292d).

³¹⁴ Schindler (note 139) at 14.

³¹⁵ Brownlie (note 45) at 404; Uniting for Peace Resolution (note 95)

³¹⁶ Schindler (note 139) at 5; Oppenheim (note 7) at 655 (§295); Bindschedler (note 297) at 10.

³¹⁷ As claimed by the radical school – see Neff (note 123) at 337; also claimed by CG Fenwick ‘Is Neutrality Still a Term of Present Law?’ (1969) 63 *American Journal of International Law* 100 at 102: neutrality was ‘terminated’ by the UN Charter.

³¹⁸ W Heintschel von Heinegg ‘Neutrality’ in: MN Schmitt, & J Pejic (ed) *International Law and Armed Conflict: Exploring the Faultlines - Essays in Honour of Yoram Dinstein* (2007) Leiden, Boston: Martinus Nijhoff, Chapter 20 at 543-568, at 547.

³¹⁹ Komarnicki ‘The Place of Neutrality in the Modern System of International Law’ 80 *Recueil des Cours* (1952, vol I) 399, 482 as cited in Whiteman (note 42) at 152; Oppenheim (note 7) at 652 (§ 292i).

In addition, if the Security Council is blocked because a veto is exercised, no obligation under the UN Charter would appear to arise.³²⁰ When the Security Council fails to take action, nothing in the Charter imposes a duty upon states to remain neutral.³²¹ If no collective solution can be found, the law applicable before the UN Charter should come into play including the Hague Conventions of 1907.³²² They are not precluded from entering the conflict, but they may not be compelled to participate by the contending states, and once they have declared neutrality, they are under an obligation to be impartial.³²³

Moreover, the Security Council has only the primary, but not the exclusive responsibility for international peace and security.³²⁴ In addition, even if the Security Council has identified the aggressor, it may, at least in theory, release a member state from its duties under the Charter. For example, in case of an embargo, there is still room for abstention and impartiality.³²⁵

Therefore, in the absence of unanimity among UN member states or when the Security Council has not called upon states to take military measures, neutrality, even in its classic sense, is possible within the framework of the UN Charter.³²⁶

A contrary view alleges that there is no authority for this argument in the UN Charter. A retreat to neutrality by a member state would allegedly constitute recognition that the UN has failed as an organization and that neutrality was utilized as the only

³²⁰ Oppenheim (note 7) at 651 (§ 292h). A contrary view by CG Fenwick maintains that when the Security Council is not able to reach a decision, states not willing to engage in the hostilities will be under obligation arising from the Charter to help the Security Council to find a solution for the case and also under an obligation not to give help to the state declared to be the aggressor. – (note 317) at 102.

³²¹ Oppenheim (note 7) at 651 (§ 292h); see also Lalive (note 312) at 79.

³²² Komarnicki (note 319) as cited in Whiteman (note 42) at 150; Baxter (note 141) at 73.

³²³ Baxter (note 141) at 73.

³²⁴ Wolff Heintschel von Heinegg (note 318) at 552.

³²⁵ Ibid at 557 and note 72.

³²⁶ Galina 'Neutrality in Contemporary International Law' 1958 (1959) *Soviet Yearbook of International Law* 200 at 225, 227 as cited in Whiteman (note 42) at 151; see also Lalive (note 312) at 79; T Komarnicki 'The Problem of Neutrality under the United Nations Charter' (1952) 38 *Transactions of the Grotius Society* 77 at 86. A member state of the UN can also choose to exercise its collective right of self-defence with the victim – Baxter (note 141) at 73; Brownlie (note 45) at 404.

resort.³²⁷ Moreover, it would amount to a return to the conditions in place before World War II and accordingly imply that the international legal regime established under the Charter has failed.³²⁸

In contrast, the opponents of this view assert that since the UN is not yet able to apply sanctions in all situations, neutrality should continue to exist.³²⁹ In the event that the Security Council should be unable to exercise its powers, the member states are not obliged to depart from the traditional law of neutrality which is based on abstention and impartiality.³³⁰ Only decisions of the SC are binding upon the members of the United Nations, according to article 25 UN Charter. Thus, under circumstances in which the Security Council is blocked, the traditional law concerning the rights and duties of neutrals would be in force.

It has also been asserted that non-belligerent states can opt for a 'qualified neutrality' on the ground that the historic notion of neutrality has disappeared with the renunciation of war as an instrument of international policy.³³¹ Qualified or quasi-neutrality would refer to the case when members of the UN have become belligerents as the result of a decision of the Security Council. The non-belligerent members of the UN are then under a general duty to assist the UN and refuse aid to the aggressor. It is unclear, however, whether they should allow their territory to be used by the aggressor in the same way (equally) as by the belligerent states. It is probable that the non-participant states have the right to discriminate against the aggressor in such a case. Unless the aggressor would consider these acts of discrimination as sufficient to declare war, the non-participating states would remain neutral or quasi-neutral.³³²

³²⁷ Grieve 'The Present Position of 'Neutral' States' 33 *The Grotius Society, Transactions for the year 1947* (1948) 99, 112-113 as cited in Whiteman (note 42) at 147.

³²⁸ Ibid.

³²⁹ Paul Guggenheim as cited in Whiteman (note 42) at 148; see also Baxter (note 141) at 75.

³³⁰ Komarnicki (note 326) at 85.

³³¹ Oppenheim (note 7) at 221 (§ 61); see also Fenwick (note 317).

³³² Oppenheim (note 7) at 649 (§ 292e); Lalive (note 312) at 80.

Some writers suggest that the creation of a state of war automatically subjects states to the rules of neutrality unless they choose to engage in the hostilities.³³³ However, this is inconsistent with state practice. There are numerous cases in which states have voluntarily subjected their relations with the belligerent states to the law of neutrality.³³⁴ The law of neutrality was invoked on several occasions in the Arab-Israeli conflict. For example, in 1952, Arab states alleged that principles of neutrality had been violated in an agreement between Germany and Israel, according to which Germany promised Israel payment of reparations. Germany denied such a violation.³³⁵

In the Six Day War of 1967, although France, the Federal Republic of Germany and the United States of America declared themselves neutral, they denied that any formal declaration of neutrality was necessary.³³⁶ Furthermore, in the Fourth Arab-Israeli War³³⁷ West Germany and other NATO member states refused transportation of American war materials from their territories to Israel based on the argument of conformity with the rules of neutrality.³³⁸

In addition, in the war between India and Pakistan from 1965, Ceylon was the only state to formally invoke the status of neutrality and refuse transit of war materials, whereas other states did not find it necessary to declare neutrality.³³⁹

The Korean War was characterized by uncertainty with regard to the legal characterization of the conflict, but the law of neutrality was perhaps most consistently and pervasively applied in that particular conflict compared to any other after World War II until the mid seventies.³⁴⁰ According to the armistice agreement, which ended the

³³³ This was the case in the Falklands conflict where states agreed to provide assistance to the UK provided that the conflict does not amount to war. – Greenwood (note 1) at 51 and note 91.

³³⁴ Greenwood (note 1) at 51.

³³⁵ Schindler (note 139) at 14.

³³⁶ Norton (note 313) at 260.

³³⁷ Also called Yom Kipur War which lasted from October 6 to 25, 1973.

³³⁸ Schindler (note 139) at 14.

³³⁹ Norton (note 313) at 262-263.

³⁴⁰ Ibid at 265.

hostilities, a 'Neutral Nations Supervisory Commission'³⁴¹ as well as a 'Neutral Nations Repatriation Commission',³⁴² were established. Hence, article 37 of the agreement defined the term 'neutral nations' as including those nations whose combatant forces have not participated in the hostilities in Korea.³⁴³ This coincides with the view that in the post-World War II regime, non-participant states are automatically to be considered to have neutral status.

Moreover, in the Korean War, the traditional law of neutrality was invoked on many occasions. For the purpose of abiding by the rules of neutrality, United Nations forces refused to pursue belligerent aircraft over Chinese and Soviet territory on the ground that those states might have been neutrals and there is no right of 'hot pursuit' into neutral territory.³⁴⁴ In addition, United Nations belligerents rejected a naval blockade of the People's Republic of China suggested by the USA. Notably, in the same proposal for a naval blockade, the United States themselves conceded that Port Arthur and Dairen, since controlled by the 'neutral' Soviet Union, could not actually be subjected to a blockade which would constitute a hostile act against a non-participant state, but only to a check for contraband.³⁴⁵

Similarly, the Arab states and Indonesia did not allow the transit of United Nations forces and supplies through their territory claiming their duty of impartiality as neutrals forbade it.³⁴⁶ Furthermore, China tried to impose neutral duties under the Geneva Conventions to Japan when North Korean prisoners-of-war escaped to it.³⁴⁷

The Vietnam War was not a declared war, but the United States insisted that all of the laws of war should apply to the conflict including the law of neutrality. In particular,

³⁴¹ Including Czechoslovakia, Poland, Switzerland, and Sweden – Norton (note 313) at 265.

³⁴² Ibid.

³⁴³ Norton (note 313) at 265.

³⁴⁴ Ibid at 266.

³⁴⁵ Ibid at 266 and note 75.

³⁴⁶ Norton (note 313) at 267.

³⁴⁷ Ibid.

the United States accepted the applicability of the Geneva Conventions.³⁴⁸ However, only when Cambodia was invaded did the law of neutrality become of crucial importance. Cambodia's failure to prevent the use of its territory as a base by the belligerent North Vietnam was seen as a violation of Cambodia's duty to remain neutral and served as justification for the invasion. This can be seen as evidence that the United States regarded the law of neutrality as generally applicable to the particular conflict. However, Cambodia alleged to have declared itself by means of domestic legislation many years before the Vietnam conflict as a neutral state in any conflict that could occur so that it was presumably bound by the duties of neutral states in any hostility.³⁴⁹

The aforementioned examples show that states have invoked the customary law of neutrality in a wide variety of armed conflicts since the Second World War. However, actual state practice also shows very contradictory application of the law of neutrality.³⁵⁰ In many cases, states did not rely upon the rules of neutrality even though they were apparently applicable; rather, they preferred not to take any legal stance at all. In addition, only in two conflicts – the Arab-Israeli and the Korean War – was the law of neutrality applied with any degree of consistency and comprehensiveness. In the rest of the cases of hostilities, this customary law was invoked by states to justify only particular decisions or armed activities.³⁵¹

There are several reasons for this outcome. From an ideological perspective, it is problematic to claim neutrality if war has actually been outlawed and no longer exists as legal institution. Declaring neutrality would implicitly acknowledge the legitimacy of an armed conflict, even though it might be deliberated by the United Nations³⁵², but does not implicitly recognize a state of war³⁵³. Practical concerns include the argument that a declaration of neutrality by a state does not confer on it any additional benefits. Rules of

³⁴⁸ Ibid at 268.

³⁴⁹ Ibid at 269.

³⁵⁰ Heintschel von Heinegg (note 318) at 561.

³⁵¹ Norton (note 313) at 276.

³⁵² Ibid.

³⁵³ Schindler (note 139) at 15.

neutrality only regulate the commercial relations between the non-participant states as well as the relations between the belligerents and the other neutral states. However, in times of peace, states can protect their citizens and their interests as well as if they were neutrals in times of conflict if not better.³⁵⁴

Hence, state practice does not give a conclusive answer to the question whether in case of a state of war third parties are obliged to observe the duties of neutrality.³⁵⁵ The examples rather suggest that the law of neutrality does not constitute a binding set of rules but is rather considered to be of a voluntary nature and applicable to any armed conflict, not just to wars.³⁵⁶ However, despite the discussed problems, which might give an incentive to ignore and avoid the law of neutrality, state practice shows that neutrality continues to operate in a considerable number of conflicts.³⁵⁷

Thus, except for the case when the Security Council has determined the aggressor in the specific conflict and decided what measures should be taken, there appears to be no reason why a state that wishes to remain neutral should not be able to choose to adopt the position of impartiality. Moreover, this would not in any case lead to a restriction of the victim state's rights. Clearly, the victim of an armed attack is entitled to take reasonable measures in self-defence even against states not involved in the hostilities. However, it is very unlikely that self-defence would justify measures going beyond the traditional belligerent rights.³⁵⁸ Hence, in the absence of an authoritative decision by the competent organ, states can make their own determination as to whether to remain neutral or not.³⁵⁹

Furthermore, the law of neutrality may be useful in establishing an upper limit to the rights of belligerent states.³⁶⁰ If a state party to the conflict takes an action such as

³⁵⁴ Norton (note 313) at 277 and E Castrén, *The Present Law of War and Neutrality* (1954) as cited in Norton *ibid.*

³⁵⁵ Schindler (note 139) at 14; see also Baxter (note 141) at 69.

³⁵⁶ Schindler (note 139) at 15; see also Heintschel von Heinegg (note 318) at 560.

³⁵⁷ Brownlie (note 45) at 404; see also Norton (note 313) at 277-278.

³⁵⁸ Greenwood (note 1) at 52.

³⁵⁹ Brownlie (note 45) at 404.

³⁶⁰ Greenwood (note 1) at 52.

interception of a ship with a flag of a non-participating state, this would be an unlawful action under the law of neutrality and amount to an unlawful threat or use of force under the UN Charter irrespective of whether the state in breach of the law of neutrality is the aggressor state or not. Hence, it will be easier to determine the legality of such actions without necessitating a judgment about who is the aggressor state.³⁶¹

In addition, in times of an armed conflict, the purpose of international law should be to limit the scope of hostilities which is also the purpose of the UN Charter. The law of neutrality serves this purpose as well.³⁶²

It is unclear whether a state which does not wish to engage in the hostilities but has not declared neutrality should be regarded as bound by the rules of neutrality. Some suggest that this would be the case only when the conflict amounts to war.³⁶³ However, it seems contrary to principle that the decision of one state to regard the conflict as war can force upon other states the status of neutrality, especially when this decision is made by the aggressor party.³⁶⁴

Hence, instead of trying to argue that neutrality, like war, has become obsolete, a call for a renewed attention to the law of neutral duties should be made.

In conclusion, resort to armed conflict does not, as it used to, oblige non-participating states to choose between belligerency and neutrality. It may lead other states to choose to adopt the position of impartiality, but it doesn't have to since neutrality is brought into operation by the acts of the non-participating states, not the belligerents. Yet, due to inconsistent state practice, the law in this regard is far from clear. What is clear, however, is that the significance of state of war for the law of neutrality is doubtful. It is furthermore clear that one state may legitimately assist another state only if the latter is

³⁶¹ Greenwood (note 1) at 52.

³⁶² Comment by Carl Salans, Deputy Legal Adviser, Department of State, as cited in Baxter (note 141) at 76; Heintschel von Heinegg (note 318) at 560.

³⁶³ Bindschedler (note 297) at 10; Oppenheim (note 7) at 655 (§295).

³⁶⁴ Greenwood (note 1) at 53.

acting within the law, for example by exercising its right of self-defence.³⁶⁵ If a state assists an aggressor, it acts in defiance of the law.

4. Declaration of war

Statements by a party to a conflict that it regards itself as being at war can constitute proof of a hostile intent.³⁶⁶ A hostile intent could be of relevance for assessing the legitimacy of a claim of self-defence. In particular, it could be significant for an act based on anticipatory self-defence.³⁶⁷

This argument was used by Israel when bombing Iraq's Osiraq Nuclear reactor on 7 June 1981.³⁶⁸ Israel defended itself by contending that Iraq's claim that it was at war with Israel rendered an otherwise ambiguous action hostile and hence entitled Israel to act in self-defence.³⁶⁹ However, SC resolution 487 from 19 June 1981 strongly condemned Israel's action and found that it violated the UN Charter.³⁷⁰

Yet, the approach could be of importance for assessing rights of states when responding to a series of 'pin-prick' attacks in the following situation: when a country engages its regular armed forces in response to a series of guerilla attacks, it would be hard to determine whether they constitute self-defence or reprisals.³⁷¹ If these guerilla attacks,

³⁶⁵ Baxter (note 141) at 69.

³⁶⁶ Brownlie (note 45) at 368.

³⁶⁷ Greenwood (note 1) at 55.

³⁶⁸ Opinions differ on whether the bombing was legitimate or not: LR Berest and Y Tsiddon-Chatto claim that Israel's preemptive action in 1981 has not violated international law, but has been an indispensable act of law enforcement and a legitimate resort to anticipatory self-defence. – 'Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor' (1995) 9 *Temple International and Comparative Law Journal* 437 at 440. In contrast, A D'Amato alleges that Israel's preemptive strike on an Iraqi nuclear reactor facility that was not even operational at the time of the strike cannot be legitimized by anticipatory self-defence without violence to the meaning of the term anticipatory self-defence ('an entitlement to strike first when the danger posed is instant, overwhelming, leaving no choice of means and no moment for deliberation.') – 'Israel's Air Strike Against The Osiraq Reactor: A Retrospective', (1996) 10 *Temple International and Comparative Law Journal* 259 at 261.

³⁶⁹ Greenwood (note 1) at 56.

³⁷⁰ UN SC Resolution 487 from 19 June 1981, adopted at its 2228th meeting, S/RES/487.

³⁷¹ Greenwood (note 1) at 56.

however, can be attributed to a country claiming to be at war, they could constitute an armed attack and therefore be legitimately met with force.³⁷²

Even so, it should be kept in mind that these consequences would not likely emanate from a legal assessment of a situation as war, but rather from the factual declaration of war being a hostile action. Nevertheless, it is likely that a statement of war would only be issued after special consideration especially with regard to the fact that such declarations have become a rarity.³⁷³

In addition, a declaration of war would make it clear that a new legal status has come into existence. This knowledge would be of great value for things such as contracts, insurance policies,³⁷⁴ and trade relations³⁷⁵. Therefore, the exact timing of the commencement of a war would be important for both individuals and the state.³⁷⁶

Hence, a declaration of war might not be conclusive as to the existence of war, or in other words, the absence of a declaration of war does not mean that there is no war, but once furnished, a declaration makes clear the exact moment when a war has begun.³⁷⁷

An unwillingness to admit the state of war might indicate a willingness to restrict the hostilities to the pursuit of certain objectives.³⁷⁸ Hence, operations could be restricted in their purpose or in a geographical sense as was assumed in the cases of the hostilities of 1950-51 between the Chinese People's Volunteers and the UN forces in Korea; the hostilities in the Formosa Strait between 1950 and 1958; and the Suez crisis between the UK and France on the one hand, and Egypt on the other, in 1956.³⁷⁹ The disinclination to

³⁷² Greenwood (note 1) at 56.

³⁷³ Greenwood (note 1) at 56; see also Y Dinstein 'Comments on War' (2003-2004) 27 *Harvard Journal of Law & Public Policy* 877 at 886.

³⁷⁴ Which might become void due to an existing state of war.

³⁷⁵ Trade may be conducted in violation of a trading-with-the-enemy act.

³⁷⁶ C Eagleton 'The Attempt to Define War' (1932-1933) 15 *International Conciliation* 237 at 265.

³⁷⁷ *Ibid* at 268.

³⁷⁸ Brownlie (note 45) at 397.

³⁷⁹ *Ibid* at 398.

recognize a state of war might also be indication for the refusal of one party to recognize the other as an existing state.³⁸⁰

In contrast, declaring war has great importance for indicating what conduct might thereafter be expected of the participants in the conflict and of third states. In addition, it entails burdens and benefits for the declarant and therefore guarantees certain discipline in its employment.³⁸¹

V. Conclusion

While war is a legal institution as old as states³⁸², there is no unanimity among the international community as to a binding definition of war.³⁸³ It has even been suggested that each separate use of the term requires its own definition based on its particular purpose.³⁸⁴ Moreover, the existence of a subjective element, an *animus belligerendi*, as a constituent element of the definition, remains unsettled. As a form of self-help, war served as lawful means in the form of both a remedy for a wrong-doing and an instrumentality for bringing about a change in the existing law. Yet, international law sought to limit the right to resort to war.

The first multilateral treaty aiming to limit the right of recourse to armed force was the Covenant of the League of Nations. Its articles 10 to 16 posed limitations to the resort to war, which served to outlaw war in certain specific circumstances only, but did not amount to a complete prohibition.

³⁸⁰ Molotov's note of 17 September 1939 claiming that the Polish State and its Government have ceased to exist - cited in G Gingsburgs 'A Case Study in the Soviet Use of International Law: Eastern Poland in 1939' (1985) 52 *American Journal of International Law* 69 at 70. However, this was not the case of the Arab-Israeli conflict where the Arab States insisted that a state of war existed despite their absence of recognition of the state of Israel. - *The Fjeld* (1950); *The Flying Trader* (1950) - Prize Court Alexandria, note 189 and Chapter II 1. f) i.

³⁸¹ Baxter (note 141) at 71.

³⁸² Eagleton (note 376) at 261.

³⁸³ Dinstein (note 2) at 4.

³⁸⁴ McNair as quoted in *Dalmia Cement Ltd v National Bank of Pakistan* at 620. This is true as far as municipal law is concerned as opposed to international law.

The prohibition of all wars of aggression came with the Kellogg-Briand Pact of 1928. With this Pact, war ceased to be a lawful instrument of national policy for changing or enforcing legal rights with the exception of individual or collective self-defence.

The prohibition of every threat or use of force culminated in article 2 (4) of the UN Charter. Exceptions were made for legitimate acts in self-defence or for sanctions by the Security Council under Chapter VII. To date, all of these limitations and prohibitions have not been successful in preventing the outbreak of open wars or wars in disguise³⁸⁵, especially in cases when the Security Council has proven to be ineffective.

Article 2 (4) prohibits the use, or the threat, of force between states. Both a declaration of war or actual hostilities would amount to a violation of this provision.³⁸⁶ Rather than assuming that a state of war has been rendered obsolete, redundant or irrelevant by this provision, the more pertinent question is whether a declaration of war would be permissible for a state which has suffered an armed attack and would like to act in self-defence in response. Some writers answer this question to the affirmative without considering the limitation by the principles of proportionality and necessity. A further view argues that a declaration of war is permissible only if it constitutes a necessary means of self-defence. Finally, an alternative school of thought asserts that a state of war is always incompatible with the UN Charter and the membership of states in the United Nations.³⁸⁷

However, it is not inconceivable that a declaration of war could be a proportionate measure of self-defence and thus compatible with the UN Charter. This is further confirmed by references to a 'state of war' in state practice, international instruments (including laws regulating the conduct of war), and municipal legislation. Thus, even subsequent to the enactment of the UN Charter, war has remained as a continuing fact both in law and in reality.

Yet, it is undeniable that not all armed conflicts constitute war. Hence the question arises whether there is any need to distinguish between 'wars' and 'conflicts not amounting to wars'.

³⁸⁵ Meng (note 20) at 283.

³⁸⁶ E Lauterpacht (note 142) at 63.

³⁸⁷ Schindler (note 139) at 17.

A state of war has important implications in some areas of domestic law, such as insurance³⁸⁸, contract and constitutional law.³⁸⁹

A general reference to international armed conflicts ignores the important theoretical as well as practical distinctions existing between wars and other uses of inter-state force short of war.³⁹⁰ It is likely that war entails the complete rupture of diplomatic relations and terminates certain categories of treaties between the belligerent states, whereas hostilities falling short of war do not.³⁹¹

A declaration of war will trigger the application of the Geneva Conventions of 1949³⁹² even in cases where no actual hostilities are taking place.

States may be called upon by the General Assembly or the Security Council to provide assistance to the victim state and to refrain from giving assistance to the wrongdoer.³⁹³ However, in the absence of an authoritative decision by the Security Council, neutrality continues to play an important role. In this case, states are not obliged to decide who the wrongdoer is and to provide assistance to the victim.³⁹⁴ Accordingly, preventing other nations from joining the conflict should be the first prerequisite for effective UN peacekeeping.³⁹⁵ Recourse to force in self-defence is only an exception, not the rule of the UN Charter. Moreover, determining the identity of the aggressor may be difficult.

Thus, the concept of war has not been made redundant by the UN Charter regime on the use of force. Moreover, it cannot be excluded that the state of war might even

³⁸⁸ See for example *New York Life Insurance Co v Bennion* 158 F. 2d 260 (C. C. A. 10th 1946) (United States Circuit Court of Appeals, New York).

³⁸⁹ Dinstein (note 2) at 4.

³⁹⁰ Dinstein (note 2) at xii (From the introduction to the first edition).

³⁹¹ Malanczuk (note 117) at 309.

³⁹² Whose applicability depends on the existence of an armed conflict.

³⁹³ Baxter (note 141) at 69.

³⁹⁴ *Ibid* at 76 citing Mr Carl Salans, Deputy Legal Adviser, Department of State.

³⁹⁵ *Ibid* at 81 citing Mr Edwin Hoyt.

witness some revival in future years.³⁹⁶ War as a term has acquired over the years ‘deep psychological and emotional significance’.³⁹⁷

Hence, in recent years an attempt has been made to label the fight against terrorism as ‘war’. The legal question behind it refers to whether the use of force could be extended within the framework of self-defence to military responses to terrorist acts, particularly since most such responses will violate the territorial integrity of a State that is not itself directly responsible for the terrorist attack.³⁹⁸ However, it is likely that these developments were influenced by the particular circumstances of the 11 September 2001 attacks.³⁹⁹ Thus, conclusions that any enduring change in international law has occurred are premature. It is for future state practice to reveal more.⁴⁰⁰

To label the fight as ‘war against terror’ may conform to a political analysis and have psychological advantages, but from an international humanitarian law perspective it inevitably implies conferring upon the terrorists an equal status, which criminals do not enjoy and should not have.⁴⁰¹ Thus, figures of speech like ‘war on terrorism’ must be taken as metaphorical.⁴⁰²

Not only has the legal state of war not become legally irrelevant to international law by virtue of article 2 (4) of the UN Charter,⁴⁰³ but, quite on the contrary, the state of war has become ‘more deeply relevant than ever’ since the actions bringing about a state of war are now illegal whereas before the adoption of article 2 (4) UN Charter they laid within the

³⁹⁶ Due to the new significance gained by the concept of just war in recent years and the possible new concept of war which has a primary political, symbolic and psychological importance – Schindler (note 139) at 20.

³⁹⁷ Brownlie (note 45) at 27.

³⁹⁸ M Byers ‘Terrorism, the Use of Force and International Law after September 11’ (2002) 51 *International and Comparative Law Quarterly* 401 at 406.

³⁹⁹ Moir (note 209) at 155.

⁴⁰⁰ Moir (note 209) at 156.

⁴⁰¹ M Sassòli ‘Ius ad Bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?’ In: Michael N Schmitt & Jelena Pejic (ed) *International Law and Armed Conflict: Exploring the Faultlines - Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers, Leiden Boston 2007, 241-264 at 261.

⁴⁰² Y Dinstein ‘Comments on War’ (2003-2004) 27 *Harvard Journal of Law & Public Policy* 877 at 886.

⁴⁰³ E Lauterpacht (note 142).

discretion of each state.⁴⁰⁴ In addition, the occasions and causes of war have not been eliminated by the introduction of the UN Charter regime. At most, the Charter regime has rendered as obsolete the notion that states are free to decide when to engage in war.⁴⁰⁵

Moreover, since treaties on bodies of law such as the rights and duties of belligerents, rules dealing with prize, neutral rights and duties and military occupation continue to be written, it would be inaccurate to suggest that these bodies of law are already dead or inoperative.⁴⁰⁶ As long as important rules of international law (such as the rules regulating the conduct of hostilities) refer to 'war', international law cannot dispose of the concept of war.⁴⁰⁷

In this sense, the contention that war is irrelevant arguably provides a more accurate description of the period before rather than after the UN Charter.⁴⁰⁸

⁴⁰⁴ J Stone *Of Law and Nations: Between Power Politics and Human Hopes* (1974) Buffalo, New York: W. S. Hein at 428.

⁴⁰⁵ L Henkin 'The Reports of the Death of Article 2 (4) Are Greatly Exaggerated' (1971) 65 *American Journal of International Law* 544 at 545.

⁴⁰⁶ Stone (note 403) at 433; see also JL Kunz 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision' 45 *American Journal of International Law* 37 at 48.

⁴⁰⁷ Kelsen (note 16) at 31.

⁴⁰⁸ Stone (note 403) at 428.

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