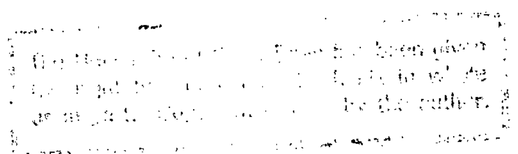
THE PROTECTION OF NEUTRALS IN THE CONTINUING USE OF FORCE

LLM-Dissertation
by Hansol van Zyl
promoter:Prof. DJ Devine
University of Cape Town



University of Cape Town

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

University of Cape Town

CONTENTS

LIST OF ABBREVIATIONS

LIST OF OFFICIAL DOCUMENTS

TABLE OF CASES

I INTRODUCTION

II WAR

1) Introduction
2) War in the pre-1914 era
3) The period between 1914-1945
4) After 1945

III THE "INCOMPATIBILITY" OF THE LAW OF NEUTRALITY WITH THE CHARTER OF THE UNITED NATIONS

1) The law of neutrality and the UN Charter
1.1) Neutrality
1.2) The Charter of the United Nations
2) Conclusion

IV CUSTOMARY LAW IN RELATION TO NEUTRAL SHIPPING

1) Introduction
2) Material fact
3) Opinio juris
4) Acquiescence
5) New customary law in relation to neutral shipping
5.1) State practice
5.2) Opinio juris
6) Conclusion

V MEASURES TO PROTECT NEUTRALS IN THE CONTINUING USE OF FORCE

1) Introduction

2) Collective Security

2.1) Collective Security and the protection of neutrals

2.2) Conclusion

3) Self-Defence

3.1) Necessity

3.2) Proportionality

3.3) Immediacy

a) the theatre of operations

b) the scale of operations and the level of weaponry

c) the graduation of the use of force and the scale of response

3.4) Comments

3.5) Conclusion

4) Intervention

4.1) Introduction

4.2) Intervention for the protection of nationals

4.3) Intervention in the territorial waters

4.4) Intervention in the contiguous zone

4.5) Intervention in the exclusive economic zone

4.6) Intervention on the high seas

4.7) Conclusion

5) War Zones

5.1) Introduction

5.2) Evolution

5.3) The legality of War Zones

5.4) Reasonableness as a test

5.5) Conclusion

VI SUMMARY

Bibliography

LIST OF ABBREVATIONS

A.J.I.L.	American Journal of International Law
B.F.S.P.	British and Foreign State Papers
B.Y.I.L.	British Yearbook of International Law
C.Y.I.L	Canadian Yearbook of International Law
H.I.L.J.	Harvard International Law Journal
I.C.L.Q.	International and Comparative Law Quarterly
I.L.C.Y.	International Law Commission Yearbook
M.L.R.	Michigan Law Review
N.I.L.R.	Netherlands International Law Review
N.Y.I.L.	Netherlands Yearbook of International Law
O.D.I.L.	Ocean Development and International Law
P.A.S.I.L.	Proceedings of American Society of International Law
U.C.L.R.	University of Chicago Law Review

TABLE OF OFFICIAL DOCUMENTS

Conventions

1907 Hague Convention (No.I) for the Pacific Settlement of International Disputes 1907 Hague Convention (No.II) Respecting the Limitation of the Employment of Force for the Recovery of Contractual Debts

1907 Hague Convention (No.III) Relative to the Opening of Hostilities

1907 Hague Convention (No.IV) Respecting the Laws and Customs of War on Land (and annexed Regulations)

1907 Hague Convention (No.V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land

1907 Hague Convention (No.XIII) Concerning the Rights and Duties of Neutral Powers in Naval War

1919 Covenant of the League of Nations

1928 General Treaty for Renunciation of War as an Instrument of National Policy (Kellog-Briand Pact of Paris)

1945 Charter of the International Military Tribunal

1945 Charter of the United Nations

1945 Statute of the International Court of Justice

1949 (First) Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field

1949 (Second) Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

1949 (Third) Geneva Convention Relative to the Treatment of Prisoners of War

1949 (Four) Geneva Convention Relative to the Protection of Civilians in the Time of War

1958 Geneva Convention on the High Seas

1958 Geneva Convention on the Territorial Seas and the Contiguous Zone

1969 Vienna Convention on the Law of Treaties

1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

1982 United Nations Convention on the Law of the Sea

Resolutions

1965 Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty

1970 Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty

TABLE OF CASES

1. Anglo Norwegian Fisheries case
2. Asylum case
3. Caroline case
4. Corfu Channel
5. Lotus case
6. Nicaragua case (case concerning military and paramilitary activities in and against Nicaragua)
7. North Sea Continental Shelf cases
8. Nuremberg Trial (International Military Tribunal)
9. Oscar Chin case

CHAPTER ONE

THE PROTECTION OF NEUTRALS IN THE CONTINUING USE OF FORCE

INTRODUCTION

As an aspect of international law, the law of neutrality is surrounded by a cloud of uncertainty. Professor Kuntz, in 1956, made the observation that the law of neutrality is perhaps one of the most uncertain parts of international law.[1] This holds true, even today, approximately fifty years after the acceptance of the United Nations Charter in 1945.

The preamble of the United Nations Charter expresses the determination of: "the Peoples of the United Nations.... to save succeeding generations from the scourge of war." Article 1(1) of the Charter states first among the purposes of the organisation: "to maintain international peace and security." This is ius cogens and has an erga omnes character.[2] Everything that is advanced in this work will try to conform with this erga omnes norm of international law.

Despite scepticism regarding the binding effect of international law, especially the laws of war, states do in fact regard the rules binding in nature.[3] It follows that if the rules are precise it is easier to understand and abide by them. Conversely it is also true that imprecise rules conform more easily to the manifold of situations that arise in practice.

The aim of this study is fourfold: first, to look at the outlawing of war; secondly to examine the incompatibility of the law of neutrality with the United Nations Charter; thirdly to look at a possible extended right in relation to neutrals trading with the enemy,

1 RW Tucker, 'International Law Studies 1955, Vol 50, The Law of War and Neutrality at Sea', (1957), 194-195

2 Y Dinstein, 'War Aggression and Self-Defence', (1988), 98

3 M Akehurst, 'A Modern Introduction to International Law', 3ed, (1977) 9

and fourthly to suggest measures as to how neutrals can be protected in the continuing use of force.

CHAPTER TWO

WAR

1. Introduction

War in the factual sense of hostilities involving the use of armed force between states, still exists and rules of international law exist to regulate it. It is however a contentious issue as to whether war continues to exist as a legal condition. If it does there are certain automatic legal consequences that arise for the contending parties as well as for other states.[4]

2. War in the pre-1914 era

Prior to 1914 and even after, a state of war was a legal condition. A state of war resulted in an entirely different legal regime that governed the conduct between the parties as well with other States. According to Greenwood the creation of a state of war in the 19th century had three main consequences.

(1) The laws of war became applicable and governed the conduct of hostilities between parties.

(2) The Non-hostile relations of the parties, such as the application of treaties between them, were affected.

(3) Relations between the belligerents and other states became subject to the law of neutrality.[5]

---

4 C Greenwood, 'The Concept of War in Modern International Law', (1987), 36, I.C.L.Q., 283

5 ibid 284

3. The period between 1914-1945

The twentieth century heralded a new approach to the right to go to war in international law. For the first time the right to go to war was not an absolute right. Certain procedural limitations were imposed.[6] The First World War brought about the end of the balance of power system and resulted in efforts to rebuild international affairs on the basis of an organised international society.

The League of Nations was created to oversee the conduct of the world community and to ensure that aggression could not happen again. It should, however, be noted that the League of Nations did not prohibit war or the use of force. It merely set up a procedure that provided for a cooling-off period. The procedure was as follows: the Covenant of the League declared that members should submit disputes likely to lead to a rupture to arbitration or judicial settlement or inquiry by the Council of the League. A compulsory period of three months had to pass, after either the arbitral award, judicial decision or report, before any member of the League was allowed to go to war.

The Covenant of the League of Nations qualified the right to go to war.[7] In Article 10 the Members of the League pledged "to respect and preserve as against external aggression the territorial integrity and political independence of all the Members of the League." The article had to be read in conjunction with the other articles to ascertain its true meaning.[8]

The Covenant did not abolish the right of states to resort to war. War, subject to certain provisions, remained lawful.[9] There were certain loopholes in the Covenant which permitted where resort to war. The following can be noted.[10]

---

6 I Brownlie, 'International Law and the Use of Force by States', (1963), 338

7 Dinstein (n2) 77

8 ibid

9 ibid 78

10 ibid 79

(a) Article 15(7) created the most important problem in this regard. In the absence of unanimity in the Council or a required majority in the Assembly, excluding the votes of the parties to the dispute, the parties retained their freedom of action.

(b) Article 15(8) stipulated that the Council was incompetent to reach a decision, if in its opinion the matter came within the domestic jurisdiction of a party to the dispute. It follows that in domestic disputes the parties retained their freedom of action and an international war could be triggered if it was of a non international character.

(c) Article 12 determined a time limit for the Council to reach a decision, and if this was not the case member states retained freedom to take any action they deemed fit.

(d) Articles 13 and 15 determined that after three months, war could be started against a state failing to comply with the award, decision or recommendation.

(e) The Covenant only applied to League Members inter se and did not cover the situation where there was a dispute between a League Member and a non Member or between two non Members.

In 1928 the Kellog-Briand Pact followed, which consisted of three articles, one of which was of a technical nature. In Article 1 the contracting parties determined that: "they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." In Article 2, they agreed that the settlement of all disputes with each other: "shall never be sought except by pacific means."[11]

The Kellog-Briand Pact was flawed in four ways. Firstly the issue of self-defence was not clearly addressed in the text. Secondly, no limits were set on the legality of war as an

---

11 ibid 81

instrument of international policy. Thirdly, the prohibition of war did not embrace the entire international community and lastly, forcible measures short of war were eliminated from consideration.[12]

In the 19th century it was quite easy to determine whether there was a state of war or not. This was partly due to the habit of making the event by a declaration of war or by some other formal pronouncement. Greenwood indicates that the circumstances where there was a formal declaration in the pre-1919 era were also limited. In the twentieth century the instances where it was difficult to determine a state of war increased.[13]

The question which arises is: how does one determine whether there is a state of war or not? This ultimately depends on the era and whether one prefers the objective or the subjective approach. In the beginning of the twentieth century there were two schools of thought as to what amounted to a state of war.[14] A state of war could be determined either subjectively or objectively depending on the particular period in world history. In the period preceding the League of Nations it was a matter to be determined subjectively.[15] State practice between 1798 and 1920 leads us to conclude that a state of war was a situation regarded by one or both of the parties as a state of war. It was thus of a subjective nature, although there were certain difficulties. This was especially so in cases where the lesser party to the conflict elected to treat it as war. In such cases the opinion of the greater power was accepted. Policy considerations also played a major role in the determination of whether a state of war existed or not.[16] The non labelling of a conflict as a state of war has two advantages. Firstly the action might be labelled as a reprisal or a justified intervention. Secondly, it prevents a mistaken or an accidental act leading to all out war.

---

12 ibid 83

13 Greenwood (n4) 285

14 ibid 285

15 Brownlie (n6) 38

16 ibid 39

The subjective school, which felt that the animus belligerendi was of primary importance, led to certain unsatisfactory results. Firstly, whether certain rules of international law were applicable depended on the whim of the parties. It was especially undesirable with regard to third parties - the laws of neutrality, the Pact of Paris and the League of Nations were of direct importance to third parties. Secondly, it was able to create an artificial separation between the state of war as a legal concept and the fact of war in terms of actual fighting. It was thus possible to have a state of war without actual fighting.[17]

In the period from 1920 onward there has been a marked shift towards an objective determination of a state of war. There has also been a tendency to avoid the term war. It can be concluded, as was done by Brownlie, that: "The present position in international practice would seem to be that states reserve the right to look at the facts and determine that 'war' exists for the purposes of general international law irrespective of the characterisations of the parties to the conflict."[18]

The objective approach was able to address the inadequacies of the subjective approach, but it had a major flaw. States as well as the academic writers were unable to agree what the criteria were by which a state of war was to be identified and distinguished from other uses of force falling short of a state of war. In the absence of objective criteria it was fruitless to have an objective definition for war. In the period between 1919 and 1945 the gap widened between the state of war and actual hostilities. In this period and the period following it, with the exception of World War II, declarations of war became a rarity.[19]

It can be concluded that in the twentieth century the right to go to war was prohibited in certain circumstances according to the Pact of Paris and the League of Nations.

---

17 Greenwood (n4) 286

18 Brownlie (n6) 401

19 Greenwood (n4) 287

4. After 1945

In the pre-1945 era war was accepted as a legal position even though it changed from the initial 'do as you like' approach. With the passing of time constraints were imposed as to which conduct was acceptable and which was not.

In 1945, after the Second World War, the world made an attempt to address the weaknesses of the Covenant and the Pact of Paris. The Charter of the United Nations resulted from these attempts. The following was done: (1) legal loopholes permitting legitimate warfare were closed; (2) enforcement machinery was strengthened; (3) the provisions for collective security were centralised and (4) an objective binding authority was established.

After the establishing of the United Nations and the signing of the Charter, war as a legal state was uncertain. There are those writers who feel that war as a legal state is something of the past. There is no such thing as a state of war is and the only existing state is a state of peace in which, within constraints, force may be used.[20]

There are two articles that are relevant in this regard. First there is Article 2(4) which prohibits the use of force. It reads as follows:

> "All 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 way inconsistent with the purposes of the United Nations."

Article 51 is also of primary importance, and these two articles should be read together. Article 51 states:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United

---

20 HJ Taubenfeld, 'International Actions and Neutrality', A.J.I.L., (1953), 377-396; ibid 287

Nations, until the Security Council has taken measures necessary to maintain international peace and security."

The effect of Article 51 was that war as a technical condition ceased to exist. The reasoning is as follows: since war is the use of force or a threat to use force war per se is illegal.[21] The question arises whether the traditional law of war at sea still applies in limited conflicts which are neither war nor peace but which still require some sort of legal regulation.[22]

Both these articles are seen as peremptory norms of international law, implying that they could only be changed by a superseding peremptory norm of international law. It is thus impossible to change them by treaty or by way of an international customary law norm. The prohibition of the use of interstate force, as formulated in Article 2(4) of the United Nations Charter, is a peremptory rule of international law or, to put it differently it is regarded as ius cogens.[23]

Article 53 of the 1969 Vienna Convention on the Law of Treaties[24] addresses the subject of ius cogens. Under the article: "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." To qualify as peremptory, a norm has to be: "accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent peremptory norm of international law." Article 64 of the Convention should also be kept in mind. This article stipulates that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

The Convention does not stipulate the requirements of a peremptory norm of international law, but the International Law Commission, in its commentary on the draft of the Vienna

---

21 E Lauterpacht, The Legal Irrelevance of the "State of War"', P.A.S.I.L., (1968), 58-83

22 T Orford, The Iran-Iraq Conflict Recent Developments in the International Law of Naval Engagements, Publication Number 7, UCT, 1988, 15

23 Dinstein (n2) 99

24 Vienna Convention on the Law of Treaties, 1969, (1969) U.N.J.Y. 145

Convention, identified the Charter's prohibition on the use of force as a "conspicuous example" of ius cogens. The International Court of Justice accepted this view as correct.[25] When an international legal norm is classified as ius cogens, certain kinds of conduct are rendered obsolete and the contractual freedom of the States is curtailed. Two major issues ensue due to the curtailment of the contractual freedom of the States.[26]

(a) A pact of aggression is contrary to the Charter and the customary international law and is further void ab initio due to the Vienna Convention.[27]

(b) Contracting states are not allowed to conclude a treaty derogating inter se from ius cogens, even though they safeguard the rights of non-contracting parties. There is no contracting out of ius cogens.[28]

It has been observed by the International Law Commission that: "it would clearly be wrong to regard even ius cogens as immutable and incapable of modification in the light of future developments."[29] But any modification of a peremptory norm must be brought about in the same way as original norm was established.

With the demise of war as a legal state, the self-defence principal was the way to regulate a conflict. The aim of the United Nations, as articulated in Article 1 of the Charter, is to promote peace and security. The first and foremost purpose of the United Nations is enshrined in Article 1(1) of the Charter:

> "To maintain international peace and security, and to that end to take effective collective measures for the prevention and removal of threats to the peace."

---

25 Nicaragua (1986) I.C.J. Rep. 14, 100

26 Dinstein (n2) 100

27 ibid

28 ibid 100

29 Report of the International Law Commission, 18th session, (1966) II I.L.C.Y.248

The raison d'être for the United Nation Organisation is found in the first paragraph of the preamble of the Charter: "to save succeeding generations from the scourge of war." Moreover, Article 2(3) prescribes that:

> "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

To achieve this end, the United Nations established an international legal order in terms of which the unilateral use of force by States not acting under the authority of the United Nations was prohibited with the sole exception of the right of self-defence.[30]

The prohibition on the use of force and the restriction of the grounds on which states are permitted to use force has imposed restrictions not only on the initial resort to force but also on the way in which force is used.[31] The principles of necessity and proportionality dictate that the use of armed force, whether recognised or not, must at all times in any armed conflict be reasonable to the achievement of a legitimate and limited objective.[32]

Since the Second World War all the conflicts have been limited as to scale, area and level of weaponry.[33] This could be attributed to the principle of self-defence, which placed substantial limitations not only upon the right to go to war, but also on the way force may be used as seen above.[34] The right to use force, either as individual or collective self-defence, only exists until the Security Council has taken steps to restore peace. However, until the Council makes a determination, the aggrieved state is entitled to decide whether an armed attack has occurred. This is, however, subject to the Council's review - it ensures that an objective assessment should be made as to whether there was an armed attack or not.[35] The Council is not an organ known for its decisive action on these matters and it is

30 Dinstein (n2) 86

31 Orford (n22) 17

32 ibid 8

33 ibid 18

34 DP O'Connell, 'The Influence of Law on Sea Power', (1975), 1-15

35 Orford (n22) 18

largely left to individual states to determine whether or not there has been an armed attack or not.[36]

It has also been contended that a resort to force in lawful self- defence will usually not amount to a state of war. The reason for this contention lies in the proportionality principle. The force used must not exceed what is reasonably necessary to resist the attack which is being met. It follows that the creation of a state of war is only possible if it is a reasonable, proportionate response to an armed attack. It is highly unlikely that this requirement will be satisfied where a state of war is created.[37]

The above shows quite clearly that there are only two instances in which force may be legally used. It is either in individual or collective self-defence against an armed attack or it is authorised by the Security Council under the provisions of Chapter 6 and 7.[38]

---

36 Dinstein (n2) 268-270

37 Orford (n22) 22

38 ibid 11

CHAPTER THREE

THE "INCOMPATIBILITY" OF THE LAW OF NEUTRALITY WITH THE CHARTER OF THE UNITED NATIONS

1. The law of neutrality and the United Nations Charter

1.1 Neutrality

The law of neutrality has its origins, at least in part, in the 1600's as a positivist concept premised on the understanding that part and parcel of the sovereignty of nations is the general right to engage in or to abstain from international conflict as they deem their national interest might be.[39]

Under the traditional law, the rules for when the law of neutrality was applicable and when it was not were quite clear. Belligerents would first notify third states of a state of war. The third state then had a duty to choose a status of either a neutral or a co-belligerent and then formally declare that decision. By this declaration of intention a legal relationship of neutrals and belligerents would be established, bringing into operation the entire system of the law of neutrality. It would remain in operation until the official termination of the war or until either a belligerent or a neutral chose to assume an active belligerent status toward the other. Of course the rules were not always that easily ascertainable but as a whole the rules were simple and clear in conception and readily applied.[40]

The law of neutrality has evolved through two centuries of state practice, has been codified in the 1907 Hague Regulations, especially Hague VIII dealing with the rights and duties of

39 R Grunawalt, 'The Rights of Neutrals and belligerents', (1988), I.C.L.Q, 304

40 PM Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality', (1976), 17 H.I.L.J., 249-311

neutral powers in naval warfare, and more recently has developed during the two World Wars.[41]

The law of neutrality is based on a reciprocal foundation of rights and duties, a balance of largely irreconcilable interests. The only way in which the law of neutrality will remain vital, is if there is a satisfactory balance between the legitimate interest of the belligerents on the one hand and the neutrals on the other.[42] The traditional law of neutrality was a balance between the interests of the belligerents and those of third parties. The opposing sides' desire is to bring the utmost pressure on one another. The non-belligerents want to pursue normal commercial relations. They want to trade and want the freedom of the high seas. Toby Orford summarises the competing interests correctly by stating the following:

> "The extensive rights acquired by belligerents in time of war are balanced against a neutral's right to trade freely in an attempt to avoid additional conflict between belligerents and third countries."[43]

At present this is not the case - this has lead to disregard of the traditional rules of neutrality as codified in the Hague Regulations. There is ample state practice of the disregard and this was especially the case in the Gulf conflict. It is a simple fact that the law has to develop to accommodate the evolving practices due to the military development of new devices of destruction and the economic basis of warfare. Today we are familiar with new devices to conduct naval conflict. Examples are the torpedo boat, the submarine and the mine.[44] Together with these, technological strategists came to recognise the decisive importance of economic warfare - the ability to deprive the enemy of the material resources necessary to continue the struggle. The effect of the above developments was that belligerents, from about 1914, chose to ignore rights historically enjoyed by neutral commercial vessels.[45] The tanker war in the Persian Gulf was an example of the

---

41 Grunawalt (n39) 304

42 ibid 305

43 Orford (n22) 24

44 Grunawalt (n39) 307

45 R Leckow, 'The Iran-Iraq Conflict in the Gulf: The Law of War Zones', (1988), 37, I.C.L.Q. 631

devastating effect technological change had on the traditional law of neutrality. It was also evidence of the growing importance of economic warfare.

Traditionally there are basic rights that a neutral has as well as a corresponding duty. The rights involve the inviolability of neutral commerce and the corresponding duty is that a neutral abstain from the conflict and remain impartial. The rights and responsibility a neutral has are basically a mirror image of those a neutral has. The belligerent has a duty to respect the inviolability of a neutral. The right is to insist that the neutral abstain from the conflict and remain impartial. These basic principles of neutrality are subject, according to Professor Tucker, to continuing evolution characterised by belligerent encroachment particularly on neutral rights dealing with maritime commerce. It is a simple fact that international law is of an evolutionary character and is selectively adapted, through state practice, to changed conditions.[46] This is also the case as far as the law of naval warfare is concerned. Russo is of opinion that: "these states and extra state practices in the Gulf War have crystallised an expanded right, emerging since the end of World War II, of belligerent interference with neutral shipping engaged in trade of a kind that sustains the economic war strength of an opposing belligerent."[47]

It can be contended that this balance between the belligerents and the neutrals is contrary to one of the most fundamental principles of the law of the sea, the freedom of the high seas. Any measure of maritime coercion comes into conflict with this fundamental principle. However, even with the most expansive interpretation the freedom of the high seas was never an unfettered freedom. The 1982 United Nations Convention on the Law of the Sea is the latest authoritative statement on the law of the high seas. Even in this Convention, which deals with a state of peace, there are limitations on the freedom of a ship on the high sea. A few examples are - due regard for other lawful users and not engaging in piracy. Where there is an armed conflict there is a further limit on the principle

---

46 Grunawalt (n39) 305

47 FV Russo, 'Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Law', (1988), 19, O.D.I.L 381 at 382

of freedom of the high sea, for the contending parties have legitimate interests to limit the maritime commerce of each other.[48]

Before we accept that the law of neutrality is still applicable, in however modified a form, due to the evolutionary character of international law we have to assess the influence of the Charter of the United Nations.

1.2 The Charter of the United Nations

The United Nations Charter had an influence on the traditional rules of neutrality by creating a system of collective security which grants certain powers of decision to the Security Council.

Article 24(1) of the Charter of the United Nations stipulates the following:

> Member States "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree in carrying out its duties under this responsibility the Security Council acts on their behalf".

The Security Council is, in terms of Article 24 of the United Nations Charter, the organ of the United Nations designated to ensure international peace and security.[49] The decisions of this organ are binding on all the members of the United Nations. The chapters of the Charter that are particularly relevant to peace and security are Chapters 6 and 7. The actions adopted by the Security Council in terms of Chapter 6 are only recommendatory. The measures adopted in terms of Chapter 7 are of a compulsory nature.[50] There is a certain procedure that the Council should follow before it is able to take action in terms of this chapter. Before the collective system is able to function, the Security Council, in terms of Article 39, should determine whether there was a threat to the peace, breach of peace or

---

48 HB Robertson, 'Interdiction of Iraqi Maritime Commerce in the 1990-1991 Persian Gulf Conflict', (1991), 22, O.D.I.L. 289

49 JF Lalive, 'International Organization and Neutrality', BYIL, xxiv, (1947) 78

50 MN Shaw, 'International Law' 2ed, (1986), 557

an act of aggression.[51] The main reason for the United Nation's failure to abolish the law of war is attributed to the inability of the Security Council to operate effectively.[52] As seen in the past fifty years the Security Council is hampered in its operation. The likelihood of an Article 39 determination is quite slim.[53] This, is however, a prerequisite for any action in terms of Articles 41 or 42. Article 41 deals with measures not involving the use of force - the severance of diplomatic relations or a trade embargo. Article 42 deals with steps involving the use of force.[54] The states are under no obligation to take Chapter 7 enforcement action against any state that has violated the Charter's ban on the use of force, unless there has been an Article 39 determination and action in terms of either Article 41 or 42. In accordance with the above, Article 2 (5) provides:

> "All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action".

The situation where there is no Article 41 or 42 action is akin to the pre-1945 era where states decided there position. The members of the United Nations are under no legal obligation to take discriminatory measures. Neutrality is thus de facto possible. The traditional law of neutrality is based on the sovereign right of all states to go to war.[55] An aggressor is defined as any member of the United Nations who uses force contrary to the purposes of the Charter. There are obligations on other states, in terms of the Charter, to refrain from assisting the aggressor, to differentiate in the treatment of the parties and to assist the United Nations in restoring peace and security.[56] There is an obligation to restore the status quo ante. The participants in an armed conflict no longer enjoy equal belligerent status. One side will be using unauthorised, hence illegal force, the other will be the victim of an illegal armed attack.[57]

---

51 Lalive (n49) 79-81

52 Orford (n22) 38

53 Shaw (n50) 558

54 Lalive (n49) 80

55 Orford (n22) 34

56 ibid

57 ibid

In the twentieth century, as seen above, there has been a move towards outlawing the unauthorised use of force. The factual basis for the law of neutrality has been removed. The neutral duties of impartiality and abstention do not correlate with the obligations the United Nations imposed on its members, when an Article 39 determination has been made and action is taken in terms of Articles 41 and 42. Impartiality has been viewed with suspicion. It has been said that:

> "It is clear ... that when authorised and therefore lawful armed force is being used against an aggressor state, the performance of neutral duties to that state would be a violation of the positive obligation assumed by members under the Charter and would be unlawful interference with the enforcement action in progress."[58]

It is not only the lack of an Article 39 determination and action in terms of Articles 41 and 42 that leads to the traditional laws of neutrality being invoked. In terms of the Charter it is possible to remain neutral. Article 48 of the Charter makes it possible for certain states to remain neutral even though an Article 39 determination has been made. In terms of Article 43 of the Charter all members should make armed forces available to the Security Council, however, Article 48 qualifies it by stating that not all members may always be required to participate with their armed forces.[59] There are those writers who feel that this is not entirely correct and advocate that this type of neutrality is only possible where the member has been expressly exempted.

The recognition that the law of neutrality still applies and that the Charter had not rendered the law defunct came very quickly. In 1949, the four Geneva Conventions for the Protection of War Victims recognised both that there was a need to apply at least certain of the laws of war to armed conflict not formally declared as war, and that neutrals continued to have some rights and duties in such conflicts. The Geneva Conventions are evidence of the survival of at least a certain part of the law of neutrality after the Charter.[60]

---

58 Dehn, 'The Effect of the United Nations Charter', 43

59 Orford (n22) 39; Lalive (n49) 88

60 D Schindler, 'Transformations in the Law of Neutrality since 1945' in AJM Delissen & GJ Tanja (ed), Humanitarian Law of Armed Conflict: Challenges Ahead, (1991), 375

Article 2, common to the four Conventions, provides that they should: "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognised by one of them."

The Geneva Conventions of 1949 are the best evidence that states have not regarded the Charter as rendering the law of neutrality defunct. However, there is other compelling evidence to the same effect; evidence which seems to acknowledge the continued applicability of the customary law in toto. Article 103 of the Charter of the United Nations stipulates that where the Charter is indisputably in conflict with the customary law the Charter will prevail. This stipulation is of particular importance in relation to the Hague Conventions of 1907 which codified the law of neutrality. The effect of Article 103 of the Charter is to render the Hague Conventions invalid. However, states have indicated that this is not the case and that the Hague Conventions are to be preferred in these circumstances.[61]

In addition to the above, it seems as though the traditional neutral/belligerent distinction has crept into treaties and conventions with no relevance to the law of war. The International Convention for the Prevention of Pollution of the Sea by Oil, for example retains, this distinction.

Various states also have manuals of the law of war to guide the conduct of their armed forces in times of armed conflict. The tendency of all of these manuals, with minor differences, seem to anticipate that the entire traditional law might at some time be applicable. Furthermore, all of these manuals have been edited in the last twenty years. The manuals of the United States, United Kingdom and France all expressly provide for the observance of the traditional law of neutrality.[62]

One can conclude that there is a clear indication that the law of neutrality is not defunct and may even in future still apply. State practice, however, provides the best evidence of its continued validity and scope.

---

61 Norton (n40) 257

62 ibid 257

State practice on the continued applicability of the traditional law of neutrality is not uniform. The only conclusion one can draw in this regard is that states have invoked or thought applicable the customary law of neutrality in a wide variety of armed conflicts since the Second World War and that it especially applied where a state has been able, by the exercise of some form of action, to compel its application. The ability of a state to exercise its rights under the law of neutrality often depended on its ability to enforce them. In the heyday of classical nineteenth century neutrality this was also the case. However, in the twentieth century, due to the qualifications on the applicability of the law of neutrality the law seems arbitrary and its use manipulative.

Even before the heralding of a new era by the United Nations Charter and its accompanying ideological and practical problems, the law of neutrality was in a state of flux. In the pre-1914 era it was established in international law that neutral states owed a strict duty of impartiality and abstention from belligerent conflicts. With the advent of the two World Wars this doctrine was brought into serious question. There was an inclination, before and after the World Wars, to establish a status somewhere between strict neutrality and belligerency, characterising this status as either "qualified neutrality", "non belligerency" or "neo-neutrality".[63]

There are manifold examples of traditional duties of impartiality and abstention having been breached. In the Second World War the United States accepted the Lend-Lease that authorised aid to the United Kingdom. In the Spanish Civil War Germany and Italy assisted the Fascists. In more recent times this trend has been exacerbated, while at the same time seemingly demonstrating the continuing utility of some of those rules in certain contexts. The most recent instance where there has been a violation of these duties has been in the Iran-Iraq conflict. The position adopted by the United States comes to mind in this context.[64]

The question arises whether there is now, as a matter of law, an intermediate stage between that of neutrality and belligerency. If a neutral state chooses to assist one of the

---

63 ibid 278

64 ibid

parties, this is a violation of the laws of neutrality against which reprisals consistent with the principle of proportionality are permissible. Such a violation however does not necessarily make the state in question a party to the conflict. The use of force in response to a violation of the law of neutrality is permissible only where the violation constitutes an armed attack within the meaning of the Charter.[65]

As seen from the above, the debate about a specific intermediate status between belligerency and neutrality was triggered by cases where certain states did not want to become parties to a conflict, at least not for the time being, but supported one of the belligerents or were hostile to the other. There is, however, no evidence that these cases have led, as a matter of law, to a new international law status different from that of neutrality. The fact that those neutral states quite often got away with their unneutral attitude is not enough to prove that there is now a new status where states enjoy all the advantages of neutrality without being subject to the corresponding duties.

On the other hand, violations of the duties of the neutral state do not automatically make the neutral state a party to the conflict. It is up to the belligerent who is the victim of such violation to take the appropriate countermeasures. Reprisals involving the use of force are not permissible if the unneutral action itself does not amount to an illegal use of force. Such unneutral acts as financial support or the provision of arms do not warrant a response by using force. This is in principle the case, but where the armed conflict has reached the state where it is comparable to the extended economic warfare of the First and Second World Wars or the Iran-Iraq conflict this might not be the case. As argued below, the belligerents get an extended right to interfere where the neutrals trading with the enemy are supporting the economy of the enemy.[66]

From the above we can conclude that the law of neutrality still applies, even though the Charter had a marked effect on the law. There is further uncertainty as to which of the rules of neutrality should be applicable. In view of the fact that armed conflict can only be conducted with the limitations imposed by the self-defence principle it has to be contended

---

65 Schindler (n60) 381

66 Russo (n47) 382

that only those principles of neutrality that confirm with this can be applied. The law of neutrality - albeit an adapted law of neutrality - applies from the beginning to the end of a conflict.[67]

The declaration of a formal state of war is not a prerequisite to the application of these rules. The result is due to the outlawry of war. All armed conflicts are expressed in this terminology, irrespective of the scale of the conflict. Some state practice after the Second World War suggests that belligerent rights against neutral shipping were not recognised where there was only an armed conflict, but no state of war in the technical sense. It is submitted that this distinction is no longer made in state practice. Nowadays the de facto existence of an armed conflict triggers the application of the law of neutrality, as it triggers the ius bello in general.

2. Conclusion

Under customary law the conditions for applying the law were quite unambiguous: belligerents acknowledged their belligerency, and all interested third states were required either to declare their neutrality or align themselves with one side or the other. In the present day and age the relevant juridical facts are no longer so manifest, leaving third states in a quandary about their legal status.[68]

Today we have to distinguish between a situation where the Security Council has acted in terms of Articles 41 and 42 and where this has not been the case. It is only when the Security Council takes action under Article 41 and 42 that duties of assistance may be imposed by the Council which are incompatible with the traditional rules of neutrality. But even then these duties are not necessarily imposed on all states, due to Article 48, so that neutrality remains a possibility.[69]

---

67 Orford (n22) 51

68 Norton (n40) 307-308

69 Lalive (n49)

Where there has been no determination, the customary law of neutrality has, for the past decades, led a shadowy existence. The law of neutrality has been called upon infrequently and inconsistently. The reasons for this are various. The changing technological nature of warfare, the introduction of total war, the increasing interdependence of the international economy, the diminishing relevant distinctions between individual and state - all have contributed to the result.[70]

With all of the above-mentioned uncertainty there has been an undeniable need to regulate the relations of belligerents and non-belligerents in the all-too-frequent international conflicts of our era. On many an occasion states have relied on the customary law of neutrality, for it seems to have served the interests of the parties.[71]

Although most non-belligerents have avoided formal declarations of neutrality, combatant forces have recognised the continued validity of neutral principles. It follows that the principles of neutrality, for the purposes of naval warfare, are still of importance. The purposes to be served by the law of neutrality, the values that are designed to be protected, are the confinement of hostilities to those participating in a conflict and regulating the interface between combatant forces of belligerents and neutrals who encounter one another at sea.[72]

---

70 Norton (n40) 310

71 ibid

72 Grunawalt (n39) 304

CHAPTER FOUR

CUSTOMARY LAW IN RELATION TO NEUTRAL SHIPPING

1. Introduction

The law of neutrality as part of international law is subject to change. The transformations are usually brought about by changed circumstances. In the light of the not-too-recent Iran-Iraq conflict it can be argued that opposing sides got expanded rights in relation to neutrals trading with the enemy.[73]

Custom is one of the sources of international law and it is of a dynamic nature. In a municipal law system, particularly in the developed world, it is relatively cumbersome and unimportant and often only of nostalgic value. However, in international law it is a dynamic source of law in the light of the nature of the international system, and its lack of centralised governmental organs. It is regarded as an authentic expression of the needs and values of a community at any given time.[74]

There are, however, certain requirements that should be met before it can be said that a new custom has evolved. According to Article 38 of the Statute of the International Court of Justice the essence of a custom is that it should constitute "evidence of a general practice accepted as law." There are two basic elements in the make-up of a custom. Firstly there has to be state practice in this regard - these are the material facts - and secondly the psychological or subjective belief that such behaviour is according to law. The function of the second element is to distinguish international law from principles of morality or social usage.[75]

---

73 Russo (n47) 382

74 Shaw (n50) 61

75 ibid

2. The material fact

The actual practice indulged in by states constitutes the initial factor. Questions arise as to the duration, consistency, repetition and generality of a particular practice by states. The time period required will depend upon the circumstances of the case and the nature of the usage in question.[76] The first time the International Court of Justice characterised the nature of a customary rule was in the Asylum case.[77] The court declared that a customary rule must be: "in accordance with a constant and uniform usage practised by the states in question."[78] The degree of uniformity needed for a customary rule was reiterated in the Anglo-Norwegian Fisheries case[79] and in the North Sea Continental Shelf cases.[80] In the latter case the court held state practice had to be: "both extensive and virtually uniform in the sense of the provision involved."[81] There are certain other factors that should be kept in mind. This is the opposition to the practice and the strength of the prior rule that is overthrown.

The question arises whether failure to act can be regarded as state practice. In the Lotus case[82] the court held that abstention can only give rise to the recognition of a custom if it was based on a duty to abstain.[83] The decision has been criticised and would appear to cover categories of non-acts based on legal obligations, but not instances where, by simply not acting against a particular rule states tacitly accept the legality and relevance. It should, however, be remembered that where a failure to take action is in some way connected, influenced or accompanied by lack of knowledge of all the relevant circumstances, then it cannot be interpreted as acquiescence.

---

76 ibid 63

77 ICJ Reports, (1950), 266

78 ibid 276-277

79 ICJ Reports, (1951), 116

80 ICJ Reports, (1969), 3

81 ibid 43

82 PCIJ, Series A, no10, (1927), 18

83 ibid 28

The further question arises as to what actually constitutes state practice. In this regard it is contended that the statement by Akehurst that: "state practice covers any act or statement from which views about customary law might be inferred."[84]

3. The Opinio juris

The opinio juris, or the belief that an activity is legally obligatory, is the factor which turns usage into a custom and renders it part of the rules of international law.[85]

The great problem connected with opinio juris is that if it calls for behaviour in accordance with law, how can new customary rules be created since that requires action different from or contrary to what until then is regarded as law? If one takes a restricted view of the psychological aspect then logically the law will become stagnant and this has not happened. It follows that one has to treat the matter in terms of a process whereby states behave in a certain way in the belief that such behaviour is law or is becoming law. It will then depend on how other states react as to whether this process of legislation is accepted or rejected. A problem arises in these circumstances as to the exact time the one rule of international law supersedes the other. It should, however, be remembered that this is a complication inherent in the nature of custom.[86]

4. Acquiescence

Abstention can amount to consent to a customary rule and that absence of protest implies agreement, or to put it differently when a state or states take action which they declare to be legal, the silence of other states can be used as an expression of concurrence in the new legal rule. This is especially the case where these states have vested interests in the issue at hand.[87]

---

84 M Akehurst, 'Custom as a Source of International Law', 47, B.Y.I.L., (1974-1975), 53

85 ibid 31

86 Shaw (n50) 72-73

87 ibid 75; IC Macgibbon, 'Customary International Law and Acquiescence', 33, B.Y.I.L., (1957), 115-145

5. New customary law in relation to neutral shipping

In the context of new customary rules in relation to neutral shipping the rights emerge through a process of interaction between belligerent tactics employed to control neutral shipping and non belligerent reaction thereto. The reaction can either be to reject vehemently or to accept. When the latter has been the case and this conduct has gained acceptance, it will supplant existing law and thereby become the new customary law.[88] It has been said by Professor Tucker, in relation to the dynamic nature of customary law that:

> "Where belligerents have asserted new forms of control over neutral trade on the high seas, and neutrals have acquiesced in such measures, the traditional law may well be regarded as modified."[89]

The question arises as to what states do with respect to the law of naval warfare when testing the law in conflict. According to Professor Tucker the law of neutrality might be assessed, after the World Wars, by:

> "an analysis that is to constitute something more than speculation over future possibilities, and must concentrate on an evaluation of the recent behaviour of states in applying - or failing to apply - once valid rules. In a word, attention must be directed to the experience of the two World Wars, however difficult it may be to assess this experience in terms of its effects upon traditional law."[90]

The validity of new rules of customary law will depend on their capacity to achieve and maintain, to the maximum extent possible, an acceptable balance among the competing interests, including those of a genuine neutral. If this is not achieved the law of naval warfare will lack the level of acceptance and adherence required to fulfil its function as a standard for neutral and belligerent behaviour during periods of armed conflict at sea.[91]

---

88 Russo (n47) 383

89 Tucker (n1) 194-195

90 ibid

91 Russo (n47) 383

In addition, an effective balance between neutral and belligerent rights stands as a means of escalation control during limited hostilities and at least in periods of less restricted warfare as a check against the conduct of naval operations which otherwise might entail a disproportionate level of non-combatant and neutral suffering.[92]

These new rights of belligerents are at odds with one of the basic freedoms of international law and this is the freedom of the high seas. It should, however, be remembered, as reiterated above, that even in time of peace this was never an absolute freedom. The freedom of navigation including the right to use sea lanes is one of the freedoms of the high seas. It exists today as an accommodation between all nations and not simply between nations engaged in hostilities and those which are not.[93]

In times of armed conflict at sea these freedoms will be diminished in favour of the belligerents. The extent to which this will be the case will depend on the various interests of the parties. This is a contest between the interests of the various parties, on the one hand the interests of the neutrals in the safety of their merchant shipping and the uninterrupted flow of international maritime commerce and on the other hand those of the belligerents to undertake military actions necessary to meet their security and operational requirements and deny their enemy the commerce necessary to sustain its war effort. The navigational freedoms available to neutrals during times of naval conflict will depend on how well neutral rights survive the challenge posed by competing belligerent interests. Or, to put it another way, as neutral rights are eroded, navigational freedoms will likewise diminish.[94]

This process is not necessarily a smooth one especially in the case of interference with 'neutral commerce'. The traditional rights enjoyed by belligerents and neutrals differed considerably from those they have today.

---

92 ibid

93 Robertson (n48) 289

94 Russo (n47) 384

5.1 State practice

The actual practice indulged in by states constitutes the initial factor necessary for a new customary rule to be formed. The practice should, however, have certain criteria to constitute a new customary law. The criteria were defined initially in the Asylum case[95] and later reiterated in the Anglo-Norwegian Fisheries[96] and the North Sea Continental Shelf cases[97]. The court declared, on the nature of custom, that the practice must be in accordance with a constant and uniform usage practised by the states in question.

Practice with regard to neutral shipping shows a marked difference from the pre-1914 era. It has been noted that during the First World War there was a manifest commitment to inflict the most devastating harm possible on neutral shipping trading with the enemy. This was due to the harsh facet of total economic warfare. The Second World War removed all doubts about this new facet of armed conflict at sea.[98] By reading the communiqués of the International Military Tribunal at Nuremberg one gets the impression that Germany did not justify its submarine campaign as reprisals, but that it invoked rather confidently and as a matter of right, a course of action that seemed settled and to which several states assented. The German Counsel for Admiral Doenitz developed all his reasoning on this perception. Counsel recalled the practices of the First World War and developments in the inter-war era and concluded, even though he dealt with war zones, he concluded with these words: "a development typical for the rules of naval warfare, was confirmed here, namely, that the modern technique of war leads to the use of war methods which are at first introduced in the guise of reprisals, but which gradually come to be employed without such a justification and recognised as legitimate."[99] This is the type of procedure that is followed, not only in the case of war zones, but in all new ways of conducting conflict at sea.

---

95 see (n77)

96 see (n79)

97 see (n80)

98 GP Politakis, 'Waging War at Sea:The Legality of War Zones', (199)1, N.I.L.R., 136

99 Official Proceedings - International Military Tribunal, 329

In the post 1945 era, in those cases where there were conflicts at sea, state practice was to regard neutral ships dealing with the enemy as legitimate targets. However, this was not the case in the pre-1914 period. Another complicating factor was the UN Charter. As seen above, one of the ideals of the Charter was to 'rule' the world by means of the Security Council and to save succeeding nations from the scourge of war.[100]

This was not to be, and neutrality in conflict with the Charter may be correct in a legal sense, but not in a factual sense. In the period following the Second World War, the conflict where 'neutral' shipping suffered most devastating was the Gulf War. It has been estimated that more than 400 commercial vessels were attacked in the eight- year of the Gulf War. Almost all were neutral ships. These attacks resulted in the deaths of 200 merchantmen and in more than 40 million dead weight tons of damaged shipping. In this protracted conflict the ships flying flags of 30 different countries, including all the permanent members of the Security Council were attacked.[101]

It can be concluded that in the twentieth century there has been a marked shift towards a state practice where attacks on neutrals trading with the enemy have become the norm rather than the exception. It could, according to the Asylum case[102], be said that it is in accordance with a uniform practice and usage practised by the states in question.

---

100 Article 1 of the United Nations

101 Russo (n47) 381

102 see (n82)

5.2 Opinio juris

Opinio juris is the factor which turns usage into custom and renders it part of international law. States now regard it as legally obligatory or as permissive conduct under international law.[103] To use the words of Article 38 (1)(b) of the Statute of the International Court of Justice, the usage is transformed into a "general practice accepted as law" - that is, into an international custom; the custom must be followed on the basis of a claim of right and, in turn, submitted to as a matter of obligation. The binding force of customary obligations may properly be attributed to the opinio juris. The part the latter concept plays in the acquisition of customary rights is limited. Its place is taken in this context by the doctrine of acquiescence.[104] It can be concluded that state practice, in order to create customary international law, must be accompanied by statements that certain conduct is permitted, required or forbidden by international law. A claim that conduct is permitted can be inferred from the mere existence of such conduct, but claims that conduct is required or forbidden need to be stated expressly.[105]

In the context of interference with neutral commerce, the mere existence of such conduct is sufficient to infer that it is allowed. The opinio juris of the world community, in this regard can be found in resolutions of the Security Council. In the war between Iran and Iraq the Security Council adopted resolutions 540, 552 and 582. In these resolutions, the Council favours a firm basic standard of protection for genuine neutral merchants trading with non-littoral states. It should, however, be noted, that neutral states trading with the enemy fall into a different category. Through resolution 552 the Security Council again reaffirmed the: "right of free navigation in the international waters for shipping transiting to or from littoral states not parties to the hostilities". The same organ of the United Nations, in the same resolution: "condemned attacks on commercial ships trading with Kuwait and Saudi Arabia and demanded that there should be no interference with ships en route to and from states that are not parties to the hostilities." The above resolutions, all adopted since 1983,

---

103 Shaw (n50) 70

104 Macgibbon (n87) deals thoroughly with the concept

105 M Akehurst 'Custom as a Source of International Law', British Yearbook of International Law, (1974-1975) 38

reiterate the navigational freedoms of States not parties to the hostilities in the Gulf War.[106]

A further aspect of the opinio juris on interference with neutral shipping trading with the enemy, is that the commercial shipping industry has been among the most vocal supporters of belligerent war exclusion zones as a means of controlling the area of maritime hostilities. This is indicative of the extent to which those merchants (traditionally regarded as neutrals) trading with the enemy in economically vital goods, have lost legal protection.[107] Interference has now gained acceptance and recognition in law as well as in practice.

6. Conclusion

The extended rights belligerents posses over neutral ships trading with the enemy will only exist in circumstances where conduct can be regarded as reasonable.[108] The circumstances that should be considered are the scope of the hostilities, their protracted nature and what can be considered as vital for the respective economies. These can lead to an extended right where hostilities at sea are as devastating and far-reaching as those of the two World Wars and the Iran-Iraq conflict.

---

106 Russo (n47) 395

107 ibid 391

108 MS McDougal, 'The Hydrogen Bomb Test and the International Law of the Sea', A.Y.I.L., 49 (1955) 359

The apt words of McDougal should never be forgotten:

> "From the perspective of realistic description, the international law of the sea is not a mere static body of rules but is rather a whole decision making process, a public order which includes a structure of authorised decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants and ultimately accept or reject them. As such a process, it is living growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena." [109]

He later continues as follows:

> "The factual claims asserted by nation state decision-makers to the use of the world's seas, the events to which the regime of the high seas is authoritative response, vary enormously in the comprehensiveness and particularity of interests sought to be secured, in the location and size of the area affected, in the duration of the claim, and in the degree of interference with others."[110]

---

109 ibid 357

110 ibid

CHAPTER FIVE

MEASURES TO PROTECT NEUTRALS IN THE CONTINUING USE OF FORCE

1. Introduction

The measures that are proposed as means to protect neutrals in the continuing use of force should not be seen as exhaustive. They are merely possible ways to protect the neutrals.

The measures that are proposed in this context are collective security, adapted principles of neutrality through the self-defence principles, intervention for the protection of nationals and war zones.

2. Collective security

Collective security differs from self-defence in the sense that it operates on the strength of an authoritative decision made by an organ of the international community. In the case of self-defence the state that is acting in response to an armed attack has a choice to act or not, or, to put it differently, it has a discretion.[111]

The Charter of the United Nations was designed to introduce a genuine system of collective security in the international arena. The first traces of a collective security system was to be found in the League of Nations treaty.[112] Article 24 of the Charter of the United Nations stipulates the following:

> Member States "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree in carrying out its duties under this responsibility the Security Council acts on their behalf".

---

111 Dinstein (n2) 254

112 ibid 255

The collective security system of the Charter is set out in Chapter 7 of the Charter. The essence is to be found in Article 42 which allows the Council to exert force on a limited or a comprehensive scale.

It should be noted that the Council is allowed to act even though there was not an armed attack. In this sense the Council can bring the collective security system into operation when it determines that there was a breach of the peace, a threat to the peace or an act of aggression. When the Council acts by way of collective security there is no limitation on what it may do and when it may do it. One can conclude that the Council has a carte blanche to act. It may even use force in the absence of an armed attack and even when there is a mere threat to peace.[113]

The powers of the Council are so broad as to allow interference in the domestic jurisdiction of a state. There merely has to be a determination of a threat to peace, breach of peace or an act of aggression. Even though it is contrary to Article 2(7) of the Charter, which precludes intervention by the United Nations: "in matters that are essentially within the domestic jurisdiction of any state", there is an express reservation that: "this principle shall not prejudice the application of enforcement measures under Chapter 7 of the Charter".

The task of the Security Council is to maintain international peace and security.[114] This function can only be fulfilled if there is an enabling resolution. Once this is the case, the Security Council shall, according to Article 39, determine whether there was a threat to the peace, breach of the peace or an act of aggression. Before an enabling resolution is possible the requirements of Article 27 have to be met. Article 27 is better known as the veto article. For a motion to be carried there has to be an affirmative vote of at least nine of its fifteen members and none of the permanent members should vote against the resolution. The effect of Article 27 is to exclude any Chapter 7 measures, if one of the

---

113 ibid 258

114 Article 24(1) of the United Nations

permanent members votes against it.[115] A permanent member will vote against a resolution if it is a party to the dispute or if it affects a state with which it is closely associated.[116]

The record of the Security Council is a very poor one. Article 42 on which the whole collective security system hinges, has been only applied once.[117] The sole reason for this is the veto or the threat of the veto power by the permanent members of the Security Council.

The action against Iraq, after the invasion of Kuwait, revealed that governments may give effect to collective security without the prior consent of the Security Council. Collective self-defence was the legal basis for coercion when a state has been attacked. The advantage of self-defence is the absence of a requirement of authorisation by the Council. The Council can, however, prohibit or terminate self-defence measures, but the requirements of Article 27 have to be met. It follows that collective self-defence provides the legal basis for collective security.[118]

When collective self-defence measures are taken, the conditions imposed by international law should be observed. In the Nicaragua case[119] the court confirmed the requirements of necessity and proportionality.

---

115 Shaw (n50) 597

116 Dinstein (n2) 262

117 The Beira blockade 1960

118 O Schacter, 'United Nations Law in the Gulf Conflict', (1992), A.J.I.L., 471

119 ICJ Reports, (1986) 14,121-122

2.1 Collective Security and the protection of neutrals

In the Iran-Iraq conflict the Council determined, after seven years of hostilities, that: "there exists a breach of the peace as regards the conflict between Iran and Iraq". There was, however, no action in terms of Articles 41 and 42. The ideal for the protection of neutral vessels would be a small United Nations escort flotilla. This would have required the agreement of the permanent members of the Security Council and, as seen above, this represented a major snag. Furthermore this force would have been of a peacekeeping nature and will require the consent of the participating parties. This has been the case where these forces have been employed on land. When dealing with a situation such as the molesting of tankers in the Gulf conflict, there is a right under international law to use the area for navigation which is not dependent on consent.[120]

The above has indicated that collective measures are possible, even though the consent of the permanent members of the Security Council has not been obtained. The concept used in this instance is collective self-defence. For example member states of a collective self-defence treaty, such as NATO, will be able to take measures that are necessary and proportionate in the exercise of collective self-defence. They could send warships to protect their merchant ships. This is a right historically also enjoyed by neutral states and it was employed in the Gulf conflict. When there is an armed attack against a neutral convoy or a neutral warship it constitutes an armed attack within the meaning of Article 2(4) and it triggers the right of self-defence under Article 51. The limitations imposed by international law on self-defence are also applicable.

2.2 Conclusion

Collective measures either by way of collective security or collective self-defence will ultimately provide the best way to protect neutral navigation in these circumstances. The reason for this is simple: it will indicate a manifest commitment on the part of the world community as a whole to maintain the rule of law in the area.

---

120 EL Richardson, 'U.N. Protection for Non-Belligerent Vessels', (1988), I.C.L.Q., 312

Furthermore, such a force will be more difficult to attack or resist than the ships of an individual state.[121] The only way the international community will be able to provide the desired protection is by effectively supplying force for the enforcement of international rules.[122]

3. Self-defence

Initially, self-defence did not play a big role in the regulation of hostilities, States did not need a legal justification to commence hostilities. Self-defence was relevant to the discussion of state responsibility for forcible measures undertaken in peacetime. Legally it had no role to play in the international arena as regards the cardinal issue of war. Self-defence was rather seen as a political excuse for the use of force in international relations. States, initially had an unfettered right to go to war.[123]

The rise of self-defence goes hand in hand with the prohibition on aggression.[124] The right of self-defence is enshrined in Article 51 of the Charter of the United Nations, which proclaims:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

The traditional definition of the right of self-defence in customary international law occurs in the Caroline case.[125] In the case the American Secretary of State laid down the

121 ibid 312

122 Dinstein (n2) 277

123 ibid 166

124 ibid 167

essentials of self-defence. There had to exist: " a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[126] Not only were such conditions necessary before self-defence became legitimate, but the action taken in pursuance of it must not be unreasonable or excessive: "since the act, justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it." These basic principles were accepted, about a century later, at the International Military Tribunal at Nuremberg.[127]

The definition of self-defence in customary international law differs from the United Nations Article 51 definition of self-defence. Article 51 permits self-defence solely when an armed attack occurs. The question arises whether under the auspices of Article 51 anticipatory self-defence is possible. The commentators have different views as to whether self-defence under Article 51 is possible when an armed attack has not occurred. The requirement of an armed attack as a condition of legitimate self-defence, precludes not only threats, but also any violation short of an armed attack.

In the Nicaragua case[128] the court confirmed that the two elements of self-defence, necessity and proportionality, are well established in international law and that it is part and parcel of the Article 51 definition of self-defence. As seen above these requirements were espoused for the first time by the American Secretary of State in the Caroline case.[129] Although Article 51 is silent on the issue, the right of self-defence is never admissible unless three requirements are met.[130] The requirements are:

(1) necessity
(2) proportionality
(3) immediacy

---

125 29 B.F.S.P. 1137 & 30 B.F.S.P.

126 ibid 195, 196-198

127 International Military Tribunal, Judgment (1946), I.M.T. 171,207

128 see (n25) 94

129 see (n125)

130 Dinstein (n2) 191

On the whole it can be said that the principle that armed force should be used only when necessary and proportionate is accepted international law. The devil, as they say, is in the details. The answer to a specific case will depend on the circumstances. Where it is a complicated issue, and it invariably is, the proper relation between the means and ends is difficult to achieve.[131]

3.1 Necessity

Necessity in the context of self-defence means that there exists a necessity to use force because no alternative means of redress is available. As O Schachter puts it in his article: "force should not be considered necessary until peaceful measures have been found wanting or when they would be clearly futile."[132] The efforts to resolve the dispute in an amicable way should be carried out in good faith. One can conclude in this context that the use of force should be regarded as the last option.

3.2 Proportionality

The requirement of proportionality can be regarded as the most difficult requirement to apply and in essence this is a standard of reasonableness in the response to force by counter-force. Due to the above this principle should be applied in a flexible way. The circumstances will determine whether or not the response is proportionate. As a result of reasonableness as a criterion there has to be a measure of flexibility in applying it.[133]

---

131 O Schachter, 'Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity' (1992), 86, P.A.S.I.L. 39

132 O Schachter, 'The Rights of States to Use Armed Force,' (1984), 82, M.L.R., 1635

133 Dinstein (n2) 191; Y Dinstein, 'Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity', (1992) P.A.S.I.L. 57

3.3 Immediacy

The requirement signifies that there should not be an undue time-lag between the armed attack and the invocation of self-defence.[134] The time span will depend on the circumstances of the attack, especially the scale of the attack. In this regard we should remember that the wheels of government grind slowly and the time to exhaust all other remedies might take a while. At the end, the question of whether immediacy requirements have been met will depend on what is reasonable given all the circumstances.

There is a limited right for a state to resort to force in international law. The resort to force has to be for the attainment of a legitimate objective. Even where this is the case, the state will be guilty of a violation of the Charter and of the general international law where the force is in excess of what is reasonably necessary and proportionate. Where the state's conduct is in accord with the laws of war, it can still be unlawful if it is not a necessary and proportionate response. Greenwood has observed that the principles of necessity and proportionality will affect measures such as the temporal scope of the conflict, the choice of weapons and the targets and the degree of coercion that may be applied against neutrals.[135]

3.4 Comments

The question arises as to the impact of these principles on the conduct of hostilities at sea - will they afford protection for neutral ships? The answer is a definite yes. O'Connell conducted a study of post-1945 naval conflicts and concluded that all such conflicts have been fought as limited wars with limited military and political objectives. The principles of necessity and proportionality have limited the measures that may be taken.[136] In the era of the United Nations Charter, the destruction of neutral shipping trading with the enemy is highly unlikely unless it can be shown that these measures are proportionate and necessary

---

134 ibid

135 C Greenwood 'Self-Defence and the Conduct of International Armed Conflict,' in Y Dinstein (ed) 'International Law at a Time of Perplexity', (1988), 273 at 275

136 DP O'Connell, 'International Law and Contemporary Naval Operations', B.Y.I.L. xxxxiv (1970) 19-85

measures of self-defence. To put it differently, the waging of economic warfare will only be possible if through a graduation of the use of force the conflict has reached the stage where this conduct can be seen as a proportionate measure.

As seen from the above the overriding requirement of self-defence is that of proportionality. It imposes limitations as to:

(a) the theatre of operations;

(b) the scale of operations and the level of weaponry ;

(c) the graduation of the use of force and the scale of response.[137]

(a) Theatre of operations.

All the naval operations since 1945 have been conducted with an inherent geographical limitation. In the era before the Charter, fighting, especially between naval units, frequently occurred thousands of miles away from the scene of the dispute which had led to the war. In the two World Wars the first major battles were fought off the coast of Latin America. Under the Charter the position is entirely different. The theatre of operations, due to the principles of self-defence, must generally be confined to the area of the threat it is designed to meet.[138]

In general the territory of a neutral state fell outside the region of war. However, the belligerent, in certain circumstances, was allowed to take measures against the territory of a neutral. The rules of the United Nations Charter limiting the use of force have modified the traditional rules of neutrality. Under the traditional law, under certain circumstances, a neutral state was required to take military action against any violation of its territory. In the post-1945 era it may not do so where this reaction would itself constitute an armed attack which is not justified by self-defence. There is thus a double limitation on the use of force in relations between a belligerent and a neutral: that pertaining to the Charter rules governing the use of force and that of the law of neutrality.

137 T Orford, 'Self-Defence at Sea: Contemporary Development in the International Law of Naval Engagements', (1986), No4, Sea Changes, 68 at 76

138 ibid

On the other hand the traditional rules of neutrality may not serve as an additional justification for the use of force. Thus, even where there is a duty on a neutral state, under the traditional law of neutrality, to take military action against violations of its neutrality such as the use of its territory by one of the belligerents, this action is limited to:

(1) measures that do not constitute a use of force prohibited by the Charter;

(2) measures which are justified as self-defence.

It should, however, be observed that the limitation imposed by the requirements of self-defence is not inflexible. The result is that in cases such as the Gulf War, where the conflict between the states is akin to a situation of total war, the proportionality requirement would no longer dictate that the defensive measures should be confined to a restricted geographical area.

(b) The scale of operations and the level of weaponry.

The basic principle in this case is that the use of force should not be greater than is strictly required to repel the aggression. Weapons that cause unnecessary suffering collateral damage have long been prohibited in international law. The principle of self-defence placed an additional limitation on the choice of weapons.[139] The force the state acting in self-defence uses should not be more than necessary to repel the attack. If lesser measures will have the same effect they should be used. As the conflict progresses from a low-level conflict to a full-scale one, so the influence of the principle will also diminish.[140]

(c) The graduation of the use of force and the scale of response.

In the principle of self-defence the overriding traits are that of limitation and control.[141] It thus follows that although a graduation of force is possible, the recipient of an armed

139 ibid 78; Greenwood (n135) 278-281

140 ibid 280

141 Orford (n137) 78

attack must not respond in such a way as to contradict these traits. The use of superior force will only be justified if it is in accordance with the initial unlawful use of force.

Once there has been an armed attack a subtle game of escalation has to be played. It can be said that there is a ladder of escalation. Initially, only harassment will be allowed and as it progresses the use of missiles will be permitted. The principle of proportionality will require that the response should be in the same mode and limited to the geographical area of the attack.[142]

It is accepted that no hard and fast rules can be laid down as to what a correct response is. The proportionality and the necessity of the response will ultimately depend on the conflict at hand. The traditional laws of neutrality will be replaced in as much as they clash with the requirements of self-defence.[143]

3.5 Conclusion

A limited war, as seen above, is limited as to the weapons employed, the geographical extent of the conflict and the type of response allowed. These limitations on the conduct of warfare are the result of the proportionality requirement of the self-defence principle. The traditional law of neutrality will only apply if the measures taken are those of legitimate self-defence. The conduct should be a necessary and proportionate response to the unlawful use of armed force.

4. INTERVENTION

4.1 Introduction

Intervention can take a myriad of forms. The form and extent of the intervention will determine the legality of the action. A disadvantage of this notion is its vagueness and the

---

142 ibid 79

143 ibid 80-81

multitude of forms in which it has been used. Furthermore there is a tendency to use it in cases where a state is weaker and thus unable to protect itself. The above have influenced the legitimacy of the principle in international law and the question arises as to the influence of the Charter of the United Nations and other international developments.[144]

The relevant question for the international lawyer is at what point the manifold forms and degrees of intervention may be said to amount to an act of unlawful interference with the sovereignty of another country. Certain acts of intervention, permissible under international law, may do far greater harm to another country than direct acts of interference that impair the sovereignty, and are forbidden by international law. The basic tendency in international law is that measures that affect another nation's economic life are legitimate, even though the population of the State may starve to death. On the other hand, the slightest act of physical violation of sovereignty would be regarded as a violation of international law.[145]

The most basic principal of international law is the equal integrity of all States, irrespective of their political or social ideology. Without such an assumption, it is impossible to maintain even a minimum of international order. Contemporary international society is built upon a foundation of legally sovereign States which are entitled to the same degree of respect and recognition. This means the rejection of differentiation according to ideology. [146]

The notion of intervention is difficult to reconcile with the high premium that is placed on territorial integrity, as espoused above. The notion is contrary to Article 2(7) of the Charter of the United Nations and the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, adopted by the General Assembly in 1965.

---

144 Brownlie (n6) 338

145 W Friedman, 'Intervention, Civil War and the Role of International Law' in L Gross(ed) 'International Law in the Twentieth Century', 1ed (1969), 726

146 Ibid 724

Internal sovereignty is carefully described, for example in the first part of Article 2(7) of the Charter of the United Nations, which reads:

> "7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to the settlement under the present Charter."

The 1965 Declaration made by the General Assembly (resolution (2131)(XX)) states the following:

> "No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."

The resolution further condemns all forms of interference or any other threats against a State. It states:

> "No State may use or encourage the use of economic, political or any other type of measures to coerce a State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also no State shall organise, assist, foment, finance, incite, or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

The 1970 Declaration, to a large extent adopted much of the same language.

The International Court of Justice also considered intervention. In the Corfu Channel case it made the following comments:

> "The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the defects of international organisations, find a place in international law. Intervention is still less admissible in the particular form it would take here; for, from the nature of things, it

would be reserved for the most powerful States, and might easily lead to perverting the administration of justice itself."[147]

In the Nicaragua v United States case[148], the International Court of Justice held that there is a customary international law principle of non-intervention whereby every sovereign State has the right to decide for itself, and without outside interference, such questions as the choice of a political, economic, social or cultural system and the formulation of its foreign policy. It follows that where the interference does not (1) impinge on matters as to which each state is to make decisions by itself freely or (2) involve interference in regard to this freedom by methods of coercion especially by force, intervention is justified.

Traditionally, international law dealt solely with the relationship between States. The relationship between a State and its citizens was a domestic affair. This position fitted in well with the theory of unlimited national sovereignty. It left States free to order their internal affairs without outside supervision and without having to account for whatever they did. The theory left a State with unlimited power in domestic affairs.

In the twentieth century this position was no longer tenable. There was a growing awareness that States were not completely sovereign. Interstate organisation became necessary, and international organisations were established. Initially their influence were minimal, but it was the beginning of a process of ever-growing "internationalisation".[149]

4.2 Intervention for the protection of nationals

In international law intervention by a state to protect the rights, interests and personal safety of its citizens abroad has been recognised. The United States, after their landing of a multinational force on the island of Grenada in October 1983, relied on this ground to justify their intervention. The intervention in this case was not humanitarian intervention in

---

147 ICJ Reports (1949) 4 at 35

148 ICJ Reports (1986) at 14

149 HG Schermers, 'The Obligation to intervene in the domestic affairs of States in AJM Delissen & GJ Tanja(ed) 'Humanitarian Law of Armed Conflict Challenges Ahead', (1991), 584

the broad sense, but rather in the sense of protection of nationals. It should be noted that if non-intervention is made an absolute right, it will endorse an unlimited sovereignty that is contrary to the protection of human rights.

Waldock, holds the view that a right to intervention exists, but he qualifies it on a very important ground and this seems to be the accepted view today. He holds that:

> "An imminent threat or injury to the nationals of another State, failure or inability on the part of a territorial government to protect the nationals may give rise to intervention provided it is confined to the protection of nationals." [150]

The following conclusion flow from the above. Intervention for the protection of nationals will only be legitimate if it is conducted within well defined parameters. Firstly it should be severely restricted in its application. Secondly, the threat to the group should be genuine, imminent and substantial and thirdly, military operations undertaken should be conducted as limited purpose rescue missions, and not as a formidable attack against the authority structure of the internal government. All these requirements have one thing in common, namely to prevent intervention as a means of achieving ulterior objectives.

This view is based on the premise that loss of life being irreparable, immediate action is necessitated, while the protection of property in other States is always possible even in the case of destruction. Accordingly it is claimed that an intervention to protect lives of aliens by their State can therefore be considered as a permissible exception to the United Nations Charter provision on the non-use of force.[151]

In the past the judgement of the individual State concerned, determined whether or not there was going to be an armed intervention to protect the lives of its citizens. With time, the discretion of the State was curtailed and it was most evident in the period after the Second World War. The Charter of the United Nations made the use of force to solve international disputes absolutely illegal, unless it was expressly excepted under its

---

150 FX De Lima, 'Intervention in International Law', (1971), 120

151 ibid 120

provisions. Jurists agree (and this is confirmed by the practice of States) to concede a right of armed intervention of an individual State to protect the lives of its nationals in another State, provided that their lives are in imminent danger of being lost. The view is widely held that the right to intervene does not exist when it is for the protection of property.[152]

4.3 Intervention in the territorial waters

There was uncertainty over the precise legal nature of the territorial waters for quite a while. A number of theories were advanced, ranging from treating the territorial sea as part of the *res communes*, but subject to certain rights exercisable by the coastal state, to regarding the territorial sea as part of the coastal State's territorial domain subject to a right of innocent passage enjoyed by foreign vessels.[153]

The uncertainty lasted until the twentieth century, when the trend in doctrine and state practice was steadily towards recognition of coastal state sovereignty over the territorial waters. By the 1950's, for the purposes of international law, States had sovereignty, and the plenary jurisdiction which is its concomitant, over the territorial sea. The principle was adopted by the Geneva Conference, and such debates as there were, were centred upon coastal state sovereignty and the right of innocent passage.

The tendency of the Conventions that followed was to provide that coastal state sovereignty extends to its territorial sea and to the airspace and subsoil thereof subject to the provisions of the Convention and international law.[154]

It can be concluded that territorial waters are subject to coastal state sovereignty, qualified by the right of innocent passage and other relevant principles of international law and the

---

152 ibid 128

153 Shaw (n50) 304

154 RR Churchill and A V Lowe, 'The Law of the Sea', 2ed, (1988), 63

Conventions. It follows, from what was said above, that intervention to protect the nationals will be permissible, but within the parameters stated by Waldock.[155]

4.4 Intervention in the contiguous zone

The contiguous zone is a zone of the sea contiguous to and beyond the territorial sea in which States have limited powers for the enforcement of customs, fiscal, sanitary, and immigration laws.[156]

There was a lack of clarity, especially in the early part of the twentieth century, as to the jurisdiction of the coastal State beyond the territorial seas. Three main approaches existed. First, certain States denied that such jurisdiction existed, except where given by treaty or under the doctrines of hot pursuit and constructive presence. Secondly, other States which claimed a variety of jurisdictional zones; and, thirdly, certain States claimed a jurisdictional zone, usually for customs and security purposes, which was clearly distinct from the territorial sea.[157]

In the years between the Hague and the Geneva Conferences, state practice remained divided between States, such as the United Kingdom, which did not recognise the validity of contiguous zone claims, and the increasing number of States which made such claims. The 1958 Conference eventually agreed upon the establishment of a contiguous zone within which:

> ".....the coastal State may exercise the control necessary to:
>
> (a) Prevent infringement of its custom, fiscal, immigration or sanitary regulations within its territory or territorial sea;

---

155 See n7

156 Churchill and Lowe (n154) 112

157 ibid 114

(b) Punish infringement of the above regulations committed within its territory or territorial sea."[158]

Article 33(1) of the Law of the Sea Convention has a substantially identical provision.

The basic rule in international law is that coastal states only have enforcement jurisdiction in the contiguous zone. The literal wording of Article 24 of the Territorial Sea Convention clearly states as much. However, state practice since 1958 has not always followed the conventional provisions on the status of the zones. There are States who claim both enforcement and legislative jurisdiction.[159] In the territorial sea there is a presumption in favour of coastal state jurisdiction, but in the contiguous zone the presumption is against the existence of coastal State jurisdiction over foreign ships: coastal rights were to be strictly construed. The Law of the Sea Convention changed the position, for the contiguous zone falls not within the high seas but within the EEZ. The consequence is that the presumption against coastal state jurisdiction is removed, and in cases where a dispute arises concerning a claim by a coastal State to jurisdictional rights not expressly granted under the Convention, the question is to be resolved on the basis of equity.[160]

Intervention in the contiguous zone will even be more readily accepted then in the territorial waters. The coastal state acquires rights in the contiguous zone, as defined in the Conventions. The sovereignty principle will not impede intervention, but the fundamental principles of international law should be adhered to.

4.5 Intervention in the exclusive economic zone

The EEZ is a concept of recent origin. The notion entails that the coastal state extend the limits of coastal state jurisdiction seawards to gain ever greater control over the economic resources off their coasts. The more direct and immediate origins lie in the preparations for

---

158 Article 24(1) TSC

159 Churchill and Lowe (n154) 117

160 ibid 118

UNCLOS III.[161] The maritime nations opposed the creeping jurisdiction of coastal states. At the end of UNCLOS III, the EEZ could be seen as a compromise between those States that claimed a 200 mile territorial sea and those developed States which were hostile to extended coastal state jurisdiction.

The question arises as to the exact legal nature of the EEZ.[162] This issue was also discussed during the earlier stages of UNCLOS. The maritime States argued, due to their fear of creeping coastal state jurisdiction, that the EEZ should have a residual high seas character. In the event of uncertainty, there is a presumption against coastal state jurisdiction. The majority of UNCLOS participants did not agree and were in favour of a residual territorial sea character. Neither of these views prevailed. Instead the EEZ is regarded as a separate functional zone of a sui generis[163] character, between the high seas and the territorial sea. In the EEZ certain rights are accorded to coastal states and other rights are accorded to other States. Where activities do not fall within either of the categories, then each case has to be decided on its own merits on the basis of criteria set out in Article 59 of the Law of the Sea Convention.

The influence of sovereignty is not felt in the exclusive economic zone. Article 56 of the Law of the Sea Convention sets out the rights and duties acquired by coastal states in the zone. Sovereignty will not be applicable and intervention is possible, provided that the principles of international law are adhered to.

4.6 Intervention on the high seas

The notion of open seas and the concomitant freedom of the high seas gained prominence during the eighteenth century.[164] In essence it means that no State may acquire sovereignty

---

161 ibid 133

162 ibid 136

163 ibid 137

164 Shaw (n50) 315

over it or any part of it.[165] This is however qualified by the basic principles of international law.

Article 1 of the Geneva Convention on the High Seas defined the high seas. It reflected the customary law at the time. All parts of the sea that were not included in the territorial sea or internal waters of a state were high seas. As a result of developments Article 86 of the 1982 Law of the Sea Convention defined the high seas as follows:

> "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of a archipelagic state".

The freedoms that are stated in the Conventions are not exhaustive and others recognised by the general principles of international law could be exercised with regard to the high seas and with reasonable regard to the interests of other states.

The basic principle relating to jurisdiction on the high seas is that the flag State alone may exercise rights over the ship. In the Lotus case this point was considered and it was held that: "vessels on the high seas are subject to no authority except that of the state whose flag they fly".[166] There are exceptions to the rule, but where the vessels are warships, state owned or used on governmental non-commercial service the flag state has exclusive jurisdiction. Articles 8 and 9 of the High Seas Convention also confirmed: "complete immunity from the jurisdiction of any state other than the flag state".

Intervention on the high sea is possible, but the general principles of international law should be borne in mind. The flag State has jurisdiction, but instances might arise where other rights will prevail. When a State intervenes to protect the interest of its nationals, international law will condone the action, provided it is solely for the protection of nationals and other fundamental principles of international law are not breached.

---

165 Article 2 HSC; Article 87,89 LOSC

166 PCIJ (1927) Ser. A, No.10 25

4.7 Conclusion

Intervention in international law is controversial. Brownlie in his work on international law stated the following:

> "In spite of the important instances since 1920 of use of this justification and the views of a considerable number of jurists, it is submitted that any legal basis of the right of intervention is now extremely tenuous."[167]

Initially, individual states had the sole discretion to decide whether or not to initiate armed intervention for the protection of nationals. The discretion was severely curtailed in the period after the Second World War. The right to intervene was the prerogative of the collective security system established under the auspices of the United Nations. It is well known that to date the system has dismally failed, due to various reasons, in its quest to establish an effective collective security system.

In light of what is stated above, it is submitted that a state should be able to intervene where the lives of its nationals are in imminent danger of being lost. The instances where it is acceptable should be narrowly defined, as done by Waldock, to prevent any abuse. States will be able to use intervention to protect neutrals in the continuing use of force, provided that the concept is not abused. In these instances the principles, espoused in the Charter of the United Nations, should be observed. However, the judgement of the international community might be not as harsh as in usual circumstances.

5. WAR ZONES

5.1 Introduction

At the present time war zones form an integral part of armed conflict at sea. Even though the legality of war zones is a contentious issue, it will be contended, in this chapter, that it

---

167 Brownlie (n6) 298

is part of customary law and should be considered legal.[168] In this chapter the evolution of war zones will be traced and it will be shown to be part and parcel of the modern protection of neutrals.

5.2 Evolution

The origins of war zones can be traced to the defence sea areas of the Russo-Japanese war of 1904-1905. Initially war zones were understood as being the geographical co-ordinates of hostilities at sea, either potential or actual.[169] A war zone was thus, in the beginning, a self-limitation upon the area of operation, a conscious localisation of the conflict coupled with an attempt to avoid to the fullest extent any collateral damage inflicted upon innocent neutral vessels.

After the Russo-Japanese war the concept gained prominence at the outbreak of the First World War.[170] With the advent of this war the concept underwent a major change. It came to signify a manifest commitment to inflict the most devastating harm possible on neutral shipping trading with the enemy. It can thus be summarised as a legal relationship, consisting in the alleged right of a belligerent to suspend maritime traffic altogether within a designated area, and in the corresponding duty of a neutral trading with the enemy not to sail in these waters or to risk the sinking of its ship.[171]

The First World War showed that there was a practice of violating the traditional law of sea warfare. The reason for it was simple, gone were the days of round shot: wooden hulls and sails. We entered the era of the submarine and the helicopter gunship and the only way the law of sea warfare could stay relevant was by changing and adapting to the new technological innovations.[172] The war zone was one of the changes and the Second World War emphasised that the war zone was here to stay.

---

168 Leckow (n45) 635;

169 Politakis (n98) 125

170 ibid 126

171 ibid

172 Grunawalt (n39) 307

In the post-1945 era war zones have been mapped out and enforced in various contexts. The following examples come to mind: the Korean; Vietnam; Indo- Pakistan; Falklands and Gulf limited conflicts. In all these conflicts the type of war zone differed and there are now a myriad of types of zones.[173]

5.3 The legality of war zones

The development of war zones came as a response to the inadequacies of the traditional law of sea warfare. The traditional law did not take into account the technological advances in the military field and the extended role economic warfare was to play.[174]

With the prominence of war zones the question arose as to the legality of these zones. There are different opinions on this issue. On the one hand there are those writers who feel it is contrary (if it extends to international waters) to the freedom of the high seas, as codified in the 1958 Geneva Convention on the High Seas and in the 1982 Law of the Sea Convention. They further feel that there was no such right under the traditional law of war at sea.

It is contended that war zones are legal, for they are new customary law and they fulfil the function of limiting the geographical scope of naval engagements and warn neutral shipping of the danger well in advance. It has also been held that although not having yet assumed a customary character, the war zone device would nevertheless sooner or later become admissible, inevitably stemming from irresistible developments in military technology.[175]

International law is of a dynamic nature and evolves through state practice and the changing opinio juris of the world community.[176] This can, however, not be said of the

---

173 Politakis (n98) 137,138

174 Leckow (n45) 631

175 Politakis (n98) 160

176 Shaw (n50) 59

traditional law of neutrality. In the 19th century the traditional law of neutrality addressed the interests of belligerents on the one hand and those of neutrals on the other. It was a satisfactory balance and the rules were applied to a large extent by both sides. In the twentieth century the balance shifted in favour of belligerents or, to put it rather differently, belligerents disregarded the traditional law of neutrality. To address this inadequacy the war zone was created. It gave warning as to what tract of sea was out of bounds for neutrals. However, in establishing the war zone the interests of the neutrals should be borne in mind. As Tucker puts it:

> "despite belligerent practices in the two wars the establishment of war zones forms a lawful measure only if taken in response to the pertinent misconduct of an enemy. Even then ... the right to restrict the freedom of movement of neutral vessels implies the belligerent obligation to indicate certain routes by which neutral traffic may pass through the declared zone with a reasonable assurance of safety ."[177]

The above extract is a clear indication of the balance of interests that should be obtained to legalise the zone. The question should also be answered as to what a neutral is in these circumstances - the most apt solution is to regard it in terms of a functional approach as advanced by writers such as Tucker. The ultimate test advanced to determine the legality of war zones is the test of reasonableness.[178]

5.4 Reasonableness as a test

The test most advocated for the legality of war zones is that of reasonableness. It has been the test for validity from the inception of war zones. G Crafton Wilson, commenting on the Japanese measures, had this to say: "the practice, nature of regulations, and the drift of opinion seems to show that in time of war a belligerent is entitled to take measures for its protection that are not unreasonable."[179]

---

177 Tucker (n1) 305

178 Russo (n47) 391; Politakis (n98) 162

179 JW Garner, 'Some Questions of International Law in the European War. War Zones and Submarine Warfare', (1915), 9, A.J.I.L., 596

The question arises as to how reasonableness should be determined. It has to be determined through a consideration of the circumstances of each case. Important factors in this assessment are the strategic necessity of the war zone, the extent to which other countries are notified and the degree of danger and inconvenience caused to neutral vessels.[180]

The criterion of reasonableness suffers from two blemishes. On the one hand it has an intrinsically ambiguous meaning and it is inherently subjective.[181] These "deficiencies" can also be seen in a positive light, for they can thus be applied to any set of circumstances and give a satisfactory result. It has been argued in international jurisprudence, in the Oscar Chin case[182], that:

> "an action is permissible in many circumstances if it is reasonably necessary to achieve this or that end or to prevent this or that danger, but unlawful if it goes beyond what is reasonable for this purpose. The criterion plays a very large part in the English municipal law, but is in no way peculiar to that law. It is to be found described by one term or another, I believe, in almost every system of municipal law and there are many cases where it applies in international law."[183]

The term "reasonable" has also found favour in a dissenting opinion of Judge Schwebel in the Nicaragua case[184]. He said: "a belligerent is entitled, under international law to take reasonable measures to restrict shipping, including third flag shipping, from using the ports of its opponent".[185] It is contended that the view of McDougal is correct in saying: "for all types of controversies the one test that is invariably applied by decision-makers is that simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and all variables in context, is reasonable as between the parties."[186] It is the

---

180 Leckow (n45) 635

181 Politakis (n98) 163

182 PCIJ, Series C, No. 75

183 ibid reply by Mr Beckitt at 304

184 ICJ Reports (1986) para. 236

185 ibid 379

186 McDougal (n108) 359

reasonableness of a claim and the consequent toleration of and acquiescence in it by others which establish the lawfulness.

The criticism directed at the notion of reasonableness is in essence that a host of grave illegalities could claim undeserved legitimacy in the name of cut-and-dried "reasonableness". It is said that nearly any imaginable practice could be cast in one way or other as a profile of reasonableness. It can thus be concluded that the "inherent" flaw of the notion of reasonableness is its open-endedness.[187] However, this should not result in the discarding of the test. There are many notions in international law that suffer from this deficiency and it can be concluded that the unsatisfactory results do not primarily result from the test itself, but rather from the lack of a judicial authority in international law. The lack of judicial assessment permeates not only this aspect of international law, but all other spheres of international law.[188]

One of the defects of the notion of reasonableness, open-endedness, is also its strongest point. Due to this characteristic the notion can be applied to a whole range of situations and this can well be the case in the international arena where cut-and-dried answers are not always obtainable. It should also be remembered that with the passing of time guidelines will be developed to assess which conduct will be regarded as reasonable and which as unreasonable. To put it differently: it is unwarranted to view the rules as entirely open-ended, allowing states unlimited latitude to interpret them. The general contours of what is reasonable are clear. The guidelines will ensure that extravagant claims will not be advanced and prevent a host of illegalities claiming legitimacy.

Furthermore, it should be borne in mind that unreasonable claims will not withstand pressure exercised by the international community. In the application of exclusion zones it can be argued that the final adjudicator of the reasonableness of the zone will be the state that imposed it. The point has often been made that it is incompatible with the concept of

187 Politakis (n98) 166

188 O Schachter, 'In Defense of International Rules on the Use of Force', (1986), 53, U.C.L.R. 119

law that an entity subject to the law should have the final authority to determine whether a legal rule applies to it or not.[189]

One answer to this line of argument is that third-party judgements are in fact made. Self-serving unilateral justifications are not always accepted by the international community. The legitimacy of the action of a state is appraised by other states, organisations, non-governmental groups and individuals. The more formal and prominent judgements issue from the international political organs that deal with issues of peace and security, notably the United Nations Security Council and General Assembly. These decisions generally command attention by states.[190]

It can also be argued that without international enforcement, censure has no impact on state action. In other words it remains a mere rhetorical condemnation without any sanction. However, this is not entirely correct; states do in fact strongly object to such condemnation and will make determined efforts to forestall censure by the United Nations. The reason is that a decision detrimental to the state will involve a political price.[191]

5.5 Conclusion

The international community will demand a reasonable war zone. In assessing reasonableness the interests of the belligerents and neutrals should be borne in mind.[192]

The conduct of hostilities on the high seas constituted one of the traditional freedoms of the high seas. The general rule applies that different freedoms have to be reconciled. This implies a certain limitation on neutral navigation and fishing activities, but not their exclusion. The rule established by LOSC that the high seas are reserved for peaceful

---

189 ibid 112

190 ibid

191 ibid 123

192 Russo (n47) 391,396

purposes[193] is generally regarded as not rendering illegal all combat activities, but only aggressive ones.

Neutral ships operate at their risk and peril in zones of naval hostilities. The commanders of ships engaged in naval hostilities must, however, take reasonable precautions, including appropriate warnings not to damage neutral shipping.

A state is prohibited from declaring zones where any neutral ship would be attacked. As seen from the above, belligerents may declare zones where neutral shipping will be particularly exposed to risks caused by hostilities. The extent, location, and duration must be as dictated by military necessity, due regard being paid to the principle of proportionality. Due regard should also be given to the rights of all states to legitimate uses of the seas. Where such a zone significantly impedes free and safe access to the ports of a neutral state and the use of normal navigation routes, measures to facilitate safe passage shall be taken.

The establishment of special zones is a very controversial subject. In state practice, the establishment of zones where any ship would be fired upon has never been recognised as legal. On the other hand, it may serve a useful purpose to establish clearly and notify where belligerents intend to conduct hostilities and where commercial navigation would thus be particularly at risk. But this device should certainly not be abused so as completely to bar commercial ships from large areas, and in particular from usual sea lanes. At the end of the day a satisfactory balance should be struck between the users of the sea.

---

193 Article 88

CHAPTER SIX

SUMMARY

The only way we are going to prevent aggressive wars, the unlawful use of force short of war and to ensure the protection of neutrals is for the international community to establish effective measures of collective security. These measures should not only be on paper, but should also be practised. The old adage of practice making perfect comes to mind in this context. The challenge of our day will be to supply forces for the enforcement of international rules and procedures.

The United Nations Security Council has been entrusted with this task by the Charter. This organ has dismally failed in its purpose. The inability of the permanent members of the Security Council to reach agreement on the course of conduct which ought to be followed is a case in point. There are indications that we are entering a new era, in the form of a new world order, but the question remains as to how protection is to be achieved in the meantime.

The principle of self-defence has modified the traditional law of neutrality. The principles of proportionality, necessity and immediacy have placed further restrictions on the law of neutrality. In terms of traditional law the belligerents were afforded extensive rights against neutrals. In the two World Wars the belligerents had considerable freedom to visit and search ships on the high seas as well as other belligerent rights. There was also a fair amount of force used against neutral shipping. As was advanced above, one should see the traditional law of neutrality, not as a static body of rules, but as a set of dynamic rules. Only those rules of the traditional law of neutrality that can be seen as necessary and proportionate measures of self-defence should still apply. The international community will not tolerate interference with neutral ships on the massive scale seen in the two World Wars unless it can be shown that this is justified as a necessary and proportionate measure of self-defence. It has been observed that the traditional law of neutrality can be useful in setting a ceiling to the rights that may be exercised against neutrals.

Intervention in international law should be allowed where the lives of its nationals are in imminent danger of being lost. The instances where it is acceptable should be narrowly defined, as done by Waldock, to prevent any abuse. States will be able to use intervention to protect neutrals in the continuing use of force, provided that the concept is not abused. In these instances the principles, espoused in the Charter of the United Nations, should be observed. However, the judgement of the international community for a contravention of the prohibition on the use of force might be not as harsh as in usual circumstances.

The device known as an exclusion zone, which originated in the Russo-Japanese war, can also be seen as a way to protect neutrals. Neutral ships within the designated area will be particularly exposed to risks caused by hostilities. However, this device should not be seen as a justification for the immediate destruction of ships that venture within the zone. The genuine neutrals will be aware of the risk and will rather stay outside the designated area. They will thus be protected, not in the sense of actual physical protection, but rather in the sense of being forewarned.

The selected area's extent, location and duration must be required by military necessity. In this context due regard should be given to the principle of neutrality and to the right of all states to the legitimate uses of the seas. In the cases where the exclusion zone has an adverse effect on normal navigation routes, measures have to be taken to facilitate safe passage.

BIBLIOGRAPHY

BOOKS

1. M Akehurst, 'A Modern Introduction to International Law', 3ed, (1977)

2. Bowett, DW, Self-Defence in International Law, Manchester,1956

3. Brownlie, Ian, International Law and the Use of Force by States, London 1963

4. Churchill, RR, & Lowe, AV The Law of the Sea, Manchester 1988

5. De Lima, FX, Intervention in International Law, Den Haag, 1971

6. Dinstein, Yoram, War, Aggression and Self-Defence, Cambridge 1988

7. Gross, Leo, International Law in the Twentieth Century, New York 1969

8. Lauterpacht, Sir H, Oppenheim's International Law, 7ed, 2 vols, London 1952

9. O'Connell, DP, The Influence of Law on Sea Power, Manchester, 1975

10. Orford, Toby, The Iran-Iraq Conflict Recent Developments in the International Law of Naval Engagements, Publication Number 7, UCT, 1988

11. Ott, DH, Public International Law in the Modern World, London, 1987

12. Schwarzenberger, George, A Manual of International Law, London 1967

13. Schwarzenberger, George, International Law and Order, 2 vols. London 1968

14. Shaw, MN, <u>International Law</u>, Cambridge 1986

15. Starke, JG, <u>Introduction to International Law</u>, London 1989

ARTICLES

1. Akehurst, Michael, 'Custom as a Source of International Law', British Yearbook of International Law, (1974-1975) 1-54

2. Baxter, Richard, 'The Legal Consequence of the Unlawful Use of Force Under the Charter', Proceedings of the American Society of International Law, (1968), 68-75

3. Bivens, WJ, 'Restatement of the Laws of War Applied to the Armed Forces of Collective Security Arrangements,' American Journal of International Law, (1954), 140-145

4. Boczek, BA, 'Law of Warfare at Sea and Neutrality: Lessons from the Gulf War', Ocean Development and International Law, (1989), 239-271

5. Dekker, IF and Post, HHG, 'The Gulf War from the Point of View of International Law,' Netherlands Yearbook of International Law, (1986), 75-105

6. De Muralt, RWG, 'The Military Aspects of the UN Law of the UN Law of the Sea Convention', Netherlands International Law Review, (1985), 78-99

7. Fenrick, WJ, 'The Exclusion Zone Device in the Law of Naval Warfare', The Canadian Yearbook of International Law, (1986), 91-126

8. Garner, JW, 'Some Questions of International Law in the European War. War Zones and Submarine Warfare', (1915), 9, American Journal of International Law, 596

9. Greenwood, Christopher, 'The Concept of War in Modern International Law, International and Comparative Law Quaterly (1987) 283-306

10. Greenwood, Christopher, 'Self-Defence and the Conduct of International Armed Conflict,' in Y Dinstein (ed) 'International Law at a Time of Perplexity', (1988), 273-288

11. Henkin, Louis, 'Force, Intervention and Neutrality in Contemporary International Law' Proceedings of the American Society of International Law (1963\1964), 147-162, 165-169

12. Kunz, Joseph L, 'Bellum justum and bellum legale' American Journal of International Law (1951) 528-534

13. Kunz, Joseph L, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision' American Journal of International Law (1951), 37-60

14. Kunz, Joseph L, 'Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations' American Journal of International Law, (1947) 872-879

15. Kunz, Joseph L, 'The laws of War' American Journal of International Law, (1956) 313-337

16. Lalive, JF, 'International Organisation and Neutrality', British Yearbook of International Law, (1947) 72-89

17. Lauterpacht, E, 'The Legal Irrelevance of the "State of War"', Proceedings of the American Society of International Law, (1968), 58-83

18. Lauterpacht, Sir H, 'The Limits of the Operation of the Law of War', British Yearbook of International Law, (1953), 206-243

19. Lauterpacht, Sir H, 'The Revision of the Law of War', British Yearbook of International Law, (1952) 360-382

20. Leckow, Ross, 'The Iran-Iraq Conflict in the Gulf: The Law of War Zones', International and Comparative Law Quarterly, (1988), 629-644

21. Leviten, MJ, 'The Law of Force and the Force of Law' Harvard International Law Journal, (1986), 621-657

22. McDougal, MS, 'The Hydrogen Bomb Tests and the International Law of the Sea', The American Journal of International Law, (1955), 356-358

23. Nielsen, Fred H, 'The Future of Belligerent Rights on the Sea', Proceedings of the American Society of International Law, (1935), 11-35

24. Norton, PM, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality.' Harvard International Law Journal, (1976), 249-311

25. O'Connell, DP, 'International Law and Contemporary Naval Operations', British Yearbook of International Law, (1970), 19-85

26. Orford, Toby, 'Exclusion Zones at Sea: Some Observations on the Conduct of the Falklands War, 1982' Sea Changes, No. 2 (1985), 91-120

27. Orford, Toby, 'Self-Defence at Sea: Contemporary Developments in the International Law of Naval Engagements', Sea Changes, No. 4 (1986), 68-87

28. Politakis, GP, 'Waging War at Sea: The Legality of War Zones', Netherland International Law Review, (1991), 125-172

29. Robertson, HB, 'Interdiction of Iraqi Maritime Commerce in the 1990-199 Persian Gulf Conflict', Ocean Development and International Law, (1991), 289-298

30. Russo, FV, 'Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Law' Ocean Development and International Law, (1988), 381-399

31. Schachter, O, 'In Defense of International Rules on the Use of Force', The University of Chicago Law Review, (1986), 113-146

32. Schachter, O, 'Self-Defense and the Rule of Law', American Journal of International Law, (1989), 259-277

33. Schachter, O, 'United Nations Law in the Gulf Conflict', American Journal of International Law, (1992), 452-473

34. HG Schermers, 'The Obligation to intervene in the domestic affairs of States in AJM Delissen & GJ Tanja(ed) 'Humanitarian Law of Armed Conflict Challenges Ahead', (1991), 583-594

35. Schindler, D, 'Transformations in the Law of Neutrality since 1945' in AJM Delissen & GJ Tanja (ed), Humanitarian Law of Armed Conflict: Challenges Ahead, (1991), 367-387

36. Taubenfeld, HJ, 'International Actions and Neutrality', American Journal of International Law, (1953), 377-396

37. Wright, Quincy, 'The Outlawry of War and the Law of War' American Journal of International Law, (1953), 365-376