

BACK TO THE FUTURE:

THREE CIVIL WARS AND THE LAW OF NEUTRALITY

I. INTRODUCTION

In the post-1945 era, civil wars have been the predominant form of armed conflict. Yet, while it is the job of the United Nations Security Council to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression', and to proceed to 'maintain or restore international peace and security' (1), this power has been utilised rarely with regard to an armed conflict occurring within the territorial confines of a single state. Instead, in the vast majority of cases, modern civil wars have been left to be solved through regional arrangements, or within domestic state confines.

On the other hand, the nineteenth century community of nations had developed a law of neutrality to guide international relations should war break out. When the American Civil War (April 1861 - April 1865) erupted (2), neutrality was adopted by most third states towards the conflict. This legal regime allowed states to prevent the war's spread to Europe, and to continue peaceful trade relations with each of the warring parties.

The law of neutrality was effectively modified during World War I, primarily due to the economic and technical nature of that major conflict. The Covenant of the League of Nations, adopted by the Paris Conference on 28 April 1919, was in turn an attempt to curtail the use of force in international relations. (3) Thus, when the

Spanish Civil War (July 1936 - March 1939) erupted, many states followed a policy of non-intervention (4), rather than of neutrality in the face of a belligerency. In other words, the law of neutrality was, strictly speaking, not considered to be applicable.

In view of the central political authority wielded by the U.N. Organisation, the purpose of this article is to compare nineteenth and twentieth century mechanisms to contain war and, in particular, domestic armed conflicts. It is hoped that, by briefly examining international strategies utilised over these two centuries to contain war, some useful perspective will arise regarding the maintenance of a post-Cold War peace. (5) For instance, the law of neutrality was developed by sovereign states to apply principally between them, yet it proved applicable to the American Civil War. The post-1945 international community, on the other hand, has experienced difficulty in co-ordinating policy with regard to domestic armed conflicts. Thus, any survival of traditional neutrality law is of central importance to this discussion.

A preliminary point, however, must be that the nineteenth century law of neutrality was developed during a time in which war was not prohibited. (6) On the contrary, war was, among other things, a source of legal effects. (7) The belligerents were equal in law, and victory could change the law. Once purely formal requirements for waging war between 'civilised' nations were met and observed, such as observing the laws and

customs of war, a state of belligerency was recognized by foreign states, after which the law of neutrality applied. (8) The law of neutrality allowed a degree of friendly relations to continue between the belligerents and a neutral state, so long as the neutral aided neither party to the conflict in its war effort.

Thus, the law of neutrality formed a vital part of the laws of war. When the Southern Confederate states seceded from the North, or Union, states in 1861, and U.S. President Abraham Lincoln blockaded many Confederate ports (9), belligerency was recognised, and the law of neutrality observed, by most foreign states because of the nature and extent of the hostilities. Most importantly, the recognition of a state of belligerency through the utilisation of the law of neutrality was not a recognition of Southern Confederate independence, which never occurred. (10)

The League of Nations, and the Pact of Paris (11), were attempts early this century to alter the legality of waging war. Neutrality law, as a point of reference for the international community, fell into desuetude, as did the laws of war generally (12), as 'no member of the League of Nations is ever justified in adopting a policy of neutrality toward a state which is violating the Covenant'. (13) Thus, a collective policy of non-intervention was observed during the Spanish Civil War (14), the attempted containment of which marked what was felt at the time to be a triumph for a co-ordinated

international approach to the question of belligerent rights, and the maintenance of peace. (15)

Post-1945, the interstate threat or use of aggressive force is largely prohibited. When assessing the legality of the use of interstate force, a two-tiered scrutiny is utilised: that of the *jus contra bellum* and the *jus in bello*. (16) Further, in view of the many 'internationalised' aspects of wars of self-determination, this double scrutiny has also been of growing importance to 'domestic' armed conflicts. (17) Thus, judicial and U.N. General Assembly interpretations of post-1945 rules on the use of armed force imply that foreign assistance afforded to a non-state party engaged in a high-intensity armed civil strife may no longer automatically constitute aggression. (18)

Thus, the nineteenth century law of neutrality is viewed by some commentators as superceded by the collective security provisions of the U.N. Charter (19), with the option of League 'non-intervention' reduced should the U.N. Security Council act or permit a regional arrangement to act to resolve a situation of domestic armed conflict. (20) In any event, third states in the modern era cannot consider themselves bound by the law of neutrality (21), but interest in neutrality law persists. Its continuing relevance is assured, if only due to the use of the blocking vote in the Security Council (22) throughout the post-1945 Cold War, and an international climate of constant war and preparing for war. For example, states protect their nationals and

property during civil armed conflicts by observing aspects of traditional neutrality law, e.g., by abiding by neutral rules against the premature recognition of independence of a rebelling faction within a state. (23)

In order to explore these many issues, the structure of this discussion is as follows. The origins and development of the law of neutrality are first examined. The crucial relevance of neutrality law to third-state action during the American Civil War, and the Spanish Civil War, is then outlined. Post-1945 provisions regarding the use of threat of force in international life, developments in the laws of war, and the survival of aspects of neutrality law, are then reviewed in order to gauge their post-Cold War efficacy during the dissolution conflicts of the former Federal Republic of Yugoslavia (June 1991 - November 1995), and, in particular, the war in Bosnia-Herzegovina.

II. THE LAW OF NEUTRALITY

In general terms, modern European wars were fought for a 'just cause' until the sixteenth century. This meant basically that force was justified if used to rectify the breach of a pre-existing legal state of affairs. (24) A tendency to characterise unilaterally the 'just' basis of a conflict however made the adversaries unequal in rights, and the types of harm that a 'just' (or Christian) belligerent could employ to punish the wicked knew few restrictions.

With the discovery of the New World, and of the new western civilisations, clerical disagreement over what was 'just' led to greater governmental interest in the laws and customs of warfare. The 'just' bases for waging war had become less clear; instead, the regulation of the use of force gained in importance (25), the result being that a state could release itself from all international law obligations by a declaration of war, except those obligations which related to war's conduct. (26) States which wished to remain outside of a conflict, and to continue friendly trade unhampered, could only ensure the continuation of such peacetime legal rights by adopting a stance of neutrality. Neutral practice varied, however, and the community of nations adopted principles of armed neutrality in 1780 and 1800. (27)

A. The Development of the Principles of Armed Neutrality

F.E. Smith, writing in 1900, notes that 'the law of neutrality differs from other branches of international law in the comparative certainty with which its rules may be stated'. (28) In brief, there were two principles. First, neutrals were entitled to continue peaceful trade during a war. Secondly, belligerents were entitled, for wartime purposes, to monitor certain forms of such trade in order to prevent the delivery of prohibited contraband. (29)

As trade was conducted publicly, and privately, the law of neutrality involved state-to-state relations, and

the relations between belligerent governments and neutral individuals. By the late eighteenth century, theory and practice both indicated that the duty of neutral states was to remain impartial, although it was common for neutrals to supply troops to one of two belligerents.

(30) The greater conformity in state behaviour though was in relation to neutral territory rather than maritime practice (31), and it was this latter area which led to the adoption of the principles of armed neutrality in 1780.

The background to the 1780 principles is briefly as follows. The Peace of Paris in 1763 had left Great Britain in possession of a huge colonial empire in North America. After its thirteen colonies declared their independence as sovereign states on 4 July 1776, forming a confederation for their mutual defence, the French court acknowledged this independence. On 6 February 1778, France made two treaties with the new republics (32), which it notified to Britain, whilst denying that the legality of the independence was the affair of France. France then complained of British cruisers interfering with its lawful commerce with the new republics. Britain found itself faced with a potential alliance between European maritime powers and its former colonies, and sought assistance from The Netherlands and Russia, each of which declined the request.

Russia and Spain then found their sea trade was being hampered by Britain. On advice, the Russian Empress Catherine II announced to the European powers

that she would not allow their wars to harm Russian trade. On 26 February 1780, she communicated the following principles to the courts of London, Versailles, and Madrid:

- (1) neutral vessels may navigate freely;
- (2) enemy goods carried in neutral ships are protected, apart from illegal contraband (33);
- (3) the definition of contraband contained in the tenth and eleventh articles of her 1766 treaty of commerce with Britain would be applied to all the powers at war (34);
- (4) a blockade must be effective; and
- (5) these principles would apply to the adjudication of prizes. (35)

On 9 July 1780, Denmark and Russia concluded a convention of armed neutrality to maintain these principles. Sweden acceded on 9 September 1780; the new American states, on 7 April 1781; Prussia, on 8 May 1781; Austria, on 9 October 1781; the Netherlands, in 1781; and the king of the two Sicilies, on 10 February 1783. (36) Britain, France, and Spain each communicated that it already observed these known principles of the law of nations.

The next twenty years were fraught with differing assertions of the maritime rules omitted from the 1780 Treaty. In particular, the 'duty' of neutral vessels to submit to visit by a belligerent searching for illegal contraband was problematic, as this could result in a fleet being stopped for visit and search by a single

privateer. Due to this, and other, diplomatic problems, the Russian Emperor Paul proposed a convention to the northern powers of Denmark, Prussia, and Sweden, to renew the 1780 neutrality rules and to develop mutual defence measures. (37) Three treaties were signed at St. Petersburg on 16 December 1800. (38)

This 'Second Armed Neutrality' lasted a year, after which Britain and Russia signed a convention on 17 June 1801 for 'an invariable determination of their principles upon the rights of neutrality ...'. (39) Denmark acceded to this convention in October, and Sweden, in March 1802. The 1801 treaty codified pre-existing rights, and contained new conventional law between the contracting parties. The three northern powers conceded 'free ships, free goods' (40), and search only by public ships of war. Britain conceded points regarding colonial and coasting trade, blockades, and mode of search, yielding to Russia the limitation of contraband to military stores.

Subsequent developments of note in the law of neutrality include, for present purposes, the U.S. Foreign Enlistment Act, passed by Congress on 20 April 1818, which was intended to prevent the enlistment of U.S. citizens in foreign wars. The U.S. Act was soon followed by the British Foreign Enlistment Act of 1819. (41) By the outbreak of the Crimean War in 1854, rules on the capture of property at sea were once again in need of harmonisation. The participants in that war agreed they would not authorise privateering. When the

representatives of seven states (42) assembled at the Congress of Paris in 1856 to conclude terms of peace, they adopted the Declaration of Paris. The Declaration incorporated into international law the following agreements:

- (1) privateering was abolished;
- (2) free ships made free goods;
- (3) neutral goods on enemy ships must not be appropriated; and
- (4) blockades must be effective, in the sense of preventing access to the enemy coast. (43)

B. The Operation of the Law of Neutrality

As previously noted, neutrality law pre-supposed a war between sovereign entities and the equal treatment of sovereign belligerents by neutral third states. Thus, states A and B, at war with each other, would be treated equally by neutral state C. By maintaining neutrality towards the belligerents, state C could ensure a level of continued friendly relations and trade. Where neutrality was breached, state A or state B could attack offending state C. Thus, neutrals did not allow their territory to be used by a belligerent for purposes of the war effort (44), which could include the fitting out and equipping of belligerent vessels 'to order' for use in war. It would also be a breach of neutrality for a neutral government to loan money to a belligerent. (45)

Private trade in contraband and blockade-running were discouraged but any prohibition was relative rather

than absolute; isolated cases were rarely imputable to a government which observed proper precautions. A neutral state could permit private traffic, leaving the belligerent government to confront the offending individual. (46) The ordinary penalty for carriage of contraband was confiscation of the cargo and/or vessel, which became a 'prize' upon capture. Such captures required legal confirmation by a prize court, which the admiralties of maritime belligerents were obliged to institute. Belligerent maritime rights of visit and search were also adjudicated, as well as violations of the many varieties of blockade. (47) For example, a 'pacific' blockade was considered a pre-belligerent act, falling short of war. A blockade 'proper' indicated belligerency, and had to be effective. An ineffective blockade was termed a 'paper blockade'. The question, then, was whether the blockade was intended for strictly military purposes, or to carry on a war against trade. (48)

C. Neutrality 1861 - 1865

Despite such seeming clarity in the rules, neutral third states had first to decide whether a belligerency existed (49), because a decision to recognise belligerency brought neutrality law into operation. A proclamation of neutrality constituted a legal acknowledgment of a state of war. At this point, the rights and duties of both belligerent and neutral were exercisable. There was generally no 'right' to a

recognition of belligerency, but it usually followed from a de facto state of affairs which disturbed neutral trade and diplomatic relations.

As regards neutrality law and civil wars, a domestic armed conflict could be identified as a state of belligerency either by the government against which the rebels fought or by third states. Prior to that time, the conflict could be characterised as an insurrection, or a revolt. The line of demarcation between revolt and full-scale civil war looked to the way in which the war was fought, and in particular, whether there was evidence of 'military science, tactics, and regulations, with the winning of specific military objectives as the immediate goal of the fighting'. (50)

1. Foreign recognition

The American Civil War presented the community of nations with such a de facto state of affairs. Foreign recognitions of belligerency were provoked by President Lincoln's blockade of the Southern ports on 19 April 1861. The U.S. government feared the foreign recognition of Confederate independence, and asserted throughout the war that the conflict was at most an insurgency. The U.S. felt that outside recognitions of belligerency - in particular, by Britain - were both premature, and an interference in U.S. domestic affairs. However, while the many proclamations of neutrality (51) led to equal treatment of the belligerents by the community of nations, the emotive issue of Southern slavery prevented

any international consensus regarding Confederate sovereignty. (52) However, strategic, and economic, considerations such as industrial links with Southern cotton, and concern over the territorial integrity of Canada, led to some sympathy towards the Confederate states, which had formed a government and commanded territory, were culturally and economically distinct from the Northern states, and had forces which observed the laws of war. (53)

The many proclamations of neutrality should have resulted in the continuation of friendly trade relations between the belligerents and neutral nations. However, as the U.S. refused to view the war as a belligerency, the rules did not always operate as expected. The U.S. interfered continuously with 'legitimate' Confederate trade, and it protested throughout the war, to Britain in particular, about foreign sources of Confederate procurement.

2. The growing importance of neutral territory

A crucial aspect of the operation of the law of neutrality was that the neutral duty not to supply war material to a belligerent did not necessarily extend to private commercial transactions by private citizens. For example, the U.S. protested to Britain, without justification in international law at the time, regarding private shipments of arms and munitions to the South. Problems also persisted in distinguishing between acts neutral states should restrain, particularly with regard

to the sale of ships. Uncertainty about neutral state responsibility for private activities in turn strengthened the argument that the duty of impartiality should extend to state control over private commercial activities such as shipbuilding performed 'to order' for belligerent naval operations. (54)

British shipbuilders were thus under no legal obligation to inquire into the use to which a vessel might be put, and carried on an open trade with the Confederate states. (55) By 1862, there was no doubt that Confederate cruisers were being built in British territory. As the neutral was concerned only to see that at the time of leaving the territory a ship was 'incapable of attack and defence' (56), English Commissioners of Customs assumed that a ship was prima facie the subject of innocent merchandise. This was a rule of the community of nations. As Justice Story had said in 1822, '(t)here is nothing in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit ...'. (57)

However, the U.S. remained opposed to this trade, and in the notorious case of the ship 'The Alabama' (58), drew British attention to the fact that this vessel was intended for the Confederate states (albeit indirectly), and demanded her arrest. The vessel escaped from Liverpool without arms or Confederate crew, and the law officers of the Crown advised that the Foreign Enlistment

Act should be used to prevent a re-occurrence of this embarrassment. The provisions of that statute, however, did not cover equipment which gave no means of attack or defence, and additional vessels managed to escape. The U.S. proposed arbitrating 'The Alabama' claims in 1863, without success. (59)

After the war, the U.S. made a heavy claim against the British government, claiming indemnity for increased rates of insurance caused by the destructiveness of these vessels, the transfer of the American carrying trade to England, and the prolongation of the war by at least two years. (60) The British, too, had claims. On 8 May 1871, the parties entered into the Treaty of Washington for the purpose of arbitrating their differences. (61) The rules of neutral duty were the law of the tribunal, which opened in Geneva in 1871. (62) On 14 September 1872, the arbitrators awarded \$15,500,000 to the U.S., in damages payable by Britain. (63)

D. The Laws of War, and the Hague Rules

The many legal and financial consequences which flowed from the application of neutrality law during the American Civil War made subsequent recognitions of belligerency rare. (64) States were increasingly hesitant to be drawn into the debate over the content of neutral duties, or to risk war by defending private interests. Nevertheless, the 1871 Geneva arbitration marked the beginning of a consensus that the waging of

war between 'civilised' nations could be made more certain, as well as more humane.

In particular, the American Civil War contributed to this consensus through the promulgation of the Lieber Code (66) to the Northern Union troops. The Lieber Code in turn provided a ready format for subsequent projects to codify the international laws of war, most notably, the Brussels Conference of 1874 (66), the Oxford Manual of 1880 (67), and the two Hague Peace Conferences of 1899 and 1907. (68)

Both in 1899 and 1907 'the desire to serve, even in this extreme case (of war), the interest of humanity and the ever progressive needs of civilisation' was expressed. (69) After the Franco-Prussian War (1870 - 1), the idea was further espoused that neutrality should be considered as part of the law of peace as much as, or rather than the law of war, because this body of international law allowed neutral states to counter tyranny, and safeguard their independence. (70)

The South African (1900) and Russo-Japanese (1904 - 5) Wars contributed to the inclusion of neutrality law in the deliberations of the Second Hague Peace Conference in 1907. (71) This resulted in Hague Convention V respecting the rights and duties of neutral powers and persons in war on land, and Hague Convention XIII respecting the rights and duties of neutral powers in naval war. (72) The neutrality rules developed in three parts: rules imposing duties on neutral states and belligerents, rules imposing duties on neutral states,

and rules imposing duties on belligerents. (73) New conditions in international life were further signalled with the establishment of a Permanent Court of Arbitration at the Second Hague Peace Conference, where states could arbitrate their grievances.

By no means were these codifications viewed as complete, but they represented an effort to codify what was generally viewed as customary practice. The new rules contained some elements of innovation, such as the proposal in Hague Convention XII for an international prize court to serve as a court of appeal from decisions of the prize courts of belligerents (74); however, this secured no ratifications. Hague Convention VII relative to the conversion of merchantships into warships, and Hague Convention XI relative to certain restrictions on the exercise of the right of capture, were indirectly of importance to the law of neutrality. (75)

In order to find a common basis for prize courts, a naval conference met in London in 1908, and in 1909 produced the Declaration of London concerning the law of naval war. (76) Although never signed, the belligerents in the Turco-Italian War (1911) largely complied with the Declaration, as did the U.S., Germany, and Austria-Hungary during World War I, until July 1916, the point by which Britain had so restricted the application of the Declaration as to make it inoperable. (77)

III. THE LEAGUE OF NATIONS AND THE PACT OF PARIS

The substance of neutrality law was damaged heavily during World War I, and in particular, by the demands made on neutral states to participate in what was seen at the time as a 'total war'. It is perhaps not surprising therefore that neutrality came to be viewed as 'not morally justified'. (76) Politis notes that the rules were transgressed from the beginning of hostilities, particularly those relating to maritime operations. (79) The economic demands of a total, mechanised war led to longer lists of prohibited contraband; the rule requiring 'effective' blockades was completely abandoned, and automatic contact mines decimated neutral shipping, further threatening the right of states to choose to abstain from the hostilities. (80) New developments in technology and military science meant that 'civilised' nations could no longer observe an impartial law of neutrality which could not safeguard world order.

These unprecedented incursions into neutrality law not only modified the laws of war, but also those of peace, or of non-belligerency, and the Covenant of the League of Nations reflected these incursions. Although members of the League did not renounce the right to resort to war, the jurisdiction of the League Council extended to any dispute likely to disturb the peace. (81) The Pact of Paris of 1928 (82) strengthened the League preference for mediation and collective security (83) by altering the status of aggressive war in international law. (84) This in turn altered much of the political rationale for a law of neutrality.

A. Neutrality as Defence

From 1936, if not well before, states were aware that the legal limitations on resort to war were being disregarded. (85) It is sufficient for present purposes to note the re-militarisation of the Rhineland by Germany in 1936, Germany's annexation of Austria in March 1938, the cession of the Sudetenland to Germany in September 1938, the occupation of Prague by German troops, the incorporation of Bohemia and Moravia into the Reich as 'protectorates', both in March 1939, and the German invasion of Poland, in September of that same year. (86)

Rather than an increase in international vigilance to forestall the outbreak of aggression, attention focused defensively on peace. The traditional law of neutrality maintained an existence in the new moral order, but the dilution caused to its content of abstention and impartiality resulted in a growing distinction between a law of neutrality which was applicable during war, and a stance of neutrality pronounced during a time of peace. Thus, when civil war broke out in Spain in 1936, individual state 'peacetime' neutrality was of paramount importance. The U.S. enacted legislation in 1936 and 1939 to place wide restrictions on citizen trade with belligerent countries (87); Belgium and The Netherlands affirmed their attitudes of neutrality; Switzerland strengthened its own. The Scandinavian states followed suit, re-affirming their position through a code of neutrality rules in 1938. In

1939, a General Declaration of Neutrality was adopted by twenty-one American Republics, including the U.S.. (88)

B. Non-Intervention

The Spanish army revolted on 17 July 1936 against a newly elected Popular Front government which had gained power after a closely fought contest. However, despite appealing for assistance, as it was legally entitled to do, the new Spanish government was met with a Non-Intervention Agreement which Britain, Belgium, The Netherlands, Poland, Czechoslovakia, and France entered into on 7 August 1936, and which was signed ultimately by twenty-seven European states. (89) Germany signed the Agreement on 17 August, but not the Preamble. Italy did likewise on 21 August. (90) The joint policy was in effect an embargo, thereby avoiding the problem of recognising belligerency. (91) This meant that the rights and duties of neutrality were not called into play, and in particular, that the right to stop and search maritime shipping to search for wartime contraband was not recognised.

The Non-Intervention Agreement thus created an anomaly. The Agreement neither contemplated a recognition of belligerency, nor that aid could be given to the legitimate Spanish government. On the other hand, by attempting a co-ordinated embargo over public and private trade, the Non-Intervention Agreement went further in the process of an attempt to contain and shorten war than had the abstentionist law of

neutrality. The irony perhaps is that the absence of an European recognition of belligerency prevented the legitimate exercise of neutral rights and duties by the Popular Front government. This meant the government could not exercise its right of maritime surveillance over the supply of contraband, which handicap facilitated assistance reaching the rebels led by General Franco from those countries which chose either not to implement the Agreement, or which did so only partially.

Further complicating the matter, the operation of the Non-Intervention system was partial, as well as regional. For example, the U.S. followed the European lead. Mexico objected strongly to the policy and aided the Popular Front government, insisting that covert German and Italian assistance to the Spanish rebels constituted an aggression in breach of the League of Nations Covenant. Russia aided the Spanish government secretly. (92)

Germany and Italy recognised the rebel forces of General Franco as the legitimate government on 18 November 1936, affording full diplomatic relations. Republican forces finally capitulated on 31 March 1939, in large part due to German and Italian aid in the form of war material and troops, which included entire fighting divisions, armaments, planes, and technicians. It could thus be argued that the political realities which underpinned the faulty and partial operation of the Non-Intervention Agreement also helped to facilitate the rise of European Fascism. As for the traditional law of

neutrality, it technically survived the Spanish Civil War in legal commentary which largely denied its relevance to the situation. (93)

C. The Covenant and Civil Strife

It was clear by reference to action taken by the League of Nations during the Spanish Civil War that insurrection and civil war were not merely domestic or regional problems. The League of Nations publicised facts, and condemned foreign intervention, indiscriminate aerial bombing and torpedoing. It supported initiatives to end the conflict. Further, the Covenant's general war prevention functions provided it with some jurisdiction. Articles 3 and 4 of the League Covenant permitted 'any matter .. affecting the peace of the world' to be discussed. Article 10 empowered the Council in cases of aggression to advise measures; Article 11 referred to 'war or threat of war'; and Articles 12 and 15 referred to 'any dispute likely to lead to a rupture'. Nevertheless, procedure under Article 11 was not exhausted, and Articles 12, 13 and 15 were 'hardly tapped'. (94)

Spain first appealed to the League of Nations in September 1936, predicting that 'the blood-stained soil of Spain is already in fact the battlefield of a world war'. (95) However, much of the League's inaction illustrates the complete dependence of League decision-making on its member states. From early 1936, Spanish internal affairs reflected the growing continental

hegemonic struggle between Communism, Fascism, and Democracy. The refusal of the Agreement states either to aid the Spanish government, or to proclaim the rights and duties of neutrality through a recognition of belligerency allowed attention to be focused instead on the respective merits of the political ideologies in conflict, and Germany and Italy in particular breached the spirit of the Non-Intervention Agreement with impunity. Thus, it could be argued that the realities of international reaction to the Spanish civil war were a foretaste of the reappearance of the 'just' war mentality which was to characterise World War II, and its aftermath at the International Military Tribunals at Nuremberg and Tokyo.

This explicit politicisation of international reaction to an armed conflict in turn decreased attention paid to the means and methods by which the war was fought, thereby implying that the laws of war were of secondary importance. In other words, as a situation of war was not recognised as such by the international community, international scrutiny of the implementation of the laws and customs of war was reduced. As a result, there was little incentive to, or pressure on, the belligerents to wage the war in any remotely humane manner. The restraint codified inter alia by the Hague Conventions was lacking, and the types of harm inflicted on notional 'unjust' adversaries during the Spanish Civil War knew few limits.

IV. NEUTRALITY AND THE U.N. CHARTER

From 1780 to codification at the Hague in 1907 (96), the law of neutrality constituted one mechanism through which neutral states could preserve a largely uninterrupted commerce, and confine war. The need for such a mechanism is subsequently reflected in the Covenant of the League of Nations, the Pact of Paris, the 1941 Atlantic Charter (97), and the U.N. Charter. Yet, these many instruments do not apply expressly to civil wars. (98) Further, no provision in the U.N. Charter indicates expressly whether or not the law of neutrality survives. The issue whether neutrality law remains an option (99), at least until the collective security system contained in the U.N. Charter is employed, must, then, be raised.

With the advent of the U.N. Charter, the international community acquired a legal framework through which to guide global issues, including those of peace and war. While the Charter prohibits the interstate use or threat of aggressive armed force in Article 2(4), it is of interest that the laws of armed conflict were modernised in 1949 and 1977. The International Humanitarian Law of Armed Conflict (IHL) (100) today contains limited aspects of traditional neutrality law, and extends to civil, or domestic, armed conflict at least minimal rules.

These developments will now be discussed, after which the efficacy of the modern prohibition on the interstate use of force, as developed in tandem with IHL,

in co-ordinating international behaviour during an armed conflict will be assessed by use of the example of the recently resolved armed conflict in Bosnia-Herzegovina.

A. The Post-1945 Prohibition of the Use or Threat of Armed Force

In 1928, the international community attempted to proclaim the illegality of 'wars of aggression' between states by means of the Pact of Paris. (101) Nevertheless, the threat or use of force in interstate relations remained controversial until the international agreement found in U.N. Charter Article 2(4). Article 2(4), in providing that states 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, ...' (102), seeks to guarantee the territorial integrity of all states and not just of neutral states. Thus, should state A and state B use force against the territory of state C, the territory of state A or state B is not automatically open to retaliatory attack by state C. State territory remains under the protection of Article 2(4), unless state C can make a plausible case for a retaliatory use of force under an expansive approach to U.N. Charter Article 51. (103)

Article 51 guarantees to each state the right to use individual or collective armed force to repel an aggressor until the Security Council can act with regard

to the situation. (104) Thus, third states have the right to assist the victim state, if requested, for this limited purpose, and need not take the law of neutrality into account. Should state A and state B attack state C, state C has the right to defend itself, and to request state (or regional authority) D to come to its immediate assistance. An attack against the territory of state A or state B by state C (the original 'victim') beyond the bare confines of self-defence, however, may constitute a further breach of Article 2(4).

Strictly speaking, Articles 2(4) and 51 apply to states. Situations of civil armed conflict remain beyond the confines of Article 2(4) until a threat to international peace and security is posed. (105) The difficulty of course remains the binding identification of an Article 2(4) and/or Article 51 situation.

B. The Continued Viability of the Laws of Neutrality and of Armed Conflict

The 'non-belligerents' of World War II included those states supporting one of the belligerents, as with the U.S. Lend-Lease Act. (106) This is later reflected in U.N. Charter provisions, which permit a distinction between types of neutrals: 'permanently neutral' states are distinguished from 'non-belligerent powers' through the formers' non-participation in U.N. actions, their refusal to allow troops to transit through their territory, and their appeal to neutral rights in maritime warfare.

While it is clear that Charter collective security provisions supercede neutrality law, except perhaps for the permanent neutrals, a level of optional neutrality remains, giving rise to the modern legal acceptance of terms such as 'benevolent neutrality', 'non-belligerency', and 'states not party to the hostilities'. (107) States wishing to maintain friendly relations with belligerents have thus been able to do so, particularly in view of the general ineffectiveness of Security Council decision-making and utilisation of collective security mechanism by means such as the blocking vote, the recommendation of non-binding measures, or when no U.N. action is even requested. It is at this point that the perspectives provided by the traditional law of neutrality retain viability. Nevertheless, within the context of U.N. Charter Articles 2(4) and 51, there is a central dilemma for any assessment of the technical survival of the law of neutrality: a declaration of neutrality made prior, or subsequent, to U.N. debate and/or collective action could legitimate both the hostilities and an aggressor.

As for post-Charter developments in the laws of armed conflict, the experiences of World War II indicated a need for their revision. Today, the laws of armed conflict, or IHL, consist of both codified and customary international legal obligations, including those rules contained in the four Geneva Conventions of 1949, and their Protocols 1 and 2 of 1977. (109) Further, while the vast majority of post-1945 armed conflicts have been

'civil', and propelled by a largely undefined U.N. principle of 'the equal rights and self-determination of peoples' (109), the internationalised nature of such armed conflicts is recognised in Protocol 1, which extends the protections of IHL in full to some liberation conflicts. (110)

Limited aspects of neutrality law are carried forward into the Geneva revisions. The respective rights and duties of 'neutrals or non-belligerent powers' are formally codified in the 1949 Geneva Conventions, with the more precisely stated 'neutral and other states not party to the conflict' contained in Protocol 1 of 1977.

(111) Many Hague rules remain in effect, and neutral persons, powers, countries and territory are mentioned.

(112) What these many provisions cover in essence, however, are issues such as the impartial treatment of the sick and wounded, hospital ships and medical aircraft. In other words, the limited aspects of neutrality law which continue to appear in codified form within the laws of armed conflict are mainly humanitarian in nature. This in turn supports the role played by neutrality law within the law of peace as much as within the laws of war, a characterisation posited initially in the latter part of the nineteenth century, and codified in the Hague instruments of 1899 and 1907.

Despite the legal prohibition found in U.N. Charter Article 2(4), IHL law maintains an independent role: the use of armed force is regulated, doing so through different levels of rules which are dependent on whether

there is an international, or a domestic, armed conflict in fact. In other words, the level of implementation of IHL turns on the factual issue of whether there exists an armed conflict. If so, implementation of IHL is required from the outbreak of hostilities. (113) However, the term 'armed conflict' is undefined in IHL instruments, and states in the post-1945 era hesitate to view outbreaks of armed hostilities as necessitating the implementation of IHL, even after U.N. collective security mechanisms are engaged. (114) In that there is scant recognition of 'war' by states, reference to the laws of war, or in the more content-neutral manner in which they are known in the U.N. era, of 'armed conflict', is rare.

The disregard of IHL, or the *jus in bello*, which can result from this hesitation, is, however, anomalous. Implementation of IHL does not afford a legal status to the parties to the conflict (115) For example, even if minimal levels of IHL are initially implemented in a 'civil' armed conflict, the parties remain free to come to agreement regarding more precise IHL obligations should the armed conflict develop in intensity and duration.

Therefore, recognitions of belligerency are unnecessary. IHL does, however, require an assessment of the nature of the hostilities in order to refer to the appropriate level of rules, whether those which are applicable to an international armed conflict (the higher level), or those which are applicable to armed conflicts

not of an international character (minimal). Thus, conformity with the laws of armed conflict is entirely compatible with U.N. Charter provisions which provide for restraint in the use or threat of interstate armed force. The jus in bello simply obliges the parties to an armed conflict to conform their choice of means and methods of warfare to IHL provisions, and to afford humanitarian treatment to the various categories of protected persons.

C. Collective Security 1991 - 5

With the end of the Cold War, it would appear that the U.N. was presented with an opportunity to function as originally designed. In particular, the former U.S.S.R. superpower, with its Security Council seat altered to the name 'Russia', appeared ready to compromise with the West on numerous points in exchange for political, logistic, and economic support.

This premise, along with many other post-Cold War assumptions, has been put to the test, however, in one of the most problematic armed conflicts ever to face the U.N.: the dissolution of the former Socialist Federal Republic of Yugoslavia. While it is beyond the scope of this discussion to detail the causes and events of the hostilities which were on-going in the Balkans until recently, it is perhaps informative to contrast the actions taken by the international community regarding the Yugoslav dissolution, with the previous account of the law of neutrality.

1. An overview

Yugoslavia was constructed for political imperatives after World War I which were in part attributable to support for a pan-Slav union. Until recently consisting of six republics (Slovenia, Croatia, Bosnia and Hercegovina, Serbia, Montenegro, Macedonia), and two autonomous regions (Kosovo and Vojvodina), Yugoslavia was a co-belligerent with Britain during World War II. (117) However, Yugoslavia was divided within: the Croats supported the Fascists, while the Serbs engaged in a fratricidal war fought between a nationalist movement and Serb-dominated partisans.

After World War II, population transfers took place, as they had throughout the centuries, the Serb Ottoman tradition maintaining a clear advantage over the other groups. By 1992, Slovenia had small minorities of ethnic Serbs, Croats and Hungarians. Croatia had a minority of ethnic Serbs which formed local majorities in several administrative regions. Bosnia-Hercegovina had a Croatian minority, with the rest of its population divided roughly between Muslims and Serbs. Ethnic Serbs formed two-thirds of Serbia's population, into which the former autonomous regions of Kosovo and Vojvodian were incorporated in 1991 (the latter having an Albanian majority). Montenegro had Muslim and Albanian minorities. Macedonia had some Albanians and other minorities. (118) Uniquely, perhaps, the former Yugoslavia was constructed on a dual concept of

sovereignty: the sovereignty of the republics and the sovereignty of the nations. Independence of a republic required the agreement of the other republics, and most importantly, of the nations comprising it. (119)

In 1918, no or little regard was given to the region's economic requirements. (120) During the years of Communist administration, Yugoslavia's economic imbalances were controlled through massive state control. The West supported a federal Yugoslavia because of the notable economic success achieved by 1990. (121) Nevertheless, with the collapse of Communism in Eastern Europe, it was soon evident that a successful management of the economy alone could not amount to a political strategy.

As for the Yugoslav dissolution, Slovenia put forward the idea of an 'asymmetric federation' during initial discussions on constitutional change in 1990. (122) Serbia, on the other hand, remained committed to a unitarist structure. Slovenia proclaimed legislative supremacy on 27 September 1990, and voted for independence on 23 December, a day after the Croatian parliament proclaimed its legislative supremacy in hopes of a loose federation with Slovenia. On 25 June 1991, Slovenia and Croatia declared independence. Two days later, the Yugoslav army attacked the Slovene forces. Slovenia proclaimed a 'state of war', and appealed for international assistance. By July, hostilities in Croatia had broken out, predominantly in Serbian Croat areas.

2. Embargo and recognition

Although the outbreak of hostilities at this early date was arguably a matter of domestic concern, the U.S. suspended all economic assistance to Yugoslavia in May 1991. (123) On 5 July, the E.C. banned arms exports to Yugoslavia, suspended nearly \$1 billion in economic aid, and considered the formation of 'military interposition forces'. (124) The U.N. Security Council met, and unanimously adopted Resolution 713 on 25 September 1991. (125) The Yugoslav 'crisis' was stated by the Security Council to be 'a threat to international peace and security', which pronouncement fulfilled the requirements of U.N. Charter Article 39 and brought Chapter VII of the Charter fully into play. Resolution 713 further provided (T)hat all states shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia. By late October, European draft sanctions provided for the suspension of co-operation agreements and trade concessions with Yugoslavia. (126)

Foreign recognition of the independence of the new republics was made contingent on '(a)dequate arrangements (being) made for the protection of minorities, including human rights guarantees and possibly special status for

certain areas'. (127) Serbia refused to accept these terms, and the European draft sanctions were implemented. Over Serbia's continuing objections, the E.C. then proposed a set of unilateral commitments which each republic could assume while working toward collective agreement. (128) These included, *inter alia*, respect for territorial inviolability, the 'rule of law, democracy and human rights', and a guarantee of 'the rights of ethnic and national groups and minorities'. All Yugoslav republics wishing independence were invited to state their desire to comply with these commitments by 23 December; the issue of recognition would be decided on 15 January 1992.

Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina replied affirmatively to the invitation. Slovenia and Croatia were duly recognised. Macedonia was recognised on 6 April, as was Bosnia-Herzegovina, despite Bosnian Serb opposition. However, the issue of recognition was the final factor to drive Bosnia to a war it was capable of pursuing: Bosnia held over sixty percent of the former Yugoslavia's military industries on its territory, sixty percent of which were located in Croat or Muslim regions. (129)

On 27 April 1992, the 'rump' of Yugoslavia, or Serbia and Montenegro, and the Bosnian Serbs claimed to succeed to the legal and political personality of the former federal state. However, the U.N. and C.S.C.E. (or O.S.C.E.) determined that the former federal state of Yugoslavia had ceased to exist (130), and invited them to

re-apply for membership. While there was no doubt that Serbian and Montenegrin territory remained the subject of international rights and duties, the continued participation of Serbia-Montenegro in international organisations was used effectively to moderate its actions with respect to the now-erupted war in Bosnia. (131)

Finally, and after nearly four years of ethnic massacres and other war crimes, and gross violations of human rights during armed conflict, international efforts to negotiate a peace settlement which would respect the international personality and territorial integrity of Bosnia-Herzegovina succeeded, when the General Framework Agreement for Peace in Bosnia and Herzegovina was initialled in Dayton, Ohio on 21 November 1995 by the states and entities engaged in the Bosnian armed conflict. (132) The Dayton negotiations came about after a final brutal offensive by the Bosnian Serbs in July 1995, in particular against the enclave of Srebrenica, an area declared a safe haven by the U.N. Security Council on 16 April 1993 in Resolution 819. This final push in turn provoked a series of Nato air raids. (133) The U.S. took control of the negotiations, amidst allegations of a European-led failure to find a solution, and a 'managed' collapse of Unprofor to make way for U.S. diplomatic and military initiatives. (134)

In August and September 1995, a joint Federal Republic of Yugoslavia and Bosnian Serb delegation were induced to negotiate preliminary agreements, which in

turn led to the Dayton proximity talks in November. The Framework Agreement which resulted is roughly divided into arrangements which involve international organisations, some individual states (including three of the five successor states to the former Yugoslavia), side-letters, and Annexes. The Annexes to the Agreement subdivide into two basic categories: those regarding international transitional arrangements, e.g., military and police aspects of the peace settlement (Annexes 1-A and 11), and those on Bosnian constitutional arrangements, which include an agreement on human rights (Annex 6) and an agreement on refugees and displaced persons (Annex 7).

The continuing roles of all the international forces and organs (e.g., IFOR, Council of Europe) indicated in the Framework Agreement point to strong external control over the peace process, which includes financial arrangements. In particular, this supervision has been termed a 'government in parallel' (135), and there appears to be growing apprehension regarding its ultimate success. In particular, the continued defiance of many indicted war criminals, and strains within the Alliance generally regarding the U.S. troop pull-out scheduled for the end of 1996 have increased apprehension regarding the success of elections planned for Bosnia in September.

(136)

3. The laws of war

As previously noted, the nature of armed hostilities must be assessed in order to invoke the appropriate level of IHL rules. For example, the hostilities waged until recently for the territorial and political domination of Bosnia-Herzegovina, which for purposes of brevity is the main focus of this section, would appear territorially to have been a 'civil' war. Had the armed hostilities been viewed as a domestic armed conflict, as asserted primarily by Serbia throughout the conflict, the legal obligations of the parties to the conflict through observation of IHL legal rules would have been reduced to the minimal standards and humanitarian protections contained in Common Article 3 of the four Geneva Conventions, or at a slightly higher level, those contained in Protocol 2 of 1977. (137)

As all the new Balkan entities are party to both Protocol 1 and Protocol 2 of 1977 (138), IHL rules would accordingly be supplemented beyond those contained in the 1949 codifications. Nevertheless, the sheer level of intensity and the duration of the fighting would have encouraged the parties to view themselves as Common Article 2 'Powers', and to bind themselves accordingly to the full provisions of the four Geneva Conventions of 1949 (and Protocol 1). Further, allegations of active assistance afforded by third states, particularly Serbia, to the warring Bosnian parties provoked assertions throughout the conflict in Bosnia-Herzegovina that the armed conflict had to be viewed as an internationalised, or international, armed conflict from the beginning of

hostilities. On this basis, IHL in full would also be applicable.

IHL in full could further have been viewed as applicable from the beginning of hostilities in Bosnia-Herzegovina had the conflict been viewed as a 'people's' armed struggle for self-determination, which characterisation might have brought Protocol 1 of 1977, and thus, IHL in full, into play. The latter option, however, proved highly problematic.

a. the issue of self-determination

Domestic armed conflicts in which IHL may be applicable in full are wars of self-determination. (139) As regards Bosnian Serb (and Croatian Serb) claims to the right to use armed force to achieve self-determination, or national liberation as the case may be (140), Protocol 1 Article 1(4) extends IHL provisions in full to wars which arise from situations of 'colonial domination and alien occupation and ... racist regimes'. Protocol 1 also makes explicit reference to Resolution 2625, which arguably may be construed to bring the Bosnian hostilities within the ambit of Protocol 1 Article 1(4), and hence, IHL in full, in a non-colonial situation. (141)

However, when requested to consider the issue, the E.C. Arbitration Commission ruled that the doctrine of *uti possidetis* prevented any further unravelling of the new republics. In coming to its conclusion, the Commission relied in general terms on frameworks of

analysis applicable to colonial situations, in order to delineate an entitlement to self-determination in non-colonial situations, as follows. 'True' minorities can be distinguished from 'peoples' established in territorially defined administrative units of a federal nature, as '(i)n the absence of an agreement to the contrary, the former boundaries acquire the character of borders protected by international law'. (142) The Commission thus interpreted the right to self-determination of the Bosnian (and Croatian) Serbs to mean full political participation in an existing entity.

It would thus appear that IHL in full could not be made applicable to the Bosnian armed conflict on the basis of Protocol 1 Article 1(4); nor could IHL in full be made applicable to the Bosnian conflict solely on the basis of allegations of active third state involvement. On the other hand, the Yugoslav war crimes tribunal convened in The Hague on the authority of the Security Council has authority to prosecute persons from all the warring parties who were responsible for serious violations of IHL committed in the territory of the former Yugoslavia since 1991. (143) Prosecutable offences include the 'grave breaches' listed in the 1949 Geneva Conventions, but not those contained in Protocol 1. It is of interest that the statute of the Hague tribunal makes no mention of Protocol 1, yet the list of prosecutable offences goes far beyond the minimal provisions applicable to a Common Article 3 or Protocol 2 'civil' war situation. Furthermore, instituting an

international war crimes tribunal on the basis of prosecuting 'war crimes' perpetrated during a 'civil' war would have been highly problematic, as such minimal levels of IHL rules contain no provision for international jurisdiction over 'grave breaches' or 'war crimes'. (144)

The U.N. action taken in convening the Yugoslav war crimes tribunal in The Hague indicates that the international community considers the war in Bosnia-Herzegovina to have been an international armed conflict. On this basis, it would appear that the international community assessed the 'type' of war which occurred in Bosnia-Herzegovina within frameworks more germane to those utilised during an era in which neutrality law was fully operable, rather than (or arguably, as much as) within U.N. juxtapositions of 'aggressor' and 'victim' states. In other words, a factual situation of belligerency was assessed as endangering international peace and security by means of the scale, intensity, and duration of the conflict, and the way in which the war was fought.

b. the disregard of IHL in the post-1945 era

The double scrutiny applied in the post-1945 era between the *jus contra bellum* and the *jus in bello* denotes separate and distinct legal considerations. (145) In view of the restraint mandated in U.N. Charter Article 2(4), the *jus contra bellum* allows the merits of an armed conflict to be assessed. However, though the

use or threat of force between states is 'restrained' by the U.N. Charter, the issue of IHL rules remains relevant should armed hostilities occur, as the jus in bello contains legal standards which are to be applied to and by each party to the armed hostilities, regardless of the merits of the armed conflict.

However, IHL provides for international scrutiny over the use of armed force only during international wars which are recognised as such. (146) Domestic armed conflicts remain largely self-regulating, and IHL does not apply in 'peacetime'. Thus, the premature recognition of the new states in the former territory of Yugoslavia and the degree of international intervention involved throughout the duration of the conflict in Bosnia-Herzegovina are not only of interest for purposes of comparison with nineteenth century neutrality law, but further, reveal a new ordering of these two areas of international law.

It is no longer an arguable point that the new Balkan states were recognised as independent prematurely in order to facilitate international control over the hostilities which unfolded as a result of the dissolution of the former Yugoslavia. (147) The international reaction which could have been predicted during the age of the law of neutrality, on the other hand, would have been the reverse: a recognition by third states of the fact of a belligerency did not for example constitute a recognition of Confederate independence during the American Civil War, nor was the implementation of the law

of neutrality a pretext to involvement in the hostilities; the reason for a war was less important at that time than the way in which it was fought, and it thus becomes more clear why the laws of war were initially developed during this era.

Moreover, it might appear that any political uncertainty today regarding the purpose underlying the use or threat of armed force affords an opportunity to downgrade the importance of the laws of armed conflict. In other words, the level of protection provided through observance of IHL may be greatly undermined by disagreement regarding the more 'fundamental' issue of the nature of the use of force, which positioning effectively relegates the observance of IHL to one of secondary political-legal importance. It is in this way that many domestic and international situations of armed conflict are treated as 'emergency situations', or 'public order exercises' with correspondingly lower levels of protection afforded to those involved in them than might otherwise be the case were IHL implemented from the beginning of hostilities.

This modern prioritised, or relative, positioning of the jus contra bellum and the jus in bello may in turn influence U.N. decision-making regarding action taken in pursuance of collective security. It is thus at the point of IHL applicability that the potential for politicising the relevant frameworks of analysis within which to assess, or justify, the use of force becomes evident. A recognition that IHL rules are applicable

constitutes evidence of the existence of an armed conflict. The fact of an armed conflict raises in turn the need to provide some rationale or justification for the initial use of armed force in order to escape international censure.

While a disregard for IHL in the territory of the former Yugoslavia since 1991 has led to the convening of a war crimes tribunal at The Hague, it remains speculative whether practices such as 'ethnic cleansing' occurred because political considerations underlying assessments of the jus contra bellum clouded the more factual issue of the application of the jus in bello - when the two should remain separate and equal. Conversely, as a modern IHL allows states to pay less attention to the way in which 'civil' wars are fought, the fault - such as it may lie - appears locatable in the level of state co-operation to be expected by states where their mutual interests are not at stake.

Nevertheless, where the very nature of an armed conflict is in question, and hence the level of IHL to be observed by the parties to it, a high degree of normative confusion may result regarding the substance of the rights and duties to be made operable by the belligerents. This point, coupled with the reduced scrutiny afforded to domestic, or 'civil' armed conflicts by modern IHL codifications in turn reflects the inequalities present in the international community regarding the 'right' to use armed force. In turn, any uncertainty as to the true nature of the relevant

hostilities affords third states the option to declare neutrality and to maintain what could otherwise be characterised as normal relations - including trade links - with the warring parties.

V. CONCLUSIONS

There are of course many differences in nineteenth and twentieth century legal frameworks within which to view peace and war, not the least of which is the change in attitude towards the use of armed force. Thus, the fact that the law of neutrality was developed as a tool of state economic and political survival during a time in which war was not prohibited cannot be disregarded.

With the huge expansion in war technology by the end of the nineteenth century, the means and methods of warfare needed to be harnessed, controlled, and made more humane as to their use, as the purpose of war at the time was to weaken the enemy to the point of surrender. (148) Thus, the Hague Conventions of 1899 and 1907 codified the existing laws of war, and further incorporated the rules of neutrality. Alongside developments in the laws of war grew the complimentary but distinct Geneva Conventions.

Yet, the development of a predominately nineteenth century law of neutrality began to falter at the point of its codification at The Hague. New weaponry facilitated the rise of the doctrine of 'total war', a doctrine which favoured the targetting of anything or anyone which could fuel the war effort of the belligerents. This naturally

made a stance of neutrality increasingly difficult to maintain.

Developments in the laws of war, too, began to falter during the time of the League of Nations. While this situation was to change in 1949 with developments in the Geneva Conventions, the position is different as regards any modernisation of a law of neutrality in tandem with IHL. On the contrary, the new provisions in the U.N. Charter regarding the maintenance of international peace and security, including those provisions which deal with collective security, leave the present relevance of neutrality law very much in question. Nevertheless, the factual situation in which the law of neutrality developed and provided the tools of state survival during armed conflicts survives. Individual states, faced with a frequently deadlocked international organisation, continue to decide for themselves what action is appropriate regarding particular situations of armed strife, including domestic or 'civil' wars. However, while this would appear to be in exercise of the option to do so, states which continue to observe belligerent rights and duties are in effect frequently compelled to do so. (149)

Nevertheless, it remains a point of speculation that the fundamental difference between the operation of traditional neutrality law and U.N. collective security mechanisms is that when the latter are made operable, states are afforded a right of involvement and intervention in order to rectify an international breach

of the peace. On the other hand, the substance of any duty so to act is by agreement, leaving the extent of the resources made available for this purpose in doubt. Further, while the right to aid an international 'victim' obviously improves its chances of survival, ample scope is afforded for an assisting state to impose pre-conditions to the aid. Conversely, should the cause of a post-Cold War armed conflict be locatable within frameworks of international public policy which find little favour in a U.N. whose military capacity is dominated by the West, the 'victim' has a reduced ability to acquire international assistance.

Civil wars are notorious for their ferocity, intensity, and duration. The agricultural Southern Confederacy lost its struggle for independence in 1865 to the industrial North after a war lasting four years. The Geneva Arbitration ensued, after which both the laws of war and of neutrality were developed. The Popular Front government of Spain lost its struggle to the Franco Fascists in 1939 after a three-year struggle. World War II quickly followed, after which the Geneva Conventions were developed further. The law of neutrality was relevant to each of these armed conflicts, and it is of interest that the use of force was decisive in each.

While it would be erroneous to draw too firm a conclusion from these two examples, it does appear that efforts made this century to prevent war have culminated in a post-Cold War international environment in which international rights of intervention in the Yugoslav

dissolution conflicts could be made operable, achieving in the process impressive levels of political and ideological compliance in the new states. The Hague war crimes tribunal may also lend credence to these new post-Cold War efforts, as well as the many provisions in the Dayton Framework Agreement to promote and strengthen respect for human rights.

Nevertheless, international involvement in the domestic affairs of what had been a federal socialist Yugoslav state continues to raise some alarm at several points. The situation in 1990 was such that the Belgrade government could have expected to receive international support in order to preserve its political independence and territorial integrity. In 1991, domestic law was not complied with when Slovenia and Croatia declared independence. The European Community, through its premature recognition of the independence of the new Balkan entities, effectively accelerated the dissolution of the former Yugoslavian state, and the descent of Bosnia-Herzegovina into a four-year war. The subsequent indecisiveness of action adopted by the international community did little more than help to prolong the conflict.

Neutrality law accepted that aid rendered to a belligerent invites retaliation. This basic premise is occasionally perceived as relevant in more modern times, despite the fact that belligerents can be characterised as 'aggressors' and 'victims'. Nevertheless, and in view of the manner of resolution of the Yugoslav dissolution

wars, any differences in efficacy between an impartial law of neutrality and a highly partial U.N. in preserving and restoring peace and security appear to be increasing.

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Notes

1. Charter of the United Nations Article 39. See also Articles 36 - 8.
2. See, e.g., Q. Wright, 'The American Civil War, 1861 - 65', in The International Law of Civil War (R. Falk, ed.) (Baltimore, Johns Hopkins Press, 1971), at 30; D.P. Crook, The North, the South, and the Powers 1861 - 65 New York, Wiley, 1974); M. Ellison, Support for Secession - Lancashire and the American Civil War (Chicago, University of Chicago Press, 1972); F.J. Merli, Great Britain and the Confederate Navy 1861 - 1865 (Bloomington, Indiana University Press, 1970); J.G. Randall and D. Donald, The Civil War and Reconstruction (Boston, D.C. Heath, 2d ed. 1961); Adm. F.E. Chadwick, Causes of the Civil War 1859 - 61 (New York, Harper, 1906). The war is termed the 'War between the States' by American Southerners. See infra, note 52.
3. Covenant of the League of Nations Articles 10 - 12, 16. The absolute right to resort to war was not relinquished by states until the General Treaty for the Renunciation of War 1928 (Pact of Paris). U.K.T.S. 29 (1929), Cmd. 3410, 94 L.N.T.S.57.
4. See, e.g., A.V.W. Thomas and A.J. Thomas, 'International Legal Aspects of the Civil War in Spain, 1936 - 39', in R. Falk (ed.), supra, note 2, at 111; N.J. Padelford, International Law and Diplomacy in the Spanish Civil Strife (New York, Macmillan, 1939); Garner, Comment, 'Recognition of Belligerency' (1938) 32 A.J.I.L. 106; H.A. Smith, 'Some Problems of the Spanish Civil War'

(1937) XVIII B.Y.I.L. 17; J.W. Garner, 'Spanish Civil War - Neutrality Policy of the United States' (1937) XVIII B.Y.I.L. 197; N.J. Padelford, 'International Law and the Spanish Civil War' (1937) 31 A.J.I.L. 226; Borchard, Comment, '"Neutrality" and Civil Wars' (1937) 31 A.J.I.L. 304; V.A. O'Rourke, 'Recognition of Belligerency and the Spanish Civil War' (1937) 31 A.J.I.L. 398.

5. See, e.g., J. Woodliffe, 'The Stationing of Foreign Armed Forces Abroad in Peacetime' (1994) 43 I.C.L.Q. 443; M. Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 A.J.I.L. 569, 606; 'Documents Regarding the Conflict in Yugoslavia [25 September 1991 - 16 November 1992], reprinted in (1992) 31 I.L.M. 1421; C. Gray, 'I.C.J. Cases' (1994) 43 I.C.L.Q. 704.

6. The community of nations at the time was based on state sovereignty and independence. While there were many legal rules for interstate behaviour, there was no formal organisation. See L. Oppenheim, The League of Nations and Its Problems (London, Longmans, Green and Co., 1919), at 25.

7. P. Haggemacher, 'Just War and Regular War in Sixteenth Century Spanish Doctrine', (September - October 1992) International Review of the Red Cross (I.R.R.C.), No. 290, at 434, 435. See N.J. Padelford, International Law and Diplomacy, supra, note 4, at viii; The Prize Cases (1862) 2 Black 635, 690 - 5 (J. Nelson, dissenting).

8. See H. Lauterpacht (ed.), Oppenheim's International Law Vol. II (London, Longmans, 7th ed. 1952), at 626, et seq..

9. After the battle at Fort Sumter on 12 April 1861, South Carolina, Virginia, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, Texas, and Arkansas seceded from the U.S.. West Virginia seceded from Virginia in 1863 and joined the Union. Maryland, Kentucky, and Missouri remained uncommitted.

10. Great Britain proclaimed neutrality on 14 May 1861, and was soon followed by France, Prussia, Belgium, Netherlands, Spain, Portugal, Hawaiian Islands, Bremen, and Hamburg. Q. Wright, supra, note 2, at 82. Cf. D.P. Crook, supra, note 2, at 75 - 90. It was feared by foreign nations that open support for either belligerent would extend the war to Europe. See M. Bernard, Historical Account of the Neutrality of Great Britain during the American Civil War (London, Longmans, 1870), at 124.

11. See D.J. Hill, 'Permanent Court of International Justice' (1920) 14 A.J.I.L. 387, who posits that, as the Covenant was designed to enforce peace through force, it was primarily a military compact; Pact of Paris, supra, note 3. See also Q. Wright, 'Neutrality and Neutral Rights Following the Pact of Paris for the Renunciation of War' (1930) 24 Proc. A.S.I.L. (Third Session), at 79, 80 n. 2, citing the White Paper of 12 December 1929 ('(t)he effect of these instruments is that .. (a)s

between members of the League there can be no neutral rights because there can be no neutrals'). The Pact of Paris extended the prohibition of war as an instrument of national policy or for the settlement of disputes to the U.S., the U.S.S.R., Turkey, Mexico, Egypt, Afghanistan, as the Covenant had done for members. Id., at 81. Also of note were the 1923 Treaty of Mutual Assistance, the 1924 Geneva Protocol, 1925 Locarno Treaty, the 1928 Habana Convention on Duties and Rights of States in the Event of Civil Strife, and the 1933 Montevideo Convention.

12. See J.L. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision' (1951) 45 A.J.I.L. 37. There were many attempts to prescribe new rules, e.g., the 1922 Treaty of Washington, the 1923 Hague Rules of Air Warfare, the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, etc., Gases and of Bacteriological Methods of Warfare, the 1930 London Naval Treaty, and the 1936 Protocol to the London Treaty.

13. Garner, Comment, supra, note 4, at 106.

14. See, e.g., Garner, id.; J.W. Garner, 'Spanish Civil War', and H.A. Smith, supra, note 4; cf. E. Castrén, The Present Law of War and Neutrality (Helsinki, Academia Scientiarum Fennica, 1954); N.J. Padelford, International Law and Diplomacy, supra, note 4. See also the Preamble to the Nyon Agreement of September 1937, Cmd. 5568, and the Supplementary Nyon Agreement, Cmd. 5569; infra, notes 89 - 95, and accompanying text.

15. N.J. Padelford, International Law and Diplomacy, supra, note 4, at 202. See also E. Castrén, id., at 24, 288.

16. The 'jus (or ius) contra bellum' is the prohibition against war. The 'jus (or ius) in bello' is the law of, or during war.

17. M. Bothe, 'Neutrality in Naval Warfare - What is Left of Traditional International Law?', in Humanitarian Law of Armed Conflict - Challenges Ahead (A.J.M. Delissen and G.J. Tanja, eds.) (Dordrecht, M. Nijhoff, 1991), at 367, 393; A. Whelan, 'Wilsonian Self-Determination and the Versailles Settlement' (1994) 43 I.C.L.Q. 99. Cf. D. Schindler, 'Transformations in the Law of Neutrality since 1945', in Humanitarian Law of Armed Conflict, id., at 367. See, e.g., U.N.G.A. Resolution 2105 (XX) of 1965, which 'recognized the legitimacy of the struggle of colonial peoples ...'; Resolution 2936 (XXVII) of 1972, which re-affirmed its recognition of the legitimacy of the struggle of colonial peoples by all appropriate means at their disposal; Resolutions 3070 of 1973 and 37/43 of 1982, which refer to the legitimacy of the struggle of colonial peoples by all means, including armed struggle.

18. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits (1986) I.C.J. Reports, at 14; cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1971) I.C.J. Reports, at 16.

19. See, e.g., M. Bothe and D. Schindler, supra, note 17.

This is largely because interstate war has been restrained. U.N. Charter Article 2(4) states 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 other manner inconsistent with the Purposes of the United Nations.

Article 2(6) states: '(t)he Organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of peace and security'; Article 73 provides in pertinent part that Members which have or assume responsibilities for non-self-governing territories shall 'further international peace and security'; Article 84 states in pertinent part that '(i)t shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security'. See also U.N.G.A. Resolution 3314 (XXIX) of 14 December 1974, and Resolution 2625 (XXV) of 24 October 1970; infra, note 99, and accompanying text.

20. U.N. Charter Chapters VI and VII refer to the 'parties' to a dispute rather than to 'states'. This terminology indicates an extension of Security Council jurisdiction to non-states, and is further echoed in Common Article 2, paragraph 3, to the four Geneva Conventions of 1949 ('Powers in conflict'). The problem then becomes how to recognize 'war' should it occur. See,

e.g., F. de Mulinen, Handbook on the Law of War for Armed Forces (Geneva, International Committee of the Red Cross, 1987), at 32; M.N. Schmidt, 'State-Sponsored Assassination in International and Domestic Law' (1992) 17 Yale L.J. Int'l. L. 609, 643 n. 168; C. Greenwood, 'The Concept of War in Modern International Law' (1987) 36 I.C.L.Q. 283, 297 - 301; Q. Wright, 'Changes in the Conception of War' (1924) 18 A.J.I.L. 755; M.H. Hoffman, 'The Customary Law of Non-International Armed Conflict - Evidence from the United States Civil War' (July - August 1990) I.R.R.C., No. 277, at 322.

21. D. Schindler, supra, note 17, at 374. See also D. Schindler, 'State of War, Belligerency, Armed Conflict' in The New Humanitarian Law of Armed Conflict (A. Cassesse, ed.) (Napoli, Editoriale Scientifica, 1979), at 3; J. Woodliffe, supra, note 5.

22. U.N. Charter Article 27(3).

23. See H. Wilson, International Law and the Use of Force by National Liberation Movements (Oxford, Clarendon, 1988), at 104 - 11; I. Detter de Lupis, The Law of Civil War (Cambridge, Cambridge University Press, 1987), at 36; R. Little, Intervention: External Involvement in Civil Wars (London, Robertson, 1975); L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) LVI B.Y.I.L. 189; M.H. Hoffman, 'Neutral mariners and humanitarian law: a precedent for protecting neutrals in armed conflict' (May - June 1992) I.R.R.C., No. 288, at 274; D. Schindler, supra, note 17; Y. Dinstein, 'The Laws of Neutrality' (1984) 14 Isr.

Y.B.H.R. 80; P.M. Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 7 Harv. Int'l. L.J. 249; E. Castrén, supra, note 114; H. Lauterpacht (ed.), supra, note 8, at 624, et seq.; R.R. Wilson, 'Questions relating to Irish Neutrality' (1942) 36 A.J.I.L. 288. See also N. Politis, La Neutralité et la Paix (Paris, Hachette, 1935); G.G. Wilson, 'Insurgency and International Maritime Law' (1907) 1 A.J.I.L. 46; F.E. Smith, Earl of Birkenhead, International Law (London, Dent (The Temple Primers), 1900), at 131, et seq.; H. Wheaton, History of the Law of Nations in Europe and America (New York, Gould, Banks and Co., 1845 (reprinted 1973)), at 290, et seq..

24. See S. Moratiel V., 'The Spanish School of the new law of nations' (September - October 1992) I.R.R.C., No. 290, at 416; P. Haggemacher, supra, note 7.

25. P. Haggemacher, id., at 440.

26. H. Lauterpacht (ed.), supra, note 8, at 179.

27. H. Wheaton, supra, note 23, at 329. Cf. M.H. Hoffman, 'Neutral mariners and humanitarian law', supra, note 23.

28. F.E. Smith, supra, note 23, at 131.

29. Id., at 145. See also Y. Dinstein, supra, note 23.

30. F.E. Smith, id., at 131, 133; E. Castrén, supra, note 14, at 449 - 50; N. Politis, supra, note 23, at 39 - 44.

31. H. Lauterpacht (ed.), supra, note 8, at 627 - 8.

32. The first was of amity and commerce, and the second, of defensive alliance. See H. Wheaton, supra, note 23, at 290 - 1; H. Lauterpacht (ed.), id., at 664 - 5.

33. This was termed 'free ships, free goods'. The general practice of Britain had been to confiscate only enemy goods on neutral vessels, which was in accord with the 'Consolato del Mare', a work probably dating from the Twelfth Century, but first published in 1474 in Barcelona, in Catalan. See S. Moratiel V., supra, note 24, at 424 - 5, H. Wheaton, supra, note 23, at 106 - 7, 205, and H. Lauterpacht (ed.), supra, note 8, at 628.

34. Article 10 of the Treaty of Amity and Commerce of 1766 between Great Britain and Russia restricted contraband to 'munitions of war'. Article 11 defined these as 'canons, mortiers, armes à feu, pistolêts, grenades, boûlets, balles, fusils, pierres-à-feu, mèches, poûdre, salpêtre, soûffre, cuirasses, piques, épées, ceinturons, pôches à cartouches, sêlles et brides, au dêlà de la quantité qui peut être nécessaire pour l'usage du vaisseau, etc.'. H. Wheaton, supra, note 23, at 298 n, 'u'.

35. Regarding prize courts, see infra, notes 46 - 8, 74, 76, and accompanying text.

36. H. Wheaton, supra, note 23, at 300 - 1.

37. H. Lauterpacht (ed.), supra, note 8, at 630 - 1; H. Wheaton, id., note 23, at 397; M.H. Hoffman, supra, note 23, at 277.

38. The treaties were between Russia, Sweden, Denmark, and Prussia, together forming a quadruple alliance.

39. Preamble to the Maritime Convention of 1801 between Britain and Russia.

40. Supra, note 33.

41. The U.S. Act was also called the Neutrality Law of 20 April 1818, c. 88, S.8, 3 Stat. 449. See C.S. Hyneman, 'Neutrality during the European Wars of 1792 - 1815' (1930) 24 A.J.I.L. 279; C.S. Hyneman, The First American Neutrality: A Study of the American Understanding of Neutral Obligations During the Years 1792 - 1816 (Urbana, University of Illinois Press, 1934). The British Act, 59 Geo. III, c. 69, was in force until 1870. Cf. A. Carty, The Decay of International Law? (Manchester, Manchester University Press, 1986), at 91 - 3.

42. Austria, France, Britain, Prussia, Russia, Sardinia, and Turkey.

43. Text reprinted in A. Roberts and R. Guelff (eds.), Documents on the Laws of War (Oxford, Clarendon, 2d ed. 1989), at 24. Privateering commissions were issued by governments to privately owned and manned, commercially motivated vessels employed to attack and capture enemy vessels and property. The total number of parties to the Paris Declaration Respecting Maritime Law of 1856 grew to fifty-one, including Britain as an original signatory. The U.S. refused to accept the Declaration insisting it needed privateers. This stance was to change during the American Civil War. Id., at 27 n. 'B'; Q. Wright, supra, note 2, at 80, 82, 94 - 7.

44. F.E. Smith, supra, note 23, at 134; E. Castrén, supra, note 14, at 475.

45. F.E. Smith, id., at 133; H. Lauterpacht (ed.), supra, note 8, at 743, 807. Whether neutral individuals could loan money to a belligerent was less clear, the legality

of which turned largely on the charging of a reasonable rate of interest. Cf. Kennet v. Chambers (1852) 14 Howard 38; De Wütz v. Hendricks (1824) 11 State Trials 125.

46. F.E. Smith, supra, note 23, at 158. See E. Castrén, supra, note 14, at 545, et seq.

47. See Y. Dinstein and G.G. Wilson, supra, note 23; H.A. Smith, supra, note 4; N.J. Padelford, 'International Law and the Spanish Civil War', supra, note 4.

48. F.E. Smith, supra, note 23, at 146 - 8; E. Castrén, supra, note 14, at 290, et seq.

49. H.A. Smith, supra, note 4, at 17.

50. N.J. Padelford, 'International Law and the Spanish Civil War', supra, note 4, at 227.

51. Supra, note 10. See also The Prize Cases, supra, note 7 (large-scale insurrection constitutes war in the legal sense), aff'd. in Thorington v. Smith (1868) 8 Wall. 1, Williams v. Bruffy (1877) 96 U.S. 176, Ford v. Surget (1878) 97 U.S. 1018, and Baldy v. Hunter (1897) 171 U.S. 208. Cf. Borchard, Comment, supra, note 4, at 306.

52. The causes of the war were largely economic, of which the issue of slavery was but one. See F.E. Chadwick, supra, note 2, at 3 - 16; D.P. Crook, supra, note 2, at 75; J.G. Randall and D. Donald, supra, note 2, at 355 - 69. Strong Confederate beliefs in the inequality of man and state sovereignty were not yet contradicted by the U.S. Constitution. These legal positions emerged after the Confederate defeat. Thus, the American Civil War may be viewed as a type of bellum justum See, e.g., Kunz, Comment, 'Bellum Justum and Bellum Legale' (1951) 45

A.J.I.L. 528; J. von Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939) 33 A.J.I.L. 665; S. Moratiel V., supra, note 24.

53. By the mid-nineteenth century, the laws and customs of war required standards of civilised behaviour between belligerents. See, e.g., Article 15 of Lieber's Code, which states in pertinent part that '(m)en who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God'. 'Instructions for the Government of the Armies of the United States in the Field', or Lieber's Code, is reprinted in D. Schindler and J. Toman (eds.), The Laws of Armed Conflict (Leiden, Sijthoff, 1973), at 3. See also Ford v. Surget, and Williams v. Bruffy, supra, note 51. Lieber's Code was promulgated by U.S. President Lincoln as a written code of land warfare for the Northern, or Union, troops, and was adopted by the U.S. War Department on 24 April 1863. Prepared by Francis Lieber, a German by origin, the Code reflected the customary law of the time. See Q. Wright, supra, note 2, at 54 n. 37, 46 n. 12; E. Nys, 'Francis Lieber - His Life and Work' (Pt. 2, 1911) 5 A.J.I.L. 355; J.R. Miles, 'Francis Lieber and the Law of War' (1990) XXIX - 1-2 *Revue de Droit Militaire et de Droit de la Geurre* 253; J.G. Randall and D. Donald, supra, note 2, at 325 - 339. The Confederate officers had formerly served in the U.S. military elite, and were reasonably well-versed in these customary laws.

54. To allow a neutral subject to build armed ships 'to the order of a belligerent' was a breach of neutrality, a distinction Lauterpacht terms 'hair-splitting'. H. Lauterpacht (ed.), supra, note 8, at 714. See also M.H. Hoffman, supra, note 23, at 280 - 1; F.J. Merli, supra, note 2, at 235 - 249.

55. See Atty. Gen'l, v. Sillem and Others (1863) 2 Hurlstone and Caldman 431; cf. The British Consul v. The Ship Mermaid, Bee's Am. Adm. Rep. 69.

56. F.E. Smith, supra, note 23, at 137.

57. La Santissima Trinidad (1822) 7 Wheaton 283, 346.

58. See M. Bernard, supra, note 10, at 338 - 496.

59. On the other hand, the U.S. objected to all offers of mediation as an illegal interference in its domestic affairs.

60. See F.E. Smith, supra, note 23, at 137.

61. Martens, N.R.G., 20, p. 698. Britain, the U.S., Brazil, Italy, and Switzerland each chose one arbitrator. See H. Lauterpacht (ed.), supra, note 8, at 715.

62. The 'Three Rules of Washington' provided that a neutral should

- (a) 'use due diligence' to prevent a vessel in its jurisdiction being fitted out, etc., or to leave, 'which it has reasonable ground to believe is intended' to be used against a belligerent;
- (b) not allow a belligerent to use neutral ports, etc., as a base; and
- (c) 'exercise due diligence' over its ports and persons.

63. The Award is printed in full in J.B. Moore, History and Digest of the Arbitrations to which the U.S. have been a Party (Washington, Government Printing Office, 1898), i. pp. 653 - 59. Britain, in turn, was given approximately \$7,430,000, of which \$5,500,500 arose from fisheries disputes. A minor boundary dispute was also adjudicated. J.T. Adams, A History of the American People (London, Routledge, 1933), at 141 - 4.

64. Outbreaks of armed hostilities which could have been legally recognised as belligerency included the San Domingo rebellion (1864), two Cuban rebellions (1870 and 1875), the Carlist rebellion in Spain (1874), the Balkan rebellion (1878), the Columbian revolt (1885), and the Brazilian rebellion (1893). Cf. The Salvador (1870) L.R. 3 P.C. 218; Wibourg v. U.S. (1896) 163 U.S. 632; The Ambrose Light (S.D.N.Y. 1885) 25 Fed. Rep. 408; Underhill v. Hernandez (1897) 168 U.S. 250; The Three Friends (1897) 166 U.S. 897. See also Hague Convention III (1907), reprinted in (Supp. 1908) 2 A.J.I.L. 85, which codifies the rules for a declaration of war.

65. Supra, note 53.

66. The Brussels Project of an International Declaration concerning the Laws and Customs of War, reprinted in D. Schindler and J. Toman (eds.), supra, note 53, at 25.

67. Manual Published by the Institute of International Law, reprinted id., at 35.

68. See the Final Act of the International Peace Conference, signed at The Hague, 29 July 1899, and the Final Act of the Second International Peace Conference,

signed at The Hague, 18 October 1907, reprinted id., at 49 and 53, respectively. See also F.E. Smith, supra, note 23, Appendix A, at 'M'.

69. The Preamble to both the 1899 and 1907 Hague instruments.

70. See, e.g., N. Politis, supra, note 23, at 72 - 3: Elle avait été une réaction contre la tyrannie des belligérants. ... Elle avait constitué pour les Etats tiers une garantie d'indépendance et de vie paisible, la sauvegarde de leur droit de conserver la paix en face de la guerre, ..';

G. Best, 'The Restraint of War in Historical and Philosophical Perspective', in Humanitarian Law of Armed Conflict, supra, note 17, at 3, 10.

71. See N. Politis, id., at 63.

72. Reprinted in A. Roberts and R. Guelff (eds.), supra, note 43, at 63 and 110, respectively. Of interest, Article 8 of Hague Convention XIII adopts the first of the Three Rules of Washington, substituting the words 'to use due diligence' with 'to employ the means at its disposal'.

73. Y. Dinstein, supra, note 23, at 83.

74. Hague Convention XII relative to the Creation of an International Prize Court.

75. Reprinted in A. Roberts and R. Guelff (eds.), supra, note 43, at 80 and 103, respectively.

76. Reprinted in D. Schindler and J. Toman (eds.), supra, note 53, at 625.

77. H. Lauterpacht (ed.), supra, note 8, at 633 - 4. See 'Diplomatic Correspondence between the United States and Belligerent Governments relating to Neutral Rights and Commerce' (Special Supp. 1915) 9 A.J.I.L. 1, et seq.

78. H. Lauterpacht (ed.), id., at 634 n. 3 ((n)eutrality is not morally justifiable unless intervention in war is unlikely to promote justice, or could do so only at a ruinous cost to the neutral' (citation omitted)). See also A.M. Morrissey, 'The United States and the Rights of Neutrals, 1917 - 1918' (1937) 41 A.J.I.L. 17.

79. N. Politis, supra, note 23, at 90 - 3, who adds: '(p)our s'écarter à tel point du droit établi, les belligérants ont invoqué les conditions actuelles de la vie internatinale qui imposent à la guèrre des nécessités nouvelles'. Id., at 94.

80. N. Politis, id., at 94. See also A.M. Morrissey, supra, note 78.

81. Covenant of the League of Nations Article 12; H. Lauterpacht (ed.), supra, note 8, at 97. Cf. L. Kopelmanas, 'The Problem of Aggression and the Prevention of War' (1937) 31 A.J.I.L. 244. Nevertheless, if the Council failed to reach unanimous agreement, members made the final decision individually as to whether the Covenant had been breached. League Covenant Article 15(7). Cf. Covenant Article 15(8), which provides as follows:

If the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within

the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendations as to its settlement.

82. Supra, note 3.

83. See, e.g., H. Lauterpacht (ed.), supra, note 8, at 97 - 9.

84. The Pact of Paris permitted a distinction between just and unjust wars, which contradicts the principles of neutrality in war. This in turn carried the danger that attempts to humanise war through bilateral rights of, or in, war could be viewed as misguided. P. Haggemacher, supra, note 7, at 442. See infra, notes 95, 145 - 6, and accompanying text.

85. E.g., the bombardment of Corfu by Italy (1923), the Japanese invasion of Manchuria (1931), and the Italian invasion of Abyssinia (1934). Germany withdrew from the League in October 1933. Italy withdrew in December 1937. The U.S.S.R., having joined in 1934, was expelled in 1939.

86. Also of note were the invasion of China by Japan (1937), and the Russian invasion of Finland and Poland, and the Italian incorporation of Albania (1939).

87. The Neutrality Acts of 8 January 1937, 50 Stat. 3, and of 1 May 1937, S.1, 50 Stat. 121; the Neutrality Act of 5 September 1939, Ch. 2, S.7, 54 Stat. 8, (1970) 22 U.S.C. 447.

88. The Final Act of the Consultative Members of the American Republics in Panama, 23 September - 3 October 1939, reprinted in (Supp. 1940) 34 A.J.I.L. 1. Cf. the

Harvard Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War, reprinted in (Special Supp. 1939) 33 A.J.I.L. 167.

89. 'Declarations by the European Governments Constituting the Agreement Regarding Non-Intervention in Spain, together with a Declaration by the Swiss Government in Regard to its Attitude toward the Situation in Spain, 1936', Non-Intervention Committee, Document N.I.S. (36) 2, reprinted in N.J. Padelford, International Law and Diplomacy, supra, note 4, Appendix 1, at 205.

There was no single instrument which the twenty-seven governments signed. The 'agreement' was merely a concert of policy. Fifteen states repeated verbatim the Preamble and the three basic declarations of policy.

90. The Preamble prohibited all forms of interference or intervention. In addition to Germany and Italy, Hungary, Latvia, Poland and Turkey omitted the Preamble from their notes.

91. N.J. Padelford, International Law and Diplomacy, supra, note 4, at 54. In other words, should the Agreement states act to prevent arms and munitions from reaching the parties to the conflict, the exercise by either party of the belligerent right of visit and search at sea was obviated. This in effect meant that European trade could not be hampered, even trade in illegal contraband. See N. Politis, supra, note 23, at 70; H.A. Smith, supra, note 4, at 29; E. Castrén, supra, note 23, at 288; Garner, Comment, supra, note 4, at 108.

92. By openly aiding the Spanish government, Stalin's domestic policies would have appeared contradicted. Thomas and Thomas note that the Spanish government was left to arm the working-class areas and the peasants, pitting these groups against the army, the industrialists, the middleclass, the landowners, and the aristocrats. The observance of the laws of war was undermined both by this imbalance of power, and by the absence of a recognition of belligerent rights and duties. A.V.W. Thomas and A.J. Thomas, Jr., supra, note 4, at 111 - 18, 121, et seq..

93. See supra, note 4.

94. N.J. Padelford, International Law and Diplomacy, supra, note 4, at 142.

95. League of Nations, Official Journal, 1936, Special Supplement No. 155, at 48.

96. Supra, notes 27 - 36, 71 - 6, and accompanying text.

97. Text reprinted in (Supp. 1941) 35 A.J.I.L. 191. See A. Whelan, supra, note 17; E.A. Laing, 'The Norm of Self-Determination, 1941 - 1991' (1993) 22 Cal. West. Int'l. L.J. 209; C.G. Fenwick, 'International Law: The Old and the New' (1966) 60 A.J.I.L. 475, 681; G. Thullen, Problems of the Trusteeship System (Geneva, Librairie Droz, 1964), at 58.

98. See, e.g., Article 2(7) of the U.N. Charter. But see U.N.G.A. Resolutions 2105, 2936, 3070, and 37/43, supra, note 17, and Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8

June 1977, reprinted in A. Roberts and R. Guelff (eds.), supra, note 43, at 389; Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 2), 8 June 1977, reprinted id., at 449.

99. See, e.g., M. Bothe, supra, note 17, at 254, who notes that '(r)ecognition that the Charter had not rendered the law of neutrality wholly defunct came very quickly'; D. Schindler, supra, note 17; Y. Dinstein, supra, note 23. See also Common Article 2 to the 1949 Geneva Conventions, supra, note 20, and the 1949 Geneva Convention relative to the Treatment of Prisoners of War (Third Convention) Article 4(b)(2).

100. The International Humanitarian Law of Armed Conflict (IHL) documents include: the four Geneva Conventions of 1949 ((First Convention) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (Second Convention) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Third Convention, id.; (Fourth Convention) Relative to the Protection of Civilian Persons in Time of War); surviving provisions of 1899 and 1907 Hague Law, or the laws of war; and limited aspects of post-1945 human rights law. Common Article 3 to the four 1949 Geneva Conventions provides minimal rules of humanity during non-international armed conflicts. Protocols 1 and 2 of 1977, supra, note 98, integrate all three branches of IHL.

101. I.e., wars undertaken in defiance of existing legal rights of other states. H. Lauterpacht (ed.), supra, note 8, at 180.

102. Supra, note 19.

103. Article 51 provides in pertinent part as follows:

(N)othing 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 measures necessary to maintain international peace and security ...

U.N. Charter Chapter VIII (Articles 52 - 4) is entitled 'Regional Arrangements'. Article 53 permits regional enforcement action if authorised by the Security Council.

104. Whether Article 51 applies to anticipatory self-defence remains controversial. However, under the Charter system, an unneutral service no longer triggers a right of self-defence. M. Bothe, supra, note 17, at 396. Cf. B. Levenfeld, 'Israeli Counter-Fedayeen Tactics' (1982) 21 Col. J.T.L. 1; P.M. Morton, supra, note 23.

105. Supra, notes 1 and 98.

106. 'An Act to Promote the Defense of the United States', in force 11 March 1941, reprinted in (Supp. 1941) 35 A.J.I.L. 76. H. Lauterpacht (ed.), supra, note 8, at 639 - 40, notes that the official title was derived from an appeal to the right of self-defence, and it is likely therefore that the Act did not breach neutrality law. Instead, it was used to discriminate against a belligerent acting in defiance of international law.

Lend-Lease made the U.S. a 'qualified neutral', a historic notion which was 'fully resuscitated' by the League Covenant.

107. See D. Schindler, supra, note 17, at 373, who also notes that the law of neutrality is still referred to extensively in many military manuals. Id., at 370. See also P.M. Norton, supra, note 23; M. Bothe, supra, note 17.

108. Supra, note 100.

109. U.N. Charter Articles 1(2) and 55.

110. See, e.g., Protocol 1 Article 1(4), supra, note 98; Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, M. Nijhoff, 1987), at 54 - 5:

(Protocol 1 Article 1(4)) certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist regime.

See also L. Brilmeyer, 'Succession and Self-Determination: A Territorial Interpretation' (1991) 16 Yale J. Int'l. L. 177; E. Chadwick, Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict (The Hague, M. Nijhoff, 1996).

111. The Third Convention Article 122 ('neutral or non-belligerent powers'); Protocol 1 Articles 2(c), 9(2)(a), 22(2)(a), 31, 39(1), and 64 ('neutral or other state not

a party to the conflict'), and Article 19 ('neutral and other states not parties to the conflict').

112. Neutral impartiality should result in turn in non-discrimination. See Common Article 3(1) to the Four Geneva Conventions of 1949.

113. F. de Mulinen, supra, note 20, at 7.

114. See F.D. Fryer, 'Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors' (1977) 11 Int'l. Lawyer 567; M.A. Sánchez, 'Self-Determination and the Falklands' (1982 - 83) 21 Col. J.T.L. 557; M.J. Ferretti, 'The Iran-Iraq War: U.N. Resolution of Armed Conflict' (1990) 35 Vill. L.R. 197.

115. Common Article 3(4) to the four Geneva Conventions of 1949; Protocol 1 Articles 4 and 5(5).

116. See 'Decision by the Council of Heads of State of the Commonwealth of Independent States (21 December 1991)', reprinted in (1992) 31 I.L.M. 1421; J. Woodliffe, supra, note 5.

117. H. Lauterpacht (ed.), supra, note 8, at 253 n. 1.

118. M. Weller, supra, note 5, at 569.

119. M. Glenny, The Fall of Yugoslavia, (New York, Penguin Books, 1993), at 142. See The 1974 Constitution of the Socialist Federal Republic of Yugoslavia Article 5, reprinted in Snezana Trifunovska (ed.), Yugoslavia through Documents from its Creation to its Dissolution (The Hague, M. Nijhoff, 1994), at 224, 226.

120. Id., at 63, quoting Maté Babiø, former professor of economics at Zagreb University and a former deputy Prime Minister responsible for the economy in the Croatian

government. See A. Whelan, supra, note 17; E.A. Laing, supra, note 97; P.M. Brown, 'Self-Determination in Central Europe' (1920) 14 A.J.I.L. 235.

121. See M. Chossudovsky, 'La Bosnie sous administration occidentale', Le Monde Diplomatique, April 1996, p. 12.

122. M. Glenny, id., at 144.

123. M. Weller, supra, note 5, at 570.

124. Id., at 570 - 3.

125. U.N.S.C. Resolution 713 of 25 September 1991, U.N. Doc. S/23169.

126. See also U.N.S.C. Resolution 777 of 19 September 1992, which '(c)onsider(s) that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist'.

127. M. Weller, supra, note 5, at 581.

128. See the 'E.C. Declaration on Yugoslavia and Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', reprinted in (1992) 31 I.L.M. 1485. Of interest, a similar procedure is adopted for the 1966 U.N. International Covenant on Social, Economic and Cultural Rights. See, e.g., F. Jhabvala, 'The Soviet-Bloc's View of the Implementation of Human Rights Accords' (1985) 7 H.R.Q. 461.

129. M. Glenny, supra, note 119, at 151.

130. See supra, note 126; see also Applications of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Hercegovina v. Yugoslavia (Serbia and Montenegro)) (Interim Orders concerning Application of the Convention on the Crime of Genocide) (1993) I.C.J.

Rep. 3 (8 April 1993), and 325 (13 September 1993),
reprinted in (1993) 32 I.L.M. 888, and 1599,
respectively.

131. On 22 May 1992, the U.N.G.A. admitted the Republic of Slovenia (Res. 46/237), the Republic of Bosnia and Hercegovina (Res. 46/237), and the Republic of Croatia (Res. 46/238). The date of succession for Serbia-Montenegro was 27 April 1992. See 'International Conference on the Former Yugoslavia, Documentation on the Arbitration Commission under the U.N./E.C. (Geneva) Conference [16 July to 13 August 1993]', reprinted in (1993) 32 I.L.M. 1586, 1588; 'Correspondents' Agora: United Nations Membership of the Former Yugoslavia' (1993) 87 A.J.I.L. 240.

132. See P. Szacz, 'Introductory Note: Bosnia and Hercegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Hercegovina with Annexes', 'The Dayton Agreement on Implementing the Federation of Bosnia and Hercegovina', 'Conclusions of the London Peace Implementation Conference', 'Report of the Secretary-General on the Transition from UNPROFOR to IFOR', and S.C. Resolution 1021 (terminating the weapons embargo on the former Yugoslavia) (1996) 35 I.L.M. at 75, 170, 223, and 257, respectively.

133. See, e.g., E. Vulliamy, 'Allies at odds prolonged bloodshed', The Guardian, 27 April 1996, p. 11; J. Swain, 'The Damned', The Sunday Times, 12 May 1996, Sec. 3 p. 1 - 2; E. Vulliamy, 'U.S. prolonged Bosnian war', The Guardian, 20 May 1996, p. 1.

134. See E. Vulliamy, 'Tragic cost of allies' hidden hostility', The Guardian, 21 May 1996, p. 12.

135. M. Chossudovsky, supra, note 121 ('(d)errière la façade institutionnelle, le pouvoir politique de la nouvelle Bosnie reste aux mains d'un "gouvernement parallèle" dirigé par le haut-représentant et composé de ses conseillers étrangers').

136. See E. Vulliamy and I. Black, 'West faces new Bosnia debacle', The Guardian, 18 May 1996, p. 3; I. Black, 'U.S. to raise the stakes in effort to hook Karadzic', The Guardian, 1 June 1996, p. 14.

137. Protocol 2 'develops and supplements' Common Article 3.

(Protocol 2 does) not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Protocol 2 Article 1.

138. Slovenia succeeded to the 1949 Geneva Conventions and Protocols 1 and 2 of 1977 on 26 March 1992 (retro-active to 25 June 1991), Croatia, on 11 May 1992 (retro-active to 8 October 1991), and Bosnia-Herzegovina, on 31 December 1992 (retro-active to 6 June 1992). See Table III 'States Party to the Protocols' (January - February 1993) I.R.R.C., No. 292, at 67, 70 - 1. The I.C.R.C. take the view that

These instruments were already applicable to the

territor(ies) ... by virtue of their ratification by

the Socialist Federal Republic of Yugoslavia on 21 April 1950 **and 11 June 1979, respectively.**

(May - June 1992) I.R.R.C., No. 288, at 309, 311.

139. Protocol 1 Article 1(4) and Common Article 2(3) to the four 1949 Geneva Conventions, respectively. The applicability of IHL in full to civil wars remains controversial, and usually results from the agreement of the parties. See First, Second, and Third Conventions Article 6, and Fourth Convention Article 7. See also Y. Dinstein, 'The International Law of Civil Wars and Human Rights' (1976) 6 Isr. Y.B.H.R. 62.

140. The two terms are used to distinguish colonial, post-colonial, and non-colonial situations. See R. McCorquodale, 'South Africa and the Right of Self-Determination' (1994) 10 S. Afr. J.H.R. 4.; M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 I.C.L.Q. 241; A. Whelan, supra, note 17.

141. Resolution 2625, supra, note 19, prohibits the impairment of existing state territorial integrity or political unity of

(S)tates conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

142. 'Conference on Yugoslavia, Arbitration Commission Opinions 1 - 10 on Questions arising from the dissolution

of Yugoslavia [11 January and 4 July 1992], Opinions 2 and 3', reprinted in (1992) 31 I.L.M. 1488, 1497 - 8, and 1499 - 1500, respectively.

143. The statute should extend to the full scope of 'the laws or customs of war'. Subject matter jurisdiction is however confined to (a) the 1949 Geneva Conventions; (b) Hague Convention IV and annexed Regulations of 1907; (c) the 1948 Genocide Convention; and (d) the 1945 Charter of the International Military Tribunal at Nuremberg.

U.N.S.C. Resolution 827 (1993), reprinted in (1993) 32 I.L.M. 1202. See H. McCoubrey, 'The Armed Conflict in Bosnia and Proposed War Crimes Trials' (1993) XI Int'l. Rel. 411. The U.S. has indicated, however, that practice will reflect a more expansive approach. Cf. 'Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia [3 May 1993]', reprinted in (1993) 32 I.L.M. 1159, 1170:

(T)he international tribunal should apply rules of (IHL) which are beyond any doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise.

See also P. Rowe, 'War Crimes and the Former Yugoslavia: the Legal Difficulties' (1993) XXXII - 4 Revue de Droit Militaire et de Droit de la Guerre 319; R. Zacklin, 'Bosnia and Beyond' (1994) 34 Virg. J. Int'l. L. 277, 280 (critics may view the subject matter jurisdiction as too

narrow); J. Henley, 'Serb jailers charged with murder, rape and torture', The Guardian, 14 February 1995, p. 9 (Yugoslav ad hoc war crimes tribunal issues its first mass indictments); C.N. Niarchos, 'Women, War and Rape: Challenges facing the International Tribunal for the Former Yugoslavia' (1995) 17 H.R.Q. 649; E. Vulliamy, 'War crimes trail nears Serb president as soldier admits to Bosnia massacre', The Guardian, 1 June 1996, p. 2.

144. See P. Rowe, id.

145. See M. Bothe, supra, note 17; B.A. Wortley, 'Observations on the Revision of the 1949 Geneva "Red Cross" Conventions' (1983) LIV B.Y.I.L. 143.

146. For example, Common Article 3 to the four 1949 Geneva Conventions, and Protocol 2 of 1977, do not require Protecting Powers, nor do they afford prisoner of war status to captured rebel combatants, who will doubtless be tried for treason. These omissions greatly reduce the level of international scrutiny over the means and methods of warfare.

147. See M. Weller, supra, note 5, at 603; Goodheart, Letters, 'Misunderstanding Yugoslavia', London Review of Books, 6 June 1996, p. 4.

148. Preamble to the Declaration of St. Petersburg, 1868, reprinted in A. Roberts and R. Guelff (eds.), supra, note 43, at 30 - 1. See H.-P. Gasser, 'A look at the Declaration of St. Petersburg of 1868' (November - December 1993) I.R.R.C., No. 297, at 511; H. Meyrowitz, 'The principle of superfluous injury or unnecessary suffering' (March - April 1994) I.R.R.C., No. 299, at 98.

149. See M.H. Hoffman, supra, note 23. Norton notes, for example, that an ability to enforce belligerent rights and neutral duties is crucial. N.M. Norton, supra, note 23, at 261. Eagleton agrees, but notes that the need to enforce neutrality tends to expand a war. C. Eagleton, (Third Session), supra, note 11, at 87, 89. Cf. E. Castrén, supra, note 14, at 34 - 5. The enforcement of neutrality reflects an element of self-help, e.g., the use of Arab oil to enforce control over the Suez Canal (1956), the U.S. invasion of Cambodia (1970), the Arab oil embargo during the Yom Kippur War (1973).

* I would like to thank Dr. S.R. Giles for his helpful comments on earlier drafts of this work.