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NEUTRALITY IN MODERN ARMED CONFLICTS: A SURVEY OF THE DEVELOPING LAW*

by Lieutenant Colonel Walter L. Williams, Jr. **

Neutrality may raise as many legal problems for states embracing it, as belligerency does for states at war. In this article the author, a professor of law at the College of William and Mary, discusses some of these problems. In particular, he considers whether states have an unlimited right to be neutral toward belligerents under the United Nations Charter.

Traditionally, neutrality was a matter of free choice for states, subject to any treaty obligations. There was no obligation in general to remain neutral or to become a belligerent in the face of warlike actions of other states. In modern times, some scholars have suggested that the United Nations Charter and law developed thereunder

*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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have imposed on states an obligation to take sides against a state engaging in military aggression or other unlawful warlike activity.

Professor Williams concludes that in fact the law of neutrality has not changed so drastically. Member states of the United Nations have a treaty obligation to carry out orders of the Security Council, but otherwise may remain neutral if they so desire. In reaching this conclusion, the author uses the contextual method of problem solving though application of the goal-oriented decision theory developed and refined by Professors McDougal, Lasswell, and Reisman of Yale University, and other scholars. Readers of the Military Law Review were introduced to this method and its specialized vocabulary in Professor Walker's book review at 83 Mil. L. Rev. 131 (winter 1979).

I. INTRODUCTION

The thesis of this article is that, in the context of rapidly changing technological, political and legal conditions in which modern armed conflicts have occurred, the traditional rules of neutrality have in practice altered substantially. However, any *a priori* conclusion that the entire corpus of traditional neutrality law no longer operates might well be erroneous. A careful, detailed analysis of the subject is required. This article assuredly does not present the necessary definitive analysis of the many legal issues involved. Instead, it offers an impressionistic exploratory inquiry into certain major issues, seeking to encourage the broad range of research required to develop definitive analysis useful both for governmental advisors and legal scholars. The observational perspective of the writer is that of a citizen of the world community recommending to decision-makers policies reflecting community aspirations and appropriate outcomes of legal decisions calculated to implement those policies more effectively.

The methodology¹ underlying this presentation has three aspects. The first is a requirement for *comprehensive factual analysis* of

¹A concise discussion of the methodology used in this paper is presented in McDougal, Lasswell, and Reisman, *Theories About International Law: Prologue*

any particular instance of armed conflict—an analysis that is *contextual*, viewing that conflict within the context of the existing global process of power in which states interact by various strategies to secure and maintain effective power positions in their relations. Next comes *trend analysis* of the course of decision on legal claims concerning neutrality—an analysis that, as regards past trends, properly considers the present and future effects of new conditions pertinent to the conduct of modern armed conflicts. Finally, there is need for *policy-oriented analysis* of trends of legal decision—an appraisal of trends in light of advocated world community policies seeking the maximum international peace and security reasonably attainable in this troubled world.

Only through application of such methodology may one expect to determine accurately present developments in the rules of neutrality, to project those developments into the future, and to appraise the consequences of those developments. The traditional approach to neutrality was to create a model, the “status” of neutrality. That model subsumed, *a priori*, both an hypothesized view of uniform attitude and conduct of all neutrals in all international conflict situations, and a set of contentions as to legal outcomes of decision on claims pertaining to neutrality. In turn, as this model proved unsatisfactory when imposed upon the rich diversity of reality, officials and scholars created still other models, represented by diverse terms, such as “differential neutrality” and “non-belligerency”, to describe gradations of attitude and conduct and contentions as to resulting changes in legal outcome.²

to a *Configurative Jurisprudence*, 8 Va. J. Int'l. L. 188 (1968), and in McDougal, *Jurisprudence for a Free Society*, 1 Ga. L. Rev. 1 (1966). Detailed application of this approach is illustrated in McDougal and Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961). European readers will find a discussion in McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 Hague Recueil des Cours 137 (1953).

²For discussion of one or more of these terms, see 2 Oppenheim, *International Law* (7th ed., H. Lauterpacht 1952); Tucker, *The Law of War and Neutrality at Sea* (1957); Castrén, *The Present Law of War and Neutrality* (1952); Greenspan, *The Modern Law of Land Warfare* (1959); Bowett, *Self-Defense in International Law* (1958); Kelsen, *Principles of International Law* (2d ed., rev., Tucker 1967); Lawrence, *The Principles of International Law* (1895); Brownlie, *International Law and the Use of Force by States* (1963); 11 Whiteman, *Digest of International Law* (1968); VII Hackworth, *Digest of International Law* (1943); 2 Wheaton's *International Law* (A. Keith, ed., 1944); Stone, *Legal Controls of International Conflict* (1954); Komarnicki, *The Place of Neutrality in the Modern System of International Law*, 80 Hague Recueil des Cours 395 (1952); Wilson, 'Non-

The conflicting views³ concerning the references of these terms, both factual and legal, obviously cast doubt on the value of the terms for policy and legal analysis. Also, legal literature tends to use the terms interchangeably.⁴ Yet, this babel of diverse, ambiguous terminology continues in the legal literature. Attempting to work within the doctrinal confines of this diverse terminology is arguably futile. Neither the fluid reality of state attitude and conduct, nor the multiple outcomes of legal decision on varied claims as to a neutral's rights and duties in various conflict situations, can accurately be reflected in some frozen model, or series of models, represented by such terms. State officials may use such terms as crude indicators of attitude and conduct, with at least implied assertions of legality of their state's posture. However, the terminology appears useless as a departure point for legal analysis. In place of that approach, we recommend the methodology set forth above.

II. THE PROCESS OF ARMED CONFLICT

Although, in theory, a future armed conflict could occur in which all states participate directly by using military forces, the possibility is exceedingly remote, and would be a conflict in which the laws of neutrality are irrelevant. Thus, for this discussion, it is assumed that in any armed conflict certain states, varying in number, will wish not to participate by employing military forces. Indeed, envisioning the normal conflict of the reasonably foreseeable future to be quite limited in the number of combatant states, the author suggests that frequently the overwhelming majority of states will wish to be "neutral."

This paper uses the term "neutral" merely to describe a state that is not an active fighting participant in the conflict. Likewise, here, the term "belligerent" merely describes a state that is employing its military forces in the conflict. State practice and scho-

Belligerency in Relation to the Terminology of Neutrality, 30 *American Journal of International Law* 121 (1941); and Kunz, *Neutrality and the European War 1939-1940*, 39 *Michigan Law Review* 179 (1941).

³ *E.g.*, as regards "non-belligerency", see Oppenheim, *supra* note 2, at 654 n.1, and Tucker, *supra* note 2, at 199 n.5.

⁴ *E.g.*, Oppenheim, *supra* note 2, at 649; Castrén, *supra* note 2, at 450-51; Stone, *supra* note 2, at 365, 404.

larly literature have used these terms to refer to widely varied conduct and attitudes, as well as subsuming varied legal outcomes. In view of such confusing references, we might better depart from the use of such terms as "neutral" and "belligerent," as we increasingly have departed from use of the term "war." These terms unfortunately continue to carry connotations both of law and fact existing in an earlier era, as well as twentieth century encrustations of competitive claims of law and policy made by state officials and scholars. As officials and scholars have moved to substitute the more factually descriptive term "armed conflict" for "war," we might well begin to use the terms "combatant" and "noncombatant state," or "fighting" and "nonfighting state," to reduce the risk of confusing description of conduct with legal outcomes of decision regarding permissible acts of a state as described.

To return to our discussion of the process of armed conflict, one should note that the nature of the legal claims as to the rights and duties of a neutral and of any of the belligerents will vary, depending upon the particular conflict. In large part, the appropriate application of law and policy as to those claims likewise varies. Thus, in all instances, one must analyze the factual features of the particular conflict process out of which arise claims pertaining to the laws of neutrality. We suggest the following features of the conflict process as a check list for use in comprehensively appraising relevant factors:

- a. the relative power positions of the opposing sides in the conflict, and the relative power position of each belligerent side and of each neutral (or association of neutrals);
- b. the nature of past relationships of each belligerent and each neutral;
- c. the nature of the objectives for which each belligerent is employing military forces;
- d. the geographical extent of the conflict, both in terms of the use of military forces and of the consequences (political, economic, etc.) resulting from the conflict;
- e. the duration of the conflict;

f. the "crisis" level—the level of expectation that a belligerent or neutral will suffer imminent, serious loss from the conflict unless it takes avoidance action; and

g. the nature of the military weaponry employed, with emphasis on its range, accuracy, area of impact, and specialized destructive capabilities. In any particular conflict situation any or all of these features may play an important role in the attitude and conduct of each belligerent and of each neutral in their relations *inter se*, in the types of legal claims that either will raise, and in the outcome of legal decision on those claims.

Any particular armed conflict occurs within the broader context of the global power process in which states seek to increase or maintain positions of power through the use of diplomatic, ideological, economic and military strategies. Contextual conditions that may influence conduct of belligerents and neutrals, the nature of claims about this conduct, and the outcomes of decision on those claims include:

a. the continued, albeit somewhat muted global competition for power between the United States and the Soviet Union, now become a triangular competition (in some regions) with inclusion of the People's Republic of China;

b. the relationship of each belligerent and each neutral with other neutrals, raising questions of conflicting obligations and of the potential for widened participation in the conflict or the triggering of new but related conflicts, and

c. changing perspectives and practices in the conduct of armed conflict, e.g., mass mobilization of human and physical resources, elimination of the resource base of the opponent (economic warfare), and rapidly developing military technology increasingly emphasizing indirect, less discriminate modes of broad area destruction of life and property.

III. BASIC COMMUNITY POLICIES CONCERNING NEUTRALITY

Outlined here are the general world community policies involved in considering claims pertaining to neutrality. In discussing the

trends of decision on certain selected claims, we will specify policy in greater detail in appraising those trends and making recommendations for future decision.

In any modern international conflict, claims may refer to the question of whether a particular state is required by international law to participate in some manner in that conflict, i.e., to depart from what otherwise would be the requirements of the traditional laws of neutrality. This has to do with the question of each state's responsibility for supporting international public order. The overwhelming bulk of the claims, however, will refer to various aspects of interaction of belligerent and neutral. In either situation of claim, the principal community policies involved in legal decision are:

a. the widest necessary assumption of state responsibility to act for the world community in insuring that sufficient power is mobilized and used to overcome a belligerent that has resorted unlawfully to the use of armed force, and

b. the achievement of objectives for which armed force is lawfully employed with the minimum necessary consumption or destruction of human and material resources.

As to the policy of assumption of responsibility to maintain world public order, that policy may apply differently, depending upon whether the organized community has or has not determined the lawfulness of the particular use of armed force. Where the United Nations Security Council or General Assembly (e.g., the latter acting in appropriate circumstances under the "Uniting for Peace" Resolution⁵) has characterized a belligerent's conduct as unlawful, the author urges that the principle of community responsibility is applicable. This is so regardless of whether any call upon states to take some specific action is viewed as a controlling decision or as a recommendation. In either event, the characterization of a belligerent's conduct as unlawful would be authoritative, since it would be rendered on behalf of the world community under authority of the United Nations Charter.⁶ Pertinent to policy as to neutrality, community policy calls for the widest necessary participation in placing

⁵G.A. Res. 377, 5 U.N. GAOR, Supp. (No. 20) 10, U.N. Doc. A 1775 (1950).

⁶McDougal and Feliciano, *supra* note 1, at 410.

the required resources at the disposal of those acting on behalf of the community to apply sanctions against an unlawful belligerent. This obviously proposes discrimination in favor of and assistance to the belligerents acting for the community, and might take any form, from military activity to economic and other nonmilitary assistance.

However, the policy of minimum consumption or destruction of resources also applies here. Necessarily, armed force will occasionally be required to maintain public order in the world community, as in national communities. Yet, absent the extreme of all-encompassing global conflict, all states need not, and should not, participate in a conflict situation. The United Nations Charter expressly recognizes the possibility that various Member States might remain neutral in the event of United Nations action to maintain public order. Article 48 states that,

The action required to carry out the decision of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations *or by some of them*, as the Security Council may determine.⁷

A guiding principle of sanctioning strategy is to terminate an unlawful use of force promptly and economically—the principle of economy in the use of force. We refer not just to the waste resulting from consumption of resources by unnecessary state involvement in conflicts. More important, perhaps, is the danger of increased destruction due to spread of the conflict because of unnecessary participation. Also, in certain instances, the concern for minimizing destruction will excuse a state from discrimination against an unlawful belligerent where that state is especially subject to destructive retaliation by an aggressor (e.g., a weak state bordering upon a much more powerful aggressor).⁸

Thus, the nature of participation by each state in community action against an aggressor, or in other community use of force, should vary, depending on that state's capabilities; the require-

⁷ Emphasis added.

⁸ See Komarnicki, *supra* note 2, at 479.

ments for assistance present in the particular situation (e.g., base facilities; rights of transit; provision of supplies, or perhaps, merely diplomatic support), and other factors. Perhaps in many instances the situation will not require from the great majority of states any conduct that departs from the standards set under the laws of neutrality.

Neutrality may be useful to the world community in other respects. The situation of "permanent or perpetual neutrality"⁹ of some states, such as that of Switzerland and Austria, may indeed be useful in the maintenance of public order. Generally, a state has accepted the obligation of permanent neutrality pursuant to an international agreement wherein other states agree to protect the state's territory and independence.¹⁰ The United Nations Charter does not refer explicitly to the question of admission of a permanently neutralized State. At the 1945 San Francisco Conference on the drafting of the Charter, the view that permanent neutrality of a state would be incompatible with obligations under the Charter received much support.¹¹ Nevertheless, Austria was admitted to the United Nations despite its announced policy of permanent neutrality.

The permanent neutrality of a state appears to be acceptable under the United Nations Charter, if the Security Council agrees.¹² As we discussed earlier, Article 48 of the Charter authorizes the Security Council to consider the special needs of certain states.¹³ A permanently neutral state may by its location serve as a "security buffer" between other states that fear attack from each other. Further, the need for mediators, for channels of communication between opposing belligerents, for "Protecting Powers" under the 1949 Geneva Conventions for the protection of noncombatants, or

⁹Castrén, *supra* note 2, at 449; Oppenheim, *supra* note 2, at 661; Ogleby, *The Theory and Practice of Neutrality in the Twentieth Century* 3 (1970).

¹⁰Black, *et al.*, *Neutralization and World Politics* xi (1968).

¹¹6 U.N.C.I.O. Docs. 459-60. See Kelsen, *The Law of the United Nations* 94 (1951); Bowett, *supra* note 2, at 174.

¹²Verdross, *Austria's Permanent Neutrality and the United Nations Organization*, 50 *Am. J. Int'l L.* 61, 67 (1956); Kunz, *Austria's Permanent Neutrality*, 50 *Am J. Int'l. L.* 418 (1956).

¹³Lalive, *International Organizations and Neutrality*, 24 *Brit. Y.B. Int'l. L.* 72, 88 (1974).

for a location for negotiations, are but a few of the "infrastructure" supports assisting the cause of minimizing adverse affects of conflict and facilitating the restoration of public order that can be provided more easily by a permanently neutral state.

Regardless of the question of requiring affirmative discriminatory support from states against an aggressor state or other state that is the target of community approved military sanctions, community policy requires that, at the minimum, neutral states should not actively hinder community efforts and should not actively aid the aggressor. Even to that extent, community policy would suggest altering traditional neutrality law, since under that law certain assistance could be provided to a belligerent by a neutral, as long as the neutral offered it equally to all belligerents.

The foregoing discussion has focused on the situation where the organized community has characterized the use of force by belligerents as legal or illegal. From perspectives of community policy, what is the result if this has not occurred? On the one hand, one might argue that all states should be strictly impartial vis-a-vis the belligerents. Conflicting views could result from each state deciding for itself which side in the conflict lawfully is using force, and lead to broadened conflicts that might disrupt the still fragile United Nations Organization. A similar argument could be made concerning "regional" neutrality in the settling of a conflict between members of a regional organization such as the Organization of American States or the Organization of African Unity.)

On the other hand, the firmly established recognition of the right of collective self-defense shows that the world community already authorizes third states not only to take discriminatory action as nonparticipants in a conflict, but even to launch military forces against an aggressor, on the basis of individual state characterization of the lawfulness of each belligerent's use of force. This is so, albeit the state's characterization is provisional, and action is taken at its peril, since its conclusion is subject to the appraisal of other states, and possibly, to subsequent review by the United Nations Security Council or other agencies of the organized community.

The community policy that supports direct military participation in collective self-defense, and discriminatory action by a neutral against the belligerent characterized by the neutral as the aggressor, is the same—the common interest in maintaining international

peace and security. Although individual characterization is more subject to abuse or error, the price of foreclosing a neutral state from engaging in discriminatory conduct on that basis is the sacrifice of perhaps essential assistance in maintaining public order. Ultimately, the question concerns the risks involved in decentralized community action to maintain public order against challenges of unlawful use of force, versus the risks involved in permitting successful uses of unlawful force, including the risk of repudiating rules restraining the uses of force. These rules have been established only recently at the price of enormous human suffering and destruction of resources on a global scale. Further, it should be pointed out that in many instances of armed conflict the facts clearly will show the identity of the aggressor. Even if a situation of uncertainty calls for initial suspension of judgment, the subsequent conduct of each belligerent, e.g., the nature of announced or implicit objectives; the proportionality of use of force; efforts to achieve earliest termination of the conflict and to resort to other means of resolving disputes, and acceptance of organized community efforts to achieve settlement, should serve to clarify the identity of the aggressor.

If, indeed, there are instances of true uncertainty or of essentially equal fault, those exceptional cases would not justify policy foreclosing individual state action in support of international law in *all* instances. Finally, we might also comment that past experience has not indicated such a massive "rush to judgment," as is envisioned by the argument calling for impartiality of states in the absence of organized community characterization. On the contrary, in many past situations clearly calling for support in maintaining international peace and security, we have seen a lamentable failure of such support, in that all too many states prefer noninvolvement at the risk of the defeat of community interests.

IV. TRENDS OF DECISION ON SELECTED CLAIMS: APPRAISAL AND RECOMMENDATION

A. *CLAIMS AS TO SHARED RESPONSIBILITY IN THE SUPPORT OF PUBLIC ORDER*

A major claim concerning the present development of the rules of neutrality in modern armed conflicts concerns whether, indeed, a

state presently has the right to be impartial toward all belligerents in the conflict. Does modern customary international law, or the United Nations Charter, require states to discriminate against an unlawful belligerent? Any significant work of legal scholarship considers this claim.¹⁴ However, we note that these writings generally pass over the problem, implicitly assuming an affirmative response to the question whether, under traditional neutrality law, a state indeed had a *right to be impartial*. Scholarly literature seems to assume that was the case, and now directs attention to the question of whether a neutral now is under a *duty of partiality*.

Proper assessment of the present trend of decision requires awareness that under traditional international law a state lawfully could resort to the use of force for whatever purpose it chose. A state permissibly could use force to defend itself or other states from prior armed attack, or otherwise to maintain its position of power, or to expand its power position at the expense, even the extinction, of other states. Since, in theory, any state lawfully could be the target of armed force, a state was *allowed* to be neutral at the sufferance of the belligerent states; *permitted* to be a nonparticipant in the conflict. Likewise, any state, even if the belligerents in a conflict were willing to allow it to be neutral, lawfully could choose to become a belligerent.

Thus, neutrality was essentially *contractual*, albeit that "offer and acceptance" normally were most implicit in any instance of neutrality. Likewise, with freedom to force a neutral at any time to become a belligerent by attacking it, or with the freedom of a neutral to become a belligerent at any time by entering its military forces in the conflict,¹⁵ the specific conduct indulged in by any particular neutral vis-a-vis any particular belligerent might vary depending upon the triangular power relationship of the opposing belligerent sides and of the neutral. Potentially, a broad range of conduct partial to one of the opposing belligerent sides was possible in this essentially contractual process of neutrality. That a substantial amount of uniformity of expectation developed in the nineteenth

¹⁴*E.g.*, McDougal and Feliciano, *supra* note 1; Oppenheim, *supra* note 2; Tucker, *supra* note 2; Castrén, *supra* note 2.

¹⁵Komarnicki, *supra* note 2, at 402; Orvik, *The Decline of Neutrality 1914-1941* at 28 (1971); Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* 573 (1968).

century as to the generally appropriate range of conduct of neutral and belligerent in their relations was due to the fairly uniform features of armed conflicts of that period: (a) quite limited objectives for the use of armed force; (b) the limited mobilization of resources; (c) the limited quantum of personal and equipment employed in actual combat; and (d) the limited extent and ambit of destruction resulting from military strategies.

Under traditional neutrality law, then, a neutral in reality had not the right, but the *duty* of impartiality (perhaps varying in extent in a particular conflict due to the actual process of interaction with opposing belligerents) that arose due to the implicit contractual basis of neutrality. This duty was the *quid pro quo* for the forbearance of belligerents from forcing the neutral to become a belligerent by attacking it: "[t]he classical and positivist conception of neutrality which developed in the seventeenth and eighteenth centuries was one of complete impartiality towards the parties to any conflict unless a treaty of alliance modified the position. The foundation of the doctrine of absolute neutrality was the absolute right of the state to resort to war."¹⁶

The fact that under the traditional law of neutrality a neutral did not have the right to be impartial, but rather, had a duty of impartiality, should serve to emphasize how significant would be the quantum leap in the development of international law if, today, one could conclude that under customary international law states are under the quite opposite duty of partiality against the belligerent who is the aggressor in an armed conflict. We should note that only in this century, in the lifetime of many now living, with the development of the rule prohibiting use of armed force except for self-defense or other community authorized purposes, could one say that a state had, under general international law, a right to be a neutral, and further, a right to be as impartial as it pleased toward the belligerents. The use of armed force against a state not wishing to join or assist either side of a conflict would, under the general rule prohibiting use of force, be unlawful. Implicit in the statement that the rule against unauthorized use of force exists is the assumption that, generally, a state unlawfully using force will be subject to effective sanctions, whether employed by centralized or decen-

¹⁶ Brownlie, *supra* note 2, at 402. See also Oppenheim, *supra* note 2, at 653; Tucker, *supra* note 2 at 204.

tralized community action. A state giving assistance to an aggressor likewise would be subject to proportionate sanctions.

Thus, absent some additional fundamental change in international law, one could conclude that under customary international law each state today has a duty not to assist an aggressor state, but also the right not to assist any belligerent. The question is whether the present trend of decision has moved beyond this point to reflect a still more intense development of community identifications and expectations premised on common interest, by establishing a duty of affirmative partiality—an obligation to provide affirmative assistance to those belligerents combating an unlawful disrupter of public order.

The present trend of decision is that, absent a controlling decision of the United Nations Security Council acting under Article 39 of the United Nations Charter, a state is under no duty to take a position of affirmative partiality toward either belligerent side in a conflict. Other writers¹⁷ have in detail presented the past trend of decision starting with the Covenant of the League of Nations, then moving forward to the Pact of Paris of 1928 (the Kellogg-Briand Pact), the pre-World War II practice, the United Nations Charter, and subsequent state practice. We merely map out salient details here:

1. *Covenant of the League of Nations*.¹⁸

Under the Covenant, each member was at most required not to hinder action by others in support of the Covenant, and not to provide assistance to a state that violated the Covenant. The League Council could determine whether there had been a prohibited resort to war (Article 10), but each member was free to decide whether circumstances required it to participate in the economic or other

¹⁷ See, e.g., authorities cited at note 14, *supra*.

¹⁸ See discussion of the Covenant and its effect on the laws of neutrality in McDougal and Feliciano, *supra* note 1, at 420-22; Oppenheim, *supra* note 2, at 645-46; Komarnicki, *supra* note 2, at 422; Graham, *The Effect of the League of Nations Covenant on the Theory and Practice of Neutrality*, 15 Calif. L. Rev. 357 (1927); Kunz, *The Covenant of the League of Nations and Neutrality*, 29 Proc. Am. Soc. Int'l. L. 36 (1935).

sanctions recommended by the Council under Article 16 of the Covenant.¹⁹ Thus, a member was free both to be a neutral (nonparticipant in use of force) and to be as impartial as it chose, regardless of the Council's decision.²⁰ In armed conflicts during the League's existence,²¹ various members of the League declared neutrality and many agreements during the period provided for the possibility of neutrality in future conflicts. In the 1930's, with the acts of aggression by Italy, Japan and Germany, the expectations of League effectiveness "declined steadily until the vanishing point was reached."²² Many states claimed neutrality as the clouds of major war grew darker, or at the outbreak of World War II.

2. *Pact of Paris.*

Article 1 of the 1928 General Treaty for the Renunciation of War as an Instrument of National Policy,²³ generally known as the Pact of Paris or the Kellogg-Briand Treaty, states:

The High Contracting Parties solemnly declare in the names of their respective peoples 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.

The Pact does not refer to the concept of neutrality.²⁴ The International Law Association in its Budapest Articles of Interpretation

¹⁹Kelsen, *supra* note 2, at 170 n.167.

²⁰Oppenheim, *supra* note 2, at 646.

²¹Examples include the 1921 war between Greece and Turkey, in which the Allied Powers issued a collective declaration of neutrality; the Chaco War between Paraguay and Bolivia, in which all neighboring states, who were League members, declared their neutrality; and the Italian-Ethiopian War, in which Albania, Austria, and Hungary refused to agree with the Council's conclusion that Italy had violated the Covenant.

²²McDougal and Feliciano, *supra* note 1, at 423.

²³General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1938, 45 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

²⁴Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 Transactions of the Grotius Society 178 (1934); Brownlie, *supra* note 2, at 403.

adopted in 1934, considered that the Pact authorized the parties to act contrary to the duties of neutrals.²⁵ This view has been challenged. For example, Castren maintained that the Pact of Paris "had no effect on the law of neutrality."²⁶ The present writer does not concur.

Assuredly, the parties to the Pact assumed no commitment to impose sanctions against one who violated the agreement. Therefore, neutrality in an armed conflict was permissible.²⁷ However, the Pact rejected the fundamental basis of the traditional law of neutrality, "the unrestricted right of sovereign States to go to war."²⁸ In establishing the *bellum justum* doctrine as a legal concept,²⁹ the Pact certainly expanded the permissible uses of coercion in response to unlawful use of force. Any party was authorized to determine if there had been a breach and to take action against the violator, whether as a belligerent or as a neutral taking some discriminatory action.

United States officials relied on the competence of individual league members to employ sanctions for violations of the Pact while the United States was still a neutral in the early stages of World War II. Thus, the 1940 United Kingdom-United States "destroyers for bases" agreement³⁰ and the passage of the 1941 Lend Lease Act³¹ were justified as permissible discrimination for violation of the Pact:

A system of international law which can impose no penalty on a law breaker and also forbids other states to aid the victim would be self-defeating and should not help

²⁵ 38 Int'l. L. Assn. Rep. 66-67 (1935).

²⁶ Castrén, *supra* note 2, at 432.

²⁷ Kelsen, *supra* note 2, at 168; Tucker, *supra* note 2, at 168.

²⁸ Oppenheim, *supra* note 2, at 643.

²⁹ Brierly, *Some Implications of the Pact of Paris*, 10 Brit. Y.B. Int'l. L. 208, 210 (1929); Wright, *The Meaning of the Pact of Paris*, 27 Am. J. Int'l. L. 39, 61 (1933).

³⁰ *Official Documents: Great Britain-United States, Exchange of Naval and Air Bases for Over-Age Destroyers*, 34 Am. J. Int'l. L. Supp. 184 (1940).

³¹ Act of Mar. 11, 1941, ch. 11, 55 Stat. 31.

even a little to realize mankind's hope for enduring peace.³²

3. *The United Nations Charter.*

The development of the general rule prohibiting resort to armed force except for individual or collective self-defense or other community approved objectives was a fundamental step in implementing the policy of maintaining public order. The second fundamental step, at least in terms of formal authority, was the creation of the system of the United Nations Charter for centralized decision-making as to the lawfulness of the use of force, and for community coordination in the employment of the use of force and other strategies to maintain international peace and security.

Unquestionably, the United Nations, when acting, *inter alia*, under Articles 39,³³ 25,³⁴ and 2(5)³⁵ of the Charter, would have the authoritative competence to determine which states are to give assistance, and what forms of assistance are to be used to maintain international peace and security.³⁶ Further, under Article 53, the Security Council could call upon regional organizations to implement United Nations policies, and in turn to use regional charter authorizations. Under the Charter arrangement, then, members are free to refrain from participating in community action against an aggressor only to the extent permitted by the Security Council.³⁷ Article 2(5)

³²Statement of U.S. Attorney General to the Senate Committee on Foreign Relations in Support of the Lend Lease Act, S. Rep. No. 45, 77th Cong., 1st Sess. 4 (1941). See Tucker, *supra* note 2, at 169 n.10; McDougal and Feliciano, *supra* note 1, at 425.

³³This article establishes the decisional power of the United Nations Security Council.

³⁴In this article the member states of the United Nations commit themselves to accept and carry out Security Council decisions.

³⁵This article obliges member states to give the United Nations "every assistance" in actions taken under the Charter, and to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

³⁶Greenspan, *supra* note 2, at 522.

³⁷*Id.*; Oppenheim, *supra* note 2, at 647.

reinforces what already should be viewed as the duty under customary law to refrain from giving assistance to the aggressor.

The recent and continuing problem, primarily due to the global power competition of the United States and the Soviet Union, joined now by the People's Republic of China, has been that this system of centralized community characterization, direction and coordination of effort has failed to function. Fault for this failure does not rest entirely on the shoulders of the more powerful states. All states generally have been reluctant to commit military forces or other resources to support community action unless their interests are most directly and immediately seen to be adversely affected if action is not taken.³⁸ The result is that even when the Security Council does act, the usual outcome is a recommendation to States, leaving to each state the discretion to support the community effort. (This is necessarily the result also under the solely recommending authority of the General Assembly.)

Thus, the outcome is now similar to that under the League of Nations, with at most a duty of passive discrimination, i.e., nonassistance to an unlawful belligerent, if so characterized by United Nations action.³⁹ Absent an *ad hoc* concurrence of interests of the permanent members of the Security Council, sufficient to allow a controlling decision under Article 39, which in the foreseeable future will be a rare event, states will continue to be under no duty of affirmative partiality, to provide assistance on a discriminatory basis to states engaged in armed conflict in support of international peace and security. They will be free to be impartial toward all belligerents, or to choose on the basis of individual characterization to discriminate against the side viewed as the aggressor. State practice in the Charter period indicates that many member states have elected to continue as impartial neutrals in armed conflicts, *e.g.*, the Arab-Israeli Wars.⁴⁰ This has been the case even where there has been a community determination of aggression, but no obligatory call to action. During the United Nations involvement in Korea, many members adopted a position of impartial neutrality.⁴¹

³⁸ See discussion and authorities cited in Williams, *Intergovernmental Military Forces and World Public Order* ch. 6 (1971).

³⁹ McDougal and Feliciano, *supra* note 1, at 430.

⁴⁰ Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 Har. Int'l. L. J. 249, 257-261 (1976).

⁴¹ Greenspan, *supra* note 2, at 525-26; Norton, *supra* note 40, at 265-67.

That our advocated community policy of widest assumption of necessary responsibility for maintaining world public order has been, and for the foreseeable future will continue to be, most unsatisfactorily implemented, seems a commonplace observation. Yet we must constantly reiterate to authoritative decision-makers, primarily the principal national officials, that a public order system that leaves participation in community action to terminate unlawful use of force solely to the election of each member state is fraught with the same risks that have in this century resulted in so much suffering and destruction. The author urges that national officials recognize that ultimately the maximum preservation of human values results, first, from deterrence of unlawful force and, second, from its speediest termination. Eventual effective implementation of the community policy advocated herein calls for unflagging emphasis on community identifications and common interests. Needed are perspectives that will result in acceptance of commitments to participate in community action to maintain public order, and to place claims as to neutrality, or nonparticipation, within the framework of appraisal of the requirements for maintaining international peace and security.

B. SELECTED CLAIMS ARISING OUT OF BELLIGERENT-NEUTRAL RELATIONS.

From discussion on neutrality and the claim of shared responsibility to support world public order, we turn to discussion of selected claims arising out of belligerent-neutral relations in modern armed conflicts.

1. Claims concerning neutral abstention from direct military aid to the enemy.

Traditionally, a belligerent's major area of concern as to a neutral's conduct has been whether the neutral is providing military aid to an opposing belligerent. The two principal specific claims concern: (a) providing military personnel, and (b) providing military equipment.

a. Military personnel.

Until the early nineteenth century, a neutral state permissibly could provide military personnel to either side in a conflict, as long

as the neutral offered the belligerents equal opportunity to bid for their use.⁴² Many states did not maintain sufficient military forces for wartime needs, but instead hired mercenaries as the need arose. On the other hand, neutral states needed funds to maintain their military personnel, and occasions to keep up their military readiness when those states were not engaged in conflict. Thus, nondiscriminatory provision of military forces by a neutral was permissible, since it was mutually advantageous to all.

During the nineteenth century the rule changed, due in part to development of large national military forces, but also in larger part to the establishment of the European "balance of power." That regime encouraged limiting the number of state participants in a conflict, as well as limiting the objectives of resort to force, to prevent substantial imbalance within the system. By World War I, neutral state provision of military forces was impermissible.⁴³ In World War II, when the Spanish Government sent the "Blue Division" (consisting of some volunteers, but primarily of regular Spanish military personnel) to serve with German forces on the Russian front, the Allied Powers protested and demanded the withdrawal of the Division. Spain did so, although some volunteers remained as a "Spanish Legion" under German military command.⁴⁴

Reference to the "Spanish Legion" illustrates a distinction between "state action" and "private action" under traditional international law. Thus, while neutral state action in sending military forces to aid a belligerent became impermissible, private nationals or residents could join a belligerent's forces as volunteers. Article 6 of Hague Convention V⁴⁵ provides, "The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents." Underlying this state-private dichotomy was the nineteenth century

⁴²Oppenheim, *supra* note 2, at 675.

⁴³3 Hyde, *International Law* 2231-32 (2d ed. rev. 1954); Norton, *supra* note 37, at 279.

⁴⁴Royal Institute of International Affairs, *The War and the Neutrals: Survey of International Affairs, 1939-1946* at 285, 301-02 (1956); Fox, *The Power of Small States* 160, 169, 173-74 (1959).

⁴⁵Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540.

perspective of limited state control over persons, one aspect of the general "laissez faire concept of the relationship of citizen to state."⁴⁶

During conflicts in this century, there have been various instances of private citizens joining the belligerents at times when their state was neutral.⁴⁷ This state-private dichotomy presents states with the opportunity to send military forces to aid a belligerent behind the facade of "volunteerism." The most blatant case of state action under claim of private action is that of the People's Republic of China sending hundreds of thousands of organized, equipped, and continuously supplied military personnel to fight the United Nations forces in Korea, yet referring to those personnel as "volunteers."⁴⁸ This claim was rejected by the General Assembly in its determination that the People's Republic of China was an aggressor in Korea.⁴⁹ Other recent instances of substantial neutral state involvement in raising, training, and financing military forces said to be volunteers have occurred.⁵⁰ Regardless of whether the individuals involved may wish to engage in the conflict (*i.e.*, whether they have "volunteered"), the relevant point is the degree of neutral state assistance in facilitating their participation in the conflict.

However, of more basic concern is whether the trend of decision in practice still honors the above-cited Article 6 of Hague Convention V which excuses the neutral state from responsibility for taking action to prevent its citizens or those otherwise subject to its con-

⁴⁶Norton, *supra* note 40, at 282; Stone, *supra* note 2, at 408.

⁴⁷Examples include the Escadrille Americans in World War I, various groups in the Spanish Civil War, the "Flying Tigers" in China in the 1930's, American volunteers with Canadian and British forces in World War II before the United States' entry as a belligerent, and foreign volunteer enlistments on both sides in the Arab-Israeli War of 1948. See Norton, *supra* note 40, at 279-82.

⁴⁸Statement of Mr. Wu Hsiu-Chuan, representative of the People's Republic of China, in support of Complaint of Aggression Upon the Republic of Korea, and Complaint of Armed Invasion of Taiwan (Formosa), 5 U.N. SCOR (527th mtg.) 22-23, U.N. Doc. S/p.v. 527 (1950).

⁴⁹G.A. Res. 498(V), 5 U.N. GAOR, Supp. (No. 20A), U.N. Doc. A/1775/Add. 1, at 1 (1951). See discussion in McDougal and Feliciano, *supra* note 1, at 465-66.

⁵⁰See discussion of the U.S.-financed participation of several thousand Thai troops in Laos in the early 1970's, during the Indochina War, in Norton, *supra* note 37, at 280-81.

trol from joining the belligerent of their choice. With the termination of the underlying condition upon which the rule was premised, i.e., the quite restrictive nineteenth century view of the ambit of state control over the individual, state support for the rule would seem greatly eroded.

Today, all governments exercise substantial control over the activities of citizens affecting the national interest, especially in the area of foreign relations. National laws quite commonly forbid joining the military forces of other countries, especially to engage in conflicts.⁵¹ This common practice of control over citizens in areas affecting the public interest has already in other situations given rise to perspectives of increased duty of control where the state has reasonable notice of inimical acts that persons within its territory plan to take against another state, and reasonable ability to prevent them. Examples include international cooperation to deal with the narcotics trade, counterfeiting, terrorism, and aircraft hijacking.

One may suggest that the trend of decision has repudiated the "state-private" dichotomy, to the extent that a neutral state is under a duty to use reasonable efforts to prevent its citizens or others subject to its control from joining either belligerent.⁵² Community policy would appear to promote this result. Traditional international law sought to balance the interest of the belligerent in military effectiveness and the interest of the neutral in avoiding deprivations in its internal or external activities due to the conflict. In effect, this was another illustration of the development of customary law pertaining to armed conflicts by balancing against each other the policies of military effectiveness and of minimal destruction of values. The object was to restrict as much as possible the scope of the conflict and the number of participants, and to promote to the greatest extent possible continued normalcy in the activities of neutrals.

Although acceptable conduct of a neutral vis-a-vis either belligerent might well vary in the particular conflict situation, most as-

⁵¹ Brownlie, *Volunteers and the Law of War and Neutrality*, 5 Int. and Comp. Law Q. 570, 575-79 (1956); McDougal and Feliciano, *supra* note 1, at 467-68.

⁵² *Id.*; Friedmann, *The Growth of State Control over the Individual, and its Effects upon the Rules of International State Responsibility*, XIX Brit. Y.B. Int'l. L. 118, 137 (1938), contends for this outcome. We would submit that this is today the trend of decision.

surely the principal expectation was that a neutral would not provide direct military aid to the enemy. The neutral was to avoid action that altered the relative positions of power of the belligerents, the military balance. Whether neutral state personnel are sent, or are permitted to depart to join belligerent forces, it would seem that some contribution to that belligerent's military position occurs, and in today's situation of pervasive control over the individual's transnational movements, this should be viewed as "state action." In view of the great size of the standing armies maintained by many states, the number of such private volunteers may seem insignificant; but, especially in wars between the smaller, less developed states, well trained foreign military personnel may be very valuable to a belligerent.

The concern of the African states about foreign military personnel, most recently displayed in the Angolan criminal trials of several mercenaries, undoubtedly is due in part to deep-seated hostilities felt toward former colonial states and toward Western society, generally, as well as to suspicion that non-African states are attempting to intervene in African affairs. However, this concern may also reflect the view that a relatively few foreign military experts could substantially alter the military balance in a conflict.

Although not actually an exception to the rules prohibiting provision of military personnel or war material, neutral states and their citizens may provide humanitarian relief assistance, *e.g.*, through their Red Cross Services,⁵³ without violating their obligations as neutrals.

b. Provision of War Material.

The traditional nineteenth century rule was that neutrals were forbidden from supplying, directly or indirectly, a belligerent with "war-ships, ammunition, or war material of any kind whatever."⁵⁴

⁵³*E.g.*, Art. 27, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Art. 25, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85.

⁵⁴Art. 6, Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545; Art. 16, Havana Convention of Maritime Neutrality, Feb. 20, 1928, 4 Hudson, *International Legislation* 2401 (1931).

Generally, also, the neutral was required to deny a belligerent the use of the neutral's public agencies and its financial, industrial and transportation facilities.⁵⁵ This requirement was seen as a vital aspect of the duty of impartiality. Similar to the "state-private" dichotomy discussed as to provision of military personnel, the neutral state was not required to prevent private citizens from supplying arms, other material assistance, or firearms. For example, Article 7 of Hague Convention XIII provides, "A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet."⁵⁶

As was mentioned above, in respect to the question of provision of military personnel, and as others have pointed out, this dichotomy resulted from "the particular conceptions of public order, or economic organization and social structure"⁵⁷ existing in Western Europe and the United States in the nineteenth century. These conceptions have altered fundamentally during this century. Especially as to state regulation of the international movement of war materiel, the trend is toward intense regulation.⁵⁸ Certainly, in those states where all or most international transfer of goods is handled by state trading organizations, any provision of material assistance to a belligerent would be "state action." However, in view of the general exercise by all states of comprehensive regulation over foreign trading, it may be said that state action is involved today in any authorization for international movement of goods. "The suggestion, most briefly put, is that responsibility must bear reasonable relation to actual control."⁵⁹

The present trend of decision, expressed in state legislation and in practice during post-World War II conflicts, is for states who

⁵⁵3 Hyde, *supra* note 43, at 2231-32; Oppenheim, *supra* note 2, at 738-45.

⁵⁶Note 54, *supra*. See also Art. 22, Havana Convention, *supra* note 54: VII Hackworth, *supra* note 2, at 610-21; Castrén, *supra* note 2, at 478; Stone, *supra* note 2, at 389-90.

⁵⁷McDougal and Feliciano, *supra* note 1, at 438; other authorities cited *supra* note 46.

⁵⁸Friedmann, *supra* note 52; Tucker, *supra* note 2, at 215; Norton, *supra* note 40, at 298 (citations to national legislation at n. 223).

⁵⁹McDougal and Feliciano, *supra* note 1, at 443.

assert neutrality to prohibit transfer of war materials by their private citizens.⁶⁰ We suggest that the developing trend of customary law is that a neutral state is under a duty to take all reasonable measures to prevent provision of materials and other assistance to a belligerent by individuals and associations under its control.

2. Claims concerning prevention of belligerent use of neutral territory to further military objectives.

Another major class of claims deals with prevention by a neutral of the belligerent's use of the neutral's territory to aid in achieving military objectives. The two principal subject matter areas covered by these claims are, first, transit of belligerent forces across neutral territory, and second, use of neutral territory for bases of operation or staging areas for launching operations, or support areas to sustain operations elsewhere. We are concerned here with activities of a belligerent within land, air and maritime territory of the neutral, which an opposing belligerent claims the neutral must prevent.

Community policies involved here are again, the policy of military effectiveness versus the policy of minimal disruption of values. The principle of effectiveness calls for prevention or termination of belligerent activities within neutral territory that adversely affect the military balance between opposing belligerents. This reduces the chances of involvement of neutral territory in armed attack by the complainant belligerent, and thus promotes minimal destruction. The deference to competency of the neutral to control conduct within its territory gives rise to expectations that the neutral will prevent improper belligerent use of the neutral's territory.

a. Transit of belligerent forces.

A traditional claim dealt with transit of belligerent forces or war materials across neutral territory. Customary law obligated the neutral to prevent such belligerent activity. This was reflected in Article 2, Hague Convention V,⁶¹ forbidding belligerents to move convoys of "munitions of war or supplies" across neutral territory, while Article 5 of that Convention forbade neutrals from allowing

⁶⁰ See Norton, *supra* note 40, at 298 *et seq.* for survey of most recent practice.

⁶¹ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540.

belligerents to perform such acts. The customary rule applies both to land and aerial transit.

This duty generally was adhered to in World Wars I and II,⁶² and has continued to be asserted. For example, Ceylon refused to allow its territory to be transited to allow Indonesia to supply Pakistan in the Indo-Pakistani War of 1965.⁶³ The Arab League and Indonesia asserted this duty as a basis for denying transit facilities to the United Nations in the Korean War,⁶⁴ although in view of Security Council and General Assembly characterizations of actions by North Korea and the People's Republic of China as aggression, it would not appear accurate to refer to this as a duty in that instance. Denial of transit facilities to the United Nations in that case was a permissible exercise of the option not to assist military operations conducted on behalf of the community. (Note the earlier discussion of this option, above.)

During the 1973 Yom Kippur War involving Israel, Egypt, and Syria as belligerents, various states allowed their territory to be used as refueling points for United States ships and planes enroute to Israel with military equipment, or to be used for removal of materials stored there in United States bases.⁶⁵ However, after Arab states protested and stated that permission for transit of war supplies would be considered in applying an oil embargo, most NATO member states and Spain terminated their permission, relying on the traditional duty of neutrality.⁶⁶ Absent authoritative community determination of aggression in the Yom Kippur War, each state was free to determine whether it would characterize which side was lawfully using armed force, and whether the state would choose to discriminate on the basis of its characterization, or

⁶² McDougal and Feliciano, *supra* note 1, at 446-47, recited some departures from the rule in World War II, as does Norton in recent practice, *supra* note 37, at 294-97, but neither suggests that the rule has ceased to be operative.

⁶³ Rousseau, *Chroniques des faits internationaux*, 70 *Revue generale de Droit international public* 129, 180 (1960), cited in Norton, *supra* note 40, at 294 n. 200.

⁶⁴ Schindler, *Aspects contemporains de la neutralite*, 121 *Hague Recueil des Cours* 221, 291 (1967).

⁶⁵ Norton, *supra* note 40, at 295, reports such acts by Portugal, Italy, and Germany, citing articles in the *New York Times*.

⁶⁶ *Id.*

continue impartially to deny military transit either by belligerents or states assisting the belligerents.

The present trend of decision regarding belligerent transit in territorial waters is uncertain. The trend is that during conflict a neutral is not obligated to allow passage of warships under claim of right of innocent passage.⁶⁷ The neutral has competence to regulate or even prevent such passage, except in the case of straits or canals connecting high seas⁶⁸ ("international" straits or canals). The question is, what passage may a neutral permit? Article 10 of Hague Convention XIII provides that "mere passage" of a warship or prize can be authorized by a neutral, while Article 5 states that the belligerent cannot use neutral ports and waters as a "base of operations."⁶⁹

It would appear that the neutral could permit passage that does not substantially prejudice the relative military positions of the belligerents. This would accord with the principle of military effectiveness, while recognizing the policy of minimal destruction by allowing the neutral to avoid danger of combat within its territorial waters. We must remember that the neutral was not under a duty to permit even "mere passage" of a war ship through its territorial waters. Article 10 of Hague Convention XIII provided that the neutral could authorize such passage at its option.⁷⁰ Since whether a particular passage might or might not reasonably be viewed as prejudicing the position of the opposing belligerents, depending upon the specific situation at hand, a neutral state might prefer to refuse passage in any or all cases, for increased protection from the risks of incidental damage in the course of belligerent combat, or of sanctions taken by a complainant belligerent.

The World War II case of the *Altmark*,⁷¹ a German naval auxiliary vessel passing through Norwegian waters carrying British

⁶⁷ McDougal and Feliciano, *supra* note 1, at 452 and authorities cited therein.

⁶⁸ Baxter, *Passage of Ships Through International Waterways in Time of War*, XXXI Brit. Y.B. Int'l. L. 187 (1954).

⁶⁹ Arts. 5 and 10, Hague Convention (XIII), *supra* note 54.

⁷⁰ *Id.* at art. 10.

⁷¹ Facts are set forth in VII Hackworth, *supra* note 2, at 568-69.

prisoners of war enroute to Germany, and accompanied by Norwegian military craft, points out the real possibility of dispute. British war vessels halted the Altmark and took off the British prisoners. In answer to Norwegian protests, the British response was that only a "normal cruise" through neutral territorial waters was permissible, *i.e.*, that passage through the neutral waters had to be the reasonable route between two points, normally the most direct route, and that the Altmark had departed substantially from a reasonable route in order to use the Norwegian waters as sanctuary to avoid British attack.

In the future, in view of the high speed and enormous fire power of modern surface and subsurface naval craft, and the increased breadth of territorial waters, belligerent state attitudes will equate belligerent maritime transit with land transit as being forbidden. Also, neutral states probably will concur, due to increased risk of substantial incidental damage and of other involvement that may result if combat occurs in their territorial waters when the opposing belligerent disapproves of the neutral's permission for maritime transit and has little or no time otherwise to prevent the transit.

An exception to the duty of preventing belligerent transit has allowed transit for humanitarian purposes, to allow passage of the wounded and sick.⁷² This benefits the belligerent to some extent, but the policy of minimal destruction of values—here, human life—predominates.

Discussion of belligerent use of neutral territory for base areas will be followed by consideration of the nature of the duty of the neutral to prevent belligerent transit or use of base areas, and the rights of the opposing belligerent if the neutral does not prevent these acts.

b. Belligerent use of neutral territory for base areas and other activities promoting military objectives.

Under traditional neutrality law, a neutral was obligated to prevent use of its territory by a belligerent to establish base areas either for logistic support of operations conducted elsewhere, or for positions from which to launch attacks. As to other activities, the

⁷²Art. 14, Hague Convention (V), *supra* note 61.

trend of past decision was to identify certain acts as prohibited, rather than to take a broad functional approach by prohibiting any belligerent activity in neutral territory that "augments its power to bring harm to the enemy."⁷³ Four aspects of this obligation have been selected for comment in the following discussion.

i. Recruiting efforts within neutral territory to obtain military manpower.

Although the customary rule was that a neutral was not obligated to prevent its citizens from joining a belligerent's forces, the neutral was required to prevent the conduct of belligerent recruiting operations on neutral territory.⁷⁴ In modern armed conflicts which generally involve substantial numbers of military personnel, this concern may not be as pertinent. However, in the case of conflicts between states having a scarcity of personnel trained in modern military technology, a belligerent's recruitment of military or other skilled personnel in neutral territory may continue to be of substantial concern to opposing belligerents. The points made in our earlier discussion concerning the duty of the neutral state not to assist in providing military personnel or material would apply here to favor continuing the prohibition against belligerent recruiting operations in neutral territory.

ii. Constructing and arming military vessels, aircraft or other equipment for use by the belligerent in military operations.

This is a classical area of prohibition, whether the work is carried out directly by the belligerent or by neutral state citizens acting as the belligerent's agents.⁷⁵ However, the prohibition was avoided by the technicality of direct purchase from private sources instead of commissioning war equipment construction.⁷⁶ It has been noted above that neutral states may now be obligated to prevent such direct private sales. The two present avoidance devices are (a) stockpiling of replacement parts purchased from a neutral or its

⁷³Hyde, *supra* note 43, at 2249.

⁷⁴*Id.* at 2238-40; Art. 4, Hague Convention (V), *supra* note 61.

⁷⁵Art. 8, Hague Convention (XIII), *supra* note 54; McDougal and Feliciano, *supra* note 1, at 463.

⁷⁶Oppenheim, *supra* note 2, at 714.

citizens before the conflict, and (b) establishing commitments under long-term contracts. As to the first device, it appears permissible; as to the second, it is arguable that no reasonable distinction exists between sales effected after conflict occurs and continued performance under prior long-term contracts. The same policies, discussed earlier, that support prohibition of sales also support suspension of performance under these contracts once conflict begins.

c. Use of neutral territory for communication purposes.

The traditional rule provided that the belligerent could not establish land radio stations to transmit military information, and could not use ship radios in neutral waters except for distress signals.⁷⁷ However, other means of communication existing at that time were not dealt with, such as the telegraph, land telephone, and submarine cables; and use of neutral government or privately owned radio systems was permissible.⁷⁸

During the two World Wars the trend of decision in practice was to regard neutral states as under a duty to exercise reasonable efforts to regulate all communication systems in their territory to prevent belligerent communication of military information.⁷⁹ This modern trend recognizes the vital role of communication systems in conveying intelligence information, and in coordinating far-flung military forces.

d. Use of neutral ports by belligerent war vessels.

The traditional rule was that the neutral was under no duty either to prevent entry and stay of belligerent war vessels, or to permit it, except for distress. Therefore, the neutral could establish conditions for entry, and the time allowed for repairs, refueling and resupply.⁸⁰ This approach obviously provided opportunity for neutral assistance to the belligerents, albeit offered impartially to both sides.

⁷⁷ Art. 3, Hague Convention (V), *supra* note 61; Art. 5, Hague Convention (XIII), *supra* note 70; Art. 4(b), Havana Convention, *supra* note 54.

⁷⁸ Art. 8, Hague Convention (V), *supra* note 61.

⁷⁹ McDougal and Feliciano, *supra* note 1, at 460.

⁸⁰ Tucker, *supra* note 2, at 240.

This departure from the general principle of nonassistance to either side by the neutral (e.g., no provision of military forces or military materials, and no permission for belligerent transit or base areas) is seemingly congruent with the concept of impartiality, since access to ports, and repairs, fuel, and supplies were offered equally to each belligerent. However, the rule is subject to challenge as contrary to community policies. First, in actual operation, a belligerent may be able to control the seas, so that in fact only that belligerent could avail itself of the opportunity of using neutral ports, to the detriment of the military position of the opposing belligerent. Second, in the day of long-range strike capability against naval forces through use of aircraft, submarines and missiles, one should not expect that the opposing belligerent will be inclined to accept this detrimental use of neutral facilities any more than belligerent transit or base areas in neutral territory.

Thus, the risk exists that a neutral will become involved in combat activities, with increased ambit for destruction, if the traditional rule is applied in future conflicts. In modern warfare there is less need of neutral ports, since modern naval vessels are capable of longer cruises at higher speeds and have resupply ships. The importance to belligerents of open neutral ports may be reduced, but not to the point that access to neutral ports is seen as *de minimus*. The result may be to encourage termination of the rule of open neutral ports. A general rule of admission only for distress and then, internment, would appear more in keeping with those community policies, as discussed earlier.

e. Nature of the duty of the neutral to prevent unlawful belligerent use of neutral's territory.

The duty of a neutral state to prevent belligerent transit or use of base areas, and related activities, requires it to exercise reasonable effort, including use of force, to prevent improper acts by a belligerent, unless, perhaps, the belligerent's power is manifestly so overwhelming as to demonstrate futility of effort.⁸¹ The neutral may fail to use reasonable preventive effort, or may be excused from its duty, after either reasonable but unsuccessful effort, or a showing of manifest futility of making the effort.

⁸¹Oppenheim, *supra* note 2, at 690; Hyde, *supra* note 43, at 2336-44; Castrén, *supra* note 2, at 440-42; Greenspan, *supra* note 2, at 534.

Regardless of the reasons, the neutral's failure to perform its duty authorizes the opposing belligerent to take proportionate preventive action against the unlawful belligerent activity, including action within neutral territory.⁸² Where the neutral is excused from its duty to prevent the belligerent transit, conduct of the opposing belligerent may be viewed merely as the exercise of sanction against the belligerent engaging in activity in violation of the laws of neutrality. Further, if the belligerent engaging in the improper activity was the aggressor in the conflict situation, the opposing belligerent's now permissible use of force in neutral territory also would be lawful use of force in continuing self-defense⁸³ (or pursuant to organized community authorization).

If the neutral in fact invites or grants permission for preventive action by the opposing belligerent, the latter's action could also be viewed as in collective defense of the neutral's rights to protection against forcible intrusion into its territory by a belligerent. Where the neutral negligently fails to use reasonable efforts to prevent the unlawful belligerent transit activity in neutral territory, or indeed, intentionally permits it, preventive action of the opposing belligerent may not only be used against the belligerent activity, but also in reprisal against the neutral to cause it to adhere to its duty under the laws of neutrality.

One should note again the caveat discussed earlier in this paper, that if the neutral is supporting a belligerent engaged in collective or self-defense or other action pursuant to organized community authorization, such partiality would be permissible and counteraction impermissible. This is so because the law as to impermissible use of force now authorizes discriminatory departure from the laws of neutrality. The neutral then would be asserting a neutral's right of affirmative discrimination to oppose aggression under the modern law of neutrality, while the aggressor state would be disabled from asserting a breach of neutrality.

A recent example of belligerent transit and use of base areas raising various issues was the use of Cambodian territory by mili-

⁸²Oppenheim, *supra* note 2, at 695 n.1; Greenspan, *supra* note 2, at 538; Castrén, *supra* note 2, at 462-63.

⁸³Moore, *Law and the Indo-China War* 505 (1972).

tary forces of the People's Republic of Vietnam.⁸⁴ That belligerent used the "Ho Chi Minh Trail" for years for military transit and established major base areas in Cambodia, although Cambodia had declared its neutrality in the Vietnam conflict by its domestic legislation and in formal pronouncements in the international arena.⁸⁵ One readily may grant that the Cambodian Government opposed these belligerent activities in its territory, but that any Cambodian effort to prevent them would have been futile and might have resulted in substantial destruction in Cambodia. In any event, the case is clear under international law that the opposing belligerents could in support of the laws of neutrality take proportionate action in Cambodia against the improper belligerent activities, including aerial bombing (which occurred for some years) and temporary, appropriately limited, military occupation of neutral territory (the well-known "Cambodian incursion" of 1970).⁸⁶

3. Belligerent claims to embargo economic intercourse with the enemy.

The next category of claims we consider concerns belligerent embargo of enemy economic intercourse with neutrals. The traditional law of neutrality sought to preserve to the greatest extent possible economic intercourse between neutrals and belligerents. However, in this century two world wars have involved all-out economic warfare, with the objective of virtually halting the flow of goods from and to the opposing belligerents, and consequently, terminating their commerce with neutrals. The present trend is that a belligerent state lawfully may embargo commercial relationships of the neutral and the enemy.⁸⁷

⁸⁴See Stevenson, *United States Military Action in Cambodia: Questions of International Law*, 62 Dept. of State Bull. 765 (1970); Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 Am. J. Int'l. L. 1 (1971); Norton, *supra* note 40, at 283-90.

⁸⁵Announcement of the Royal Cambodian Government, May 23, 1965, and Communiqué of the Cambodian Ministry of Foreign Affairs, June 12, 1965, in [1965] *Annuaire français du Droit international* 1077, 1082; Norton, *supra* note 40, at 269.

⁸⁶See authorities cited *supra* note 84.

⁸⁷Oppenheim, *supra* note 2, at 796-97; Stone, *supra* note 2, at 508-10; McDougal and Feliciano, *supra* note 1, at 478-79.

The only issue is the reasonableness of measures used in the context of the particular conflict. The principle of minimal destruction calls for that appraisal. Questions of what goods to control, labeled "contraband," and the methods of stopping the flow of those goods, should be answered upon a contextual analysis: reasonableness under the circumstances. No *a priori* rules will provide the answers. Here, as elsewhere, if organized community authority is exercised, it is paramount.

Article 41 of the United Nations Charter provides that the Security Council may decide upon "complete or partial interruption of economic relations." In the absence of organized community decision, the rule of proportionality must provide the guide in the process of neutral-belligerent claim and counterclaim. We briefly consider the subjects of contraband and the means of halting the flow of or embargoing the enemy's economic intercourse.

a. Contraband. The traditional approach was to divide goods into three categories: absolute contraband (items specialized as to use in war); conditional contraband (items susceptible of use in war, but which might be used for other purposes, e.g., vehicles, engines, machinery); and free articles (not capable of use in war).⁸⁸ Under the traditional rules, absolute contraband destined for enemy-controlled territory could be seized; free articles could not. Conditional contraband destined for enemy-controlled territory could be seized only if consigned to the enemy government or to its military bases.⁸⁹ Paranthetically, all enemy exports could be seized; it was only neutral exports to the belligerents that enjoyed any freedom of movement.

The modern trend of decision has been first, that the category of conditional contraband has increased enormously due to the development of military technology, and to the trend toward comprehensive national mobilization of resources for war effort. As regards the latter aspect, expansion of conditional contraband reflects community acknowledgement that governments in modern armed conflicts exercise comprehensive control over the public and private

⁸⁸ London Declaration Concerning the Laws of Naval Warfare, Feb. 26, 1909, in 2 A Collection of Neutrality Laws, Regulations and Treaties of Various Countries 1380 (Deak and Jessup eds., 1939).

⁸⁹*Id.*, Arts. 30-31, 33-35.

sectors of the economy, and allocate all resources, including food stuffs and other basic resources, in the manner best suited to support the war effort. Consequently, for both reasons stated above, the category of goods designated *a priori* as free articles has shrunk drastically. Whereas, under the 1900 Declaration of London, raw materials, foodstuffs and clothing were free articles, by World War II all were classified as conditional contraband, leaving little more than inconsequential luxury items as free articles.⁹⁰

Ironically, any item that might now still be designated as a free article probably would be one that the opposing belligerent will not permit to be imported in any event, to conserve scarce foreign exchange! Further, the general trend during World War II and afterward has been for the belligerent to seize *all* conditional contraband, recognizing that the existence of comprehensive governmental regulation of all economic resources of the state means that, at least potentially, all conditional contraband may be devoted to the war effort.⁹¹ In actual operation, then, almost all goods of significance in sustaining the opposing belligerent's economy may be treated the same as formally designated absolute contraband.

b. Methods of stopping the flow of goods from and to the enemy.

One of the traditional methods of stopping the flow of contraband to the enemy, or the flow of enemy exports, was by visit and search to identify contraband and enemy identity of exports or vessels.⁹² In modern conflicts, visit and search may be highly dangerous, with stationary vessels an easy target for aircraft, submarines, surface craft, and land-based missiles. Further, with enemy property or property destined for enemy-controlled territory masked by complex corporate and fiscal arrangements and by flags of convenience, determination of enemy identity or of contraband, now and in the future, may require lengthy investigation impossible to conduct during a visit and search on the high seas. Past difficulties in this

⁹⁰See discussion in Norton, *supra* note 40, at 304-06; McDougal and Feliciano, *supra* note 1, at 481 *et seq.*

⁹¹*Id.*, Stone, *supra* note 2, at 482.

⁹²Stone, *supra* note 2, at 478-91; Tucker, *supra* note 2, at 336-38.

regard have already resulted in a trend toward diversion of vessel and cargo to a port for investigation.⁹³ The outcome is much more extensive interruption of *all* neutral trade, for the purpose of determining whether seizable property is being carried.

The second traditional method of embargoing enemy trade was the blockade. Traditionally, the requirement for an "effective" blockade⁹⁴—a sufficiency of vessels committed to the blockade to demonstrate reasonable ability to stop the flow of enemy exports and halt contraband—rather than a symbolic "paper" blockade, had the effect of limiting the number and geographic extent of blockades. In the nineteenth century, an effective blockade required a substantial number of scarce war vessels, which were needed for combat operations as well. The result was to restrict blockades to "close-in" blockades of the most important enemy ports or other coastal areas.

Modern military technology has revolutionized blockade strategy in modern armed conflicts. On the one hand, the development of aircraft and missiles have made close-in blockades extremely dangerous; on the other hand, radar, long range aircraft and swift surface craft have reduced the need for a great number of ships to blockage a port. Further, military technology has provided mines and submarines, which can achieve effective "long distance" blockades of great areas at much less risk to the blockader.⁹⁵ However, the risk of indiscriminate destruction to neutral as well as opposing belligerent craft is much greater, even if the blockade provides assistance in guiding vessels through safe sea lanes, and so forth. Again, the result is not only more comprehensive embargo of all trade with the opposing belligerent, but substantial restriction of all neutral commerce in the general theater of the conflict.

The trend has been to recognize the legality of interdicting efforts virtually throughout the oceans, rather than merely close-in at enemy ports.⁹⁶ In fact, operationally, the most effective way to

⁹³McDougal and Feliciano, *supra* note 1, at 489.

⁹⁴Arts. 2-3, London Declaration, *supra* note 88; Harvard Research, *Rights and Duties of Neutral Powers in Naval and Aerial War*, 33 Am. J. Int'l. L. Supp. 711 (1939).

⁹⁵Oppenheim, *supra* note 2, at 791-92; Stone, *supra* note 2, at 508-10.

⁹⁶McDougal and Feliciano, *supra* note 1, at 492-97.

achieve regulation and minimize interference with acceptable neutral shipping has been for the belligerent side exercising predominant naval power to have its officials in neutral ports provide certifications that the neutral ship is not carrying contraband ("navicerts") or enemy exports ("certificates of origin and interest").⁹⁷

In the future, if the particular belligerents have the military capacity, we may expect continued use of indiscriminate area methods of blockade. As to the problem of control of carriage of goods by aircraft and submarine, future belligerents may seek to prohibit entirely such neutral traffic by aircraft, because of the impossibility of "visit and search," unless allowed to examine the aircraft at its point of departure. As to neutral traffic by submarines, adequate control would require surfacing and diversion to ports for inspection. In view of the great strike capability of the modern submarine, and its speed and evasive ability, the probabilities are that substantial sea areas off the coast of enemy-controlled territory and other critical areas would be closed to neutral submarines, or else entry in those areas would be permitted only if the submarine proceeds on the surface.

The outcomes of the trend of decision are that, depending upon the particular conflict, a belligerent may lawfully halt virtually all neutral commerce with the opposing belligerent, and that the methods used to embargo economic intercourse with the enemy automatically also restrict greatly *all* neutral trade in the geographic proximity of the opposing belligerent.

A modest suggestion, in keeping with the policy of balance of the objectives of military effectiveness and of minimal destruction of values, is that the principle of proportionality in using coercion should operate here, as elsewhere in the laws of war and neutrality. What is permissible in all future instances of conflict should not be judged by the situation of World Wars I and II. In situations where the permissible objectives for the use of force are substantially more limited, it should follow that the category of goods properly designated as contraband would be more limited, and that the necessary methods of interdicting neutral commercial intercourse

⁹⁷1 Medlicott, *The Economic Blockade* 94-101, 343-50, 436-42 (1952); 2 *id.* chs. 5 and 15 (1959).

with the opposing belligerent would be more limited. This would be matter for analysis in the context of the particular conflict situation, which can change through time. It must be recognized that the past trend of decision provides much room for broad discretion by belligerents.

4. Claims concerning belligerent conduct of hostile operations in neutral territory.

A state chooses to be neutral in order to avoid the destructive outcomes of armed conflict. So long as the neutral state adheres to its duties as a neutral, belligerent conduct of hostile operations in the neutral's territory would be unlawful. As noted above, if the neutral fails to prevent unlawful belligerent use of its territory, the opposing belligerent permissibly can conduct proportionate combat operations in the neutral's territory to terminate that unlawful belligerent activity. Beyond this exception, the problem of protection of neutral territory from destructive impact in future armed conflicts is posed by modern military technology.⁹⁸ Except for isolated minor instances of accidental misdirection of military firepower, neutral states in the past reasonably could expect to avoid destruction from the conflict. Their interest was in avoidance.

In future conflicts, one must acknowledge that if nuclear or bacteriological weapons are used, their destructive consequences may well be felt over wide regions, perhaps globally. Neutral states may suffer equally with belligerents. Missiles, nuclear and conventional, may go astray in neutral territory, and will be combatted by anti-missile systems at the opportune moment regardless of whether that happens to be when the missile is above neutral or belligerent territory. Modern aerial and long range artillery bombardment in border areas, or modern naval conflict near neutral coasts, necessarily will damage neutral territory accidentally. This was the case even during World War II, for example, when allied bombers accidentally dropped bombs on the territory of Switzerland.⁹⁹

Even if the belligerents causing this "incidental" damage to neutral states provide compensation, neutral states may have less ex-

⁹⁸See discussion in McDougal and Feliciano, *supra* note 1, at 388-90, 472-73.

⁹⁹Royal Institute of International Affairs, *supra* note 44, at 224-35.

pectation of avoidance of destructive effects in future armed conflicts. Further, depending upon the intensity of damage that is suffered by neutrals and upon the capability of belligerents causing the damage to provide compensation, there may develop a trend that the belligerent is not liable for damage that resulted unavoidably in the course of lawful, nonnegligent combat operations against the opposing belligerent, or that the belligerent causing damage in that situation is liable only to contribute compensation according to its capability.

V. CONCLUSION

In this impressionistic, highly selective survey of the developing law of neutrality in modern armed conflicts, the author has emphasized, first, that accurate, useful analysis and appraisal of legal developments require a methodology entailing: (a) comprehensive and contextual factual analysis of the particular process of armed conflict and of the relations of the particular belligerents and neutrals; (b) a careful analysis of the trends of legal decision on claims concerning neutrality and of the changes in conditions upon which those trends are based; and (c) appraisal of those trends in light of advocated world community policies.

Second, our brief survey of selected trends of decision has emphasized: (a) that the laws of neutrality are indeed pertinent to community policies concerning the maintenance of international peace and security and the limitation of the destructive outcomes of armed conflict; (b) that although the development of rules limiting the use of armed force in international relations and the establishment of the United Nations Charter system have had major impact upon the traditional laws of neutrality, substantial scope exists for the developing law of neutrality to continue to operate; and (c) that modern warfare and the present world power process already have resulted in customary practice repudiating or modifying many of the traditional rules of neutrality law.

The challenge for future legal research is both to determine definitively the present trends in the laws of neutrality, and to propose to world community decision-makers recommendations for change that will assure that the modern law of neutrality promotes

the maximum achievement of the twin goals of public order and minimal destruction from armed violence. In devoting effort to this task, legal scholars will, indeed, be serving "the interests of humanity and the ever progressive needs of civilization."¹⁰⁰

¹⁰⁰Preamble, Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277; T.S. No. 539; Martens, 3 Nouveau recueil general de traites 461.