

Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility

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Introduction	2
I. The General Nature of Hostility-related Rights	4
A. General Considerations	4
B. Hostility-related Rights of the Hostile Parties Against One Another	6
C. Hostility-related Rights of the Hostile Parties Against Third States	6
D. Inaugurating a State of Hostility	7
II. The Contents of Hostility-related Rights	9
A. Contraband	10
B. Visit and Search	12
C. Exclusions: Blacklisting and Blockade	13
D. Consequences of Over-stepping the Ambit of the Hostility-related Rights	14
III. The Relation of the Law of Hostility to General International Law	14
A. Duty of Peaceful Settlement of Disputes	14
B. The Prohibition Against the Use of Force	14
C. Traditional Belligerents' Rights	16
D. The Law of Neutrality	16
E. The Laws of the Conduct of Armed Conflict	17
F. The Right of Self-defense	17
G. Reprisal	19
IV. Illustrations from State Practice	20
A. The "Secondary" Arab Boycott Against Israel	20
B. The Western Strategic Embargo Against the Socialist States	22
C. The Cuban "Quarantine" of 1962 by the United States	24
D. The Iraqi "Tanker War" of the 1980s	25
Conclusion: The Utility of the Concept of Hostility	27

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Introduction

There has been some speculation as to whether belligerents' rights still exist in the U.N. Charter period or not. The question is closely connected with the problem of whether the law of neutrality continues to exist—the duties of neutrals being, to a large extent, correlative to the rights of belligerents. There are several schools of thought on this question. One contends that traditional belligerents' rights continue to exist, along with the law of neutrality.¹ Another insists that the U.N. Charter has abolished war as a legal institution and that it has, accordingly, thereby also abolished the traditional rights of belligerents along with the law of neutrality.² Finally, there is a middle ground between these two which contends that, although belligerents' rights *as such* no longer exist, they have in effect donned new juridical clothing and reappeared as incidents of the exercise of the right of self-defense.³ The implication of the second and third of these approaches is that the traditional law of neutrality no longer exists.

None of these approaches is persuasive. The first one, that belligerents' rights still exist, seems to take insufficient account of the U.N. Charter's abolition of the "use of force." It seems undesirable to hold that the resort to force is unlawful while at the same time contending that if such a resort is made, the state should automatically be given certain important legal privileges as, in effect, a reward for breaking the law. The second position, that belligerents' rights have been abolished along with war, seems to fly in the face of state practice. The fact is that states have

1. Robert R. Baxter, *The Legal Consequences of the Unlawful Use of Force under the Charter*, 62 AM. SOC. INT'L L. PROC. 68, 71-72 (1968); Josef L. Kunz, *The Laws of War*, 50 AM. J. INT'L L. 313 (1956). Much of the writing in this vein has been oriented towards giving an affirmative answer to the question of whether the law of neutrality continues to exist. See Titus Komarnicki, *The Place of Neutrality in the Modern System of International Law*, 80 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 395, 464-502 (1952-II); ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 171-80 (1955); J. PEREZ MONTERO, *LA NEUTRALIDAD EN EL PRESENTE* (1958); D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 174-81 (1958); A. Galina, *Neutrality in Contemporary International Law*, 1958 SOVIET Y.B. INT'L L. 225; JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES AND WAR-LAW* 382 (1973); MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 522-26 (1959); MYERS S. MCDOUGAL & FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 398-400, 427-35 (1961); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 404 (1963); Dietrich Schindler, *Aspects Contemporains de la Neutralité*, 121 R.C.A.D.I. 221, 261-77 (1967-II); Walter L. Williams, Jr., *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law*, 90 MIL. L. REV. 9, 17-27 (1980); Bruce Harlow, *The Law of Neutrality at Sea for the '80s and Beyond*, 3 UCLA PAC. BASIN L.J. 42 (1984); Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L.Q. 283, 297-301 (1987). See also the separate opinion of Vice-President Ammoun in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 92-99 (June 21).

2. LORD MCNAIR & A.D. WATTS, *THE LEGAL EFFECTS OF WAR* 457 (4th ed. 1966); L.G. Fenwick, *Is Neutrality Still a Term of Present Law?*, 63 AM. J. INT'L L. 100 (1969).

3. Elihu Lauterpacht, *The Legal Irrelevance of the "State of War"*, 62 AM. SOC. INT'L L. PROC. 58 (1968); Christopher Gree, Comment, in *THE GULF WAR OF 1980-1988: THE IRAN-IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE* 212, 215-16 (Ige F. Dekker & Harry H.G. Post eds., 1992) [hereinafter *THE GULF WAR OF 1980-1988*].

claimed and exercised many of the traditional rights of belligerents without undue objection from other states. The evidence from state practice is that the law of neutrality has survived into the U.N. Charter era.⁴ Finally, the "middle ground" approach suffers from two defects. First, it introduces a disturbing element of asymmetry into the laws of armed conflict—a body of law in which even-handedness has traditionally been a fundamental principle. This is because the rights pertaining to self-defense are, by the nature of self-defense itself, available only to the victim of an attack, not to the aggressor. The second and perhaps more serious defect is that this thesis adequately explains only one category of belligerents' rights: those rights exercised by defending states against aggressors, such as the right to take and hold prisoners, to occupy territory, and to confiscate private property at sea. It fails to explain satisfactorily why certain belligerents' rights should be exercisable against third parties (*i.e.*, against neutrals) who are not guilty of aggression. The obvious examples are the right of visit and search, confiscation of contraband, and condemnation for blockade violation.

This article proposes a remedy for these defects. The proposed solution is, in essence, to consign the traditional corpus of belligerents' rights and neutrals' duties to history and to substitute for them a set of analogous—but not identical—rights and duties that will take the fullest account of the modern law of the U.N. Charter. According to this proposed analysis, there will no longer be such a thing as a state of war. Instead, there will be an analogous—but non-forcible—relationship of hostility between enemy states, which will be governed by a set of rules that will replace the traditional law of belligerents' rights and of neutrality. In fact, it seems that, for lack of a better alternative, the term "hostility" is a good one to adopt as a proposed technical legal term to refer to this new legal relationship and the new set of legal rules that will govern it.⁵

The outstanding feature of this proposed relationship of hostility is that it gives rise to a set of rights on the part of the hostile states which may be provisionally termed, again for lack of a better term, "hostility-related rights." As this proposed legal state of hostility is the post-U.N. Charter equivalent of the old institution of war, these hostility-related rights will be seen as the post-Charter analogue of traditional belligerents' rights. At the same time, hostility-related rights will function as the post-Charter analogue of the classical law of neutrality.

This article elaborates on the law that will govern this proposed legal status of hostility. It is entirely *de lege ferenda*—it is a discussion of the law as

4. For an informative general survey of the extent to which the law of neutrality (including the exercise of belligerents' rights *vis-à-vis* neutrals) continues to exist in state practice, see Patrick M. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249 (1976).

5. "Confrontation" is a possible label but that would seem too reminiscent of the Indonesian "confrontation" campaign against Malaysia in the early 1960s in response to the entry of the Borneo provinces of Sabah and Sarawak into the Malaysian federation. On this incident, see RICHARD FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 91-125 (1970).

it ought to be, not as it presently stands. It should be stressed, however, that this proposal is resolutely non-utopian. It makes very substantial concessions to the realities of state practice—to the point that it may be open to the charge of conceding too much to reality and too little to idealism. To some, the proposed hostility-related rights will seem too strongly reminiscent of the old belligerents' rights. But there will be important differences, both in their juridical bases and in their detailed contents, as the discussion will demonstrate in due course. The single most important difference is that all hostility-related measures will be required to be non-forcible in character.

Part I of the Article sets out the general character of the proposed legal status of hostility and of the rights ancillary to it. Part II discusses in greater detail particular hostility-related rights, while part III examines the relationship between this law of hostility and various other norms of international law. Part IV provides some demonstrations of the utility of this mode of analysis by looking briefly at the legal aspects of several international crises and pointing out the superiority of an analysis along the lines proposed. The Article ends with a brief conclusion.

I. The General Nature of Hostility-related Rights

A. General Considerations

The law relating to the proposed status of hostility is to be, in brief, the modern non-forcible counterpart of the traditional law of war and neutrality. Entering into a state of hostility will constitute, in effect, the prosecution of a conflict without the use of force. War properly speaking is to be consigned unambiguously and unceremoniously to history, no longer "recognised" (in Oppenheim's cautious phraseology)⁶ by international law. Because there is no longer such a thing as war, it necessarily follows that there cannot any longer be such a thing as belligerents' rights, since those rights spring from a state of war. By the same token, the traditional law of neutrality will be banished from modern international law.

In place of the now-discarded legal status of war will be the proposed legal status of hostility, and in place of the now-discarded belligerents' rights will be the proposed set of hostility-related rights. These hostility-related rights will bear some resemblance to traditional belligerents' rights,⁷ but there will be an important distinction. Belligerents' rights were seen as *inherent* rights of states at war, triggered by the inauguration of the state of war. To be sure, the laws of war regulated belligerents' rights, but they did not *create* them. That is to say, the laws of war did not *confer* the rights of belligerents onto the parties; they merely regulated their exercise.

It will be otherwise with the hostility-related rights. These should not be seen as inherent rights of parties in a hostility relationship. Rather,

6. 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 54 (H. Lauterpacht ed., 7th ed. 1952).

7. See *infra* part III.C.

they will be created, defined, and regulated by the law relating to hostility itself. The hostility-related rights, in other words, are best regarded as "gifts" to the hostile parties, freely given by the international community at large. But these rights will be conceded only grudgingly, and they will be freely alterable, even revocable, by the community at large. The reason is quite simple. The real purpose of these rights is to safeguard international peace and security for the international community at large, not to enable the hostile parties to injure one another or third parties with maximum efficiency. As the purpose of the law of hostility is to restrict and contain conflict between states, the law should be restrictive rather than permissive in character. The hostility-related rights are granted to the contending parties on the thesis that, if they were not so conferred, the conflict might assume a more serious form. Furthermore, the specific rights are to be hedged with restrictions.⁸

We must stress at the outset two overriding restrictions upon the hostility-related rights. First, they must be non-forcible in character in order to conform to the U.N. Charter's prohibition against the use of force set out in article 2(4).⁹ Second, these rights must not prejudice the fundamental right of self-defense, which the U.N. Charter expressly preserves in article 51. This last point is, however, subject to the important caveat that the law relating to hostility will entail a certain redefining of the *scope* of the right of self-defense.¹⁰ But the right as such must be carefully preserved.

Hostility-related rights share one important feature with traditional belligerents' rights: the principle of reciprocity. Each hostile party will be equally entitled to exercise the rights, regardless of the legal merits of the underlying legal dispute between them. This requirement has an immediate consequence—a state cannot exercise hostility-related rights without automatically conceding the same prerogative to its opponent.¹¹

8. See *infra* notes 13-15 and accompanying text.

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

(1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.)

10. See *infra* text accompanying note 40.

11. The claiming of hostility-related rights will therefore be analogous to a recognition of belligerency. The analogy will not be precise, however, because the recognition will be by the contending parties themselves rather than by third parties. Notable examples occurred in the Greek War of Independence and the American Civil War. But it seems fair to say that in cases where established governments exercised belligerents' rights in the subduing of insurgencies, they thereby tacitly recognized the belligerent status of their foes. The American Civil War is the most notable example of this. Another is the Algerian independence struggle, in which France exercised the right of visit and search of third-party ships at sea in an effort to halt weapons supplies to the insurgents. On this policy, see Laurent Lucchini, *Actes de Contrainte Exercés par la France en Haute Mer au Cours des Opérations en Algérie*, 1966 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (Centre National de la Recherche Scientifique) 805.

B. Hostility-related Rights of the Hostile Parties Against One Another

Hostility-related rights can be grouped into two categories: rights of the hostile states *vis-à-vis* one another and rights of the hostile states *vis-à-vis* third parties. Regarding the rights of the hostile countries against each other, the law is already tolerably well developed in the form of the general law relating to countermeasures.¹² There is accordingly no need for a detailed discussion here. It should suffice simply to stress the single most outstanding feature of this body of law: it does *not* include the right to use force, since that would violate article 2(4) of the U.N. Charter.

C. Hostility-related Rights of the Hostile Parties Against Third States

The second category of hostility-related rights, those exercisable against third parties, is the principal concern of this discussion. Herein lies the principal difference between countermeasures on the one hand and the proposed hostility-related rights on the other. The general view is that countermeasures, which are by definition responses to prior *unlawful* conduct, can be invoked only against the actual wrongdoing state, not against third parties.¹³ Hostility-related measures, in contrast, are not necessarily based on prior unlawful conduct by the opposing state, but merely on the existence of a dispute of any character. In this respect, the proposed law of hostility would therefore be the modern counterpart of the traditional law of war, whereas the present law of countermeasures is the modern counterpart of the traditional law of reprisal. Both of these modern bodies of law differ from their traditional ancestors in that both rule out any resort to force in violation of article 2(4) of the U.N. Charter.

In its effects on third parties, the proposed law of hostility will function as the modern analogue and replacement of one vital component of the traditional law of war: the traditional law of neutrality. There will, however, be some significant differences. One crucial difference (noted above) is that these hostility-related rights, unlike traditional belligerents' rights *vis-à-vis* neutrals, are not to be seen as inherent rights of the hostile states, but rather as gifts to them from the international community at large. In addition, certain of the traditional rights of belligerents against neutrals must be excluded from this category because of the general requirement (also noted above) that these hostility-related rights must be non-forcible in character. As a consequence, these rights must therefore exclude such robust measures against neutrals as forcible reprisals or the sinking of neutral ships.¹⁴

12. See generally OMER YOUSIF ELAGAB, *THE LEGALITY OF NON-FORCIBLE COUNTERMEASURES IN INTERNATIONAL LAW* (1988).

13. For example, draft article 14 of part II of the International Law Commission's draft articles on state responsibility flatly prohibits countermeasures against third parties. *Report of the International Law Commission on the Work of Its Forty-fourth Session*, 4 May-24 July 1992, 47 U.N. GAOR, Supp. No. 10, at 73 n.48, U.N. Doc. A/47/10 (1992).

14. On the sinking of neutral ships, see TUCKER, *supra* note 1, at 344-54. On a related matter, see Quincy Wright, *The Destruction of Neutral Property on Enemy Vessels*, 11 AM. J. INT'L L. 358 (1917). The taking of forcible reprisals by belligerents against neutrals was actually virtually unknown in practice in the pre-U.N. Charter period. Ironi-

The potential importance of measures exercisable against third states should not be underestimated. Practicing statesmen have appreciated that one potentially important strategy of conflict is the interference with relations between their primary foes and third parties. The most notable illustrations from the pre-U.N. era were the Allied "blockade," or economic warfare, policies of the two world wars. These entailed pressuring the enemy by means of restricting its contacts with neutral third states.¹⁵ We shall consider further examples of this character in the post-U.N. period presently.

D. Inaugurating a State of Hostility

The question of the formalities involved in the inauguration of a hostility relationship calls for some attention. It is important that the international community at large knows as unambiguously as possible whether a state of hostility exists or not. The reason is obvious: the principal hostility-related measures will be applied against neutral third states, so it is a matter of elementary fairness that those states know when they are exposed to them. It is not proposed, however, that the issuing of formal "declarations of hostility" be required, although it seems reasonable to permit states to issue them if they wish, in the interest of clarity. Instead, it is suggested that any attempt by a state to exercise hostility-related rights should be deemed to constitute formal notice to the international community that a state of hostility exists. This, of course, adds to the importance of defining the hostility-related rights as precisely as possible in order to enable a precise pinpointing of the moment the relationship arises.

It would seem reasonable to require states that resort to hostility-related measures to give a formal statement of their reasons for so doing to the U.N. Security Council for general publication. This requirement is not particularly burdensome or innovative. In past crises, states taking extraordinary measures have informed the United Nations of the steps taken and the justifications for them. The Cuban Missile Crisis, the Viet-

cally, one illustration of this right being claimed comes from the *post-U.N.* Charter era—by Israel, in its attack on the Beirut airport in 1968. See Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969); Yehuda Z. Blum, *The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk*, 64 AM. J. INT'L L. 73 (1970).

15. These economic warfare policies, however, operated in conjunction with military measures, not as a complete alternative to them. For short accounts of the World War I blockade, see CHARLES SEYMOUR, *AMERICAN DIPLOMACY DURING THE WORLD WAR 26-39* (1934); EDWIN BORCHARD & WILLIAM POTTER LAGE, *NEUTRALITY FOR THE UNITED STATES 198-211* (2d ed. 1939); EDGAR TURLINGTON, *NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW 48-66* (1936); GERD HARDACH, *THE FIRST WORLD WAR, 1914-1918*, at 11-34 (P. ROSS & B. ROSS trans., 1977). For the British government's own description of the blockade policy, see *British Statement of the Measures Adopted to Intercept the Sea-borne Commerce of Germany*, reprinted in 10 AM. J. INT'L L. 87 (Supp. 1916). For more comprehensive accounts, see LOUIS GUICHARD, *HISTOIRE DU BLOCUS NAVAL (1914-1918)* (1929); A.C. BELL, *A HISTORY OF THE BLOCKADE OF GERMANY, AUSTRIA-HUNGARY, BULGARIA, AND TURKEY, 1914-1918* (1937); MARION C. SINEY, *THE ALLIED BLOCKADE OF GERMANY, 1914-1916* (1957). The leading account of the World War II blockade policy is W.N. MEDLICK, *THE ECONOMIC BLOCKADE* (1978).

nam War, the various Middle East conflicts, and the Falklands War all provide examples. One important innovation, however, is suggested: if the Security Council deems that the situation does not warrant the application of hostility-related measures, it should be able to prohibit the states from resorting to them. It should not be necessary for the Security Council to invoke Chapter VII of the Charter for this purpose. A simple resolution should suffice under the Security Council's "general powers" to maintain international peace and security.¹⁶ Any attempt to exercise hostility-related rights in the face of such a prohibition would be unlawful, giving rise to a duty on the part of the law-breaking state to provide compensation to all parties affected.

It may be wondered whether—and, if so, why—one state should be able to force another unilaterally into a relationship of hostility with it, either by a simple declaration or by some analogous means. In principle, this should not be permitted, although in practice it is difficult to see how it could be effectively avoided. If one state either makes a formal declaration that a state of hostility exists, or simply begins unilaterally to exercise hostility-related rights, then it should be open to the opposing state to deny that a hostile relationship exists. Whether a hostility relationship does or does not exist should, then, become an objective question which in principle could be determined by some quasi-judicial process, such as arbitration.

In reality, though, it must be conceded that a state is likely to succeed in foisting a hostility relationship onto another state in the way that states formerly could, in effect if not in theory, foist a state of war onto another state by a unilateral act.¹⁷ The practical reality is likely to be that a state will be able unilaterally to institute a relation of hostility. It will be especially easy to do so in light of the fact that many of the most important hostility-related rights are exercisable against third parties rather than against the opposing state.¹⁸ It will be open to affected third parties to make effective objection, *i.e.*, to contend that the facts of the particular situation do not justify a resort to hostility-related rights. But third states may simply acquiesce. The opposing state is, of course, free to refrain from exercising any hostility-related rights itself, but if it follows that course, it may place itself at a disadvantage. It seems likely that political pressures within the state would lead it to "fight fire with fire" by exercising hostility-related rights itself. Once that occurs, there will be no scope

16. On the existence of such "general powers," see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, para. 110 (June 21). On the quasi-judicial aspects of the Security Council's functioning, see ELIHU LAUTERPACHT, *ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE* 37-48 (1991).

17. This was, admittedly, a murky area of the pre-League of Nations law of war.

18. See *supra* part I.C. The opposing state itself, as noted above, is subject to ordinary countermeasures governed by the general law thereof. The legality of the countermeasures taken by the state declaring the hostility relationship will be determined not by the law of hostility *per se*, but rather by the legal character of the acts to which the state is reacting.

for either contending party to deny that a state of hostility existed.¹⁹

This is not, admittedly, a very satisfactory state of affairs. But several factors should mitigate any unfairness that might arise. First, there will surely be some stigma attached to instituting a hostility relationship unilaterally so that states will not lightly do so. Second, military action is excluded by article 2(4) of the U.N. Charter. Consequently, any possible advantage that powerful states hold over weak ones is thereby substantially nullified. Finally, once the hostility relationship is in force, the rights of the hostile parties become reciprocal and equal.²⁰ Any unilateral claim to hostility-related rights functions automatically as an admission that the other side is entitled to follow suit.

There is one additional consideration that should be weighed in the balance. Any state which enters into a hostility relationship with another should thereby become required to submit the matter to a third-party dispute settlement procedure. This is not much of an innovation, because the U.N. Charter already requires states to resort to *some* kind of peaceful settlement process in disputes that are likely to endanger international peace.²¹ The present proposal goes beyond the Charter only in the sense that, in a hostility situation, the use of procedures involving third parties will be required.

There would seem to be no harm in permitting the hostile states to institute such a process by agreement. Failing such agreement, though, a standing procedure should be established whereby the Security Council or the Secretary-General of the United Nations can convene a dispute settlement panel. Whether the panel's decision should be legally binding on the parties is a question that may be resolved in due course. Ideally, it should be. If, however, this stands in the way of states' accepting this proposed law of hostility, then non-binding settlement could be accepted.

II. The Contents of Hostility-related Rights

Since the hostility-related rights will not be inherent rights but rather will be "gifts" of the international community,²² the international community will have a free hand in fixing their parameters. The traditional belligerents' rights, in other words, may serve as a rough guide to this new body of law, but not as a dictatorial "dead hand."

In principle, the contents of the code of hostility-related rights would be set down either in an international convention or an agreed set of general principles. The models for a convention would be the Hague Conventions on the Laws of War, or the Geneva Conventions and their two Protocols.²³ It will be open to the international community to make alter-

19. It would still be open to third parties, however, to argue for such a denial.

20. See *supra* note 11 and accompanying text.

21. U.N. CHARTER art. 33, para. 1.

22. See *supra* part I.A.

23. For the texts of these agreements, see DOCUMENTS ON THE LAWS OF WAR 43-119, 169-337, 387-446 (Adam Roberts & Richard Guelff eds., 2d ed. 1989). Another, less

ations at any time. The problem of reaching agreement, of course, must not be underestimated. The following suggestions may be provisionally made regarding the contents of these rights.

A. Contraband

Foremost among the hostility-related rights will be that relating to contraband, *i.e.*, the right of the hostile parties to interfere with the delivery of weapons by third parties to their opponents. This is clearly analogous to the traditional law of contraband from the old and now-discarded law of neutrality. But this new law of contraband is not a straightforward borrowing of the old one. It differs from the old law chiefly in that it is no more than a right of the hostile state to *prevent delivery* of contraband goods to its opponent. It should not have the right to confiscate them and turn them to its own use as in the classical law of war and neutrality.

There are several alternatives here. One is to permit the destruction of captured contraband. Another is to arrange for sequestration of some kind, preferably in the hands of some designated third party. Perhaps a hostile party could appoint an analogue of a protecting party under the Geneva Conventions to undertake this warehousing task.

The best solution is probably to give the third party the option simply to return to the point of departure, or to an alternate destination of its choice, with the contraband material. Prize court proceedings would then be necessary only if there were some question as to the contraband status of the goods.²⁴ Whichever of these solutions is adopted, the general thrust of the law in this area is clear enough. It is to prevent the influx of weaponry into areas of tension, a goal that is consonant with the interests of the world at large. It is certainly not the purpose of this law to allow belligerents to augment their arsenals by plundering neutral traders.

It may further be speculated that the existence of a recognized state of hostility might well—and ought to—have the effect of stimulating third states to take steps on their own initiative to embargo arms shipments by their own nationals to the rival sides. There are many examples of such policies in recent history, most notably during the India-Pakistan and various Middle East conflicts. It may even be that the U.N. Security Council would use its powers under Chapter VII of the Charter to require states to halt arms shipments as it has done in the crises in Yugoslavia and Somalia in the 1990s.²⁵ This proposed modified contraband right would neatly reinforce such arms embargo policies. In addition, it may be noted that a powerful state instituting a hostility relationship by exercising this right of contraband would be taking a risk: by asserting the right, it might stimu-

successful, model was the Declaration of London of Feb. 26, 1909, which never entered into force. For the text of this document, see 3 AM. J. INT'L L. 179 (Supp. 1909).

24. For a discussion of this point, see *infra* notes 26-27 and accompanying text.

25. For the arms embargo against the states of the former Yugoslavia, see S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg. at 42, U.N. Doc. S/INF/47 (1991). For the arms embargo against Somalia, see S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg. at 55, U.N. Doc. S/INF/48 (1992).

late third states or even the United Nations itself to adopt arms embargo policies that would prejudice its own position.

The obvious and age-old difficulty concerning contraband is how to determine what goods fall into this category. It would appear that, in the light of widely varying circumstances of individual disputes and the general rush of technological development, it is impossible to set down a fixed contraband list of universal validity. The following is a potential solution to this problem.

The formulation of contraband lists should *not* be the prerogative of the hostile parties themselves but instead should be prepared by the U.N. Security Council or by a committee thereof. The contending parties should have the right to make representations to the committee as to what goods should be placed on the list, as should third states whose trade will be affected. The committee could perhaps decide on separate lists for the two parties, although that would seem in general not to be desirable. The committee's decision would of course be published and would constitute a warning to all third parties that they carry such goods to either party at the risk of interruption by the other.

The advantages of this proposal are obvious. Contraband lists would be fixed not by the parties themselves, as has happened so often in the past (notably in the world wars), but rather by the international community at large. Also, contraband lists can be tailored with a high degree of precision to the exigencies of the particular case. The committee can also amend the lists from time to time, even during the continuation of the crisis.

This proposal should not appear far-fetched. The Security Council has already had some important and relevant experience in this area. In the early 1950s, it formed a body called the Collective Measures Committee whose task, essentially, was to prepare the U.N. member-states for economic sanctions programs. This committee duly compiled what were, in effect, model contraband lists for application in cases of economic sanctions.²⁶ In addition, during the sanctions efforts that it has actually instituted, the Security Council has established committees to deal with the many technical aspects connected with the embargoes.²⁷ This experience

26. *Report of the Collective Measures Committee*, U.N. GAOR, 7th Sess., Supp. No. 17, at 21-23, U.N. Doc. A/2215 (1952). The committee produced two lists: one of "Arms, Ammunition and Implements of War," and the other of "Strategic Items." These have a direct and obvious analogy to the dichotomy in the traditional law of neutrality between absolute contraband and conditional contraband.

27. For the establishment of a committee to oversee the Rhodesian sanctions of the 1960s and 1970s, see S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg. at 5, U.N. Doc. S/INF/23/Rev.1 (1968). For the establishment of a similar committee to oversee the South African arms embargo of 1977-94, see S.C. Res. 421, U.N. SCOR, 32d Sess., 2052d mtg. at 6, U.N. Doc. S/INF/33 (1977). For the establishment of a similar committee to oversee the arms embargo against the states of the former Yugoslavia in 1991, see S.C. Res. 724, U.N. SCOR, 46th Sess., 3023d mtg. at 45, U.N. Doc. S/INF/47 (1991). This last committee was later entrusted with overseeing the general economic sanctions imposed against Serbia and Montenegro. See S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg. at 13, U.N. Doc. S/INF/48 (1992).

should prove highly relevant to the task of preparing contraband lists.

One final point should be made on the subject of contraband. An interesting and difficult jurisprudential issue might arise as to whether the U.N. committee might be seen as itself *making* the trade in these contraband items unlawful, with the two hostile parties then entrusted with enforcement of that U.N.-sourced legislation. On the whole, it would seem preferable not to view the matter in this light because it would give rise to worries on the part of U.N. member-states that the United Nations is assuming supranational legislative powers which the Charter does not grant it. It is better to say that publication of the contraband lists by the committee constitutes a Security Council authorization to the hostile parties to confiscate the goods as an exercise of their *own* hostility-related rights.

B. Visit and Search

The traditional belligerent right of visit and search was basically precautionary in nature. Since the seventeenth century, when it began to be regulated by treaty, it has assumed a well-governed and even ritualistic form.²⁸ Modern technology's principal contribution, demonstrated repeatedly in the Iran-Iraq conflict of the 1980s, is that the process is now sometimes conducted by means of helicopter descents rather than by visits from another ship. If carried out at sea, as was the traditional practice before the two world wars, visit and search involved minimal interference with the lawful activities of third parties. It seems that it therefore may safely be allowed as a hostility-related right without undue prejudice to third parties.

A difficult question regarding visit and search is how to deal with ships that refuse to submit to it peaceably. The traditional answer was that resistance by a neutral ship to visit and search made the ship good prize, *i.e.*, the ship could be captured and taken into prize for condemnation. It is suggested that this should continue to be so. Otherwise, third parties could simply strip the hostile states of this right by their own fiat.

Another question to be resolved is whether to allow the diversion of ships into the searching state's ports or instead to require visit and search to be conducted entirely at sea. It is suggested, necessarily tentatively, that searches be required to take place at sea in the interest of minimizing disruption to, and possible oppression of, third-party shipping. It is important to ensure, as noted above, that these hostility-related rights not be forcible in character; consequently, anything smacking of compulsory diversion from planned trade routes should be severely frowned upon. There is also the worrisome consideration for third parties that once a ship has been diverted into a port of the visiting state, even if ostensibly

28. The regulation of the visit-and-search process was a constant feature of treaties of friendship, commerce, and navigation from the seventeenth to the nineteenth centuries. For one example among a multitude in existence, see Denmark-Norway-Kingdom of the Two Sicilies, Treaty of Commerce and Navigation, Apr. 6, 1748, arts. 22-23, 38 Consol. T.S. 205, 224-26, 233 (Clive Parry ed., 1969).

merely for a precautionary search, it is then in the territory of the visiting state and subject to the full range of that state's sovereign rights.²⁹

C. Exclusions: Blacklisting and Blockade

Several practices that have figured in past armed conflicts should be explicitly understood *not* to fall into the category of hostility-related rights. Blacklisting, for example, should not be permitted because it is an unreasonable infringement of the general right of third parties to trade with each of the hostile states.³⁰ That is, states should not be permitted to boycott persons in neutral countries simply because they trade with the opposing state. In short, "secondary boycotting" should not be allowed.

It may be noted that in this area, the law of hostility arguably constitutes an abridgement rather than an expansion of the normal sovereign rights of states. After all, it is arguable that a state, in adopting a blacklisting policy, does nothing more than exercise its inherent sovereign right to decide with whom it will and will not trade. It may be conceded, if only for the sake of argument, that such a general sovereign right exists. But it is suggested that the law relating to hostility should override that right in favor of the right of third parties to trade as freely as possible with both hostile countries. Hostile countries, in other words, should not be permitted to exercise their "normal" sovereign rights in a manipulative fashion to deny neutral countries *their* normal sovereign right to trade freely with both sides.³¹

Blockade likewise should be excluded from the list of hostility-related rights on two grounds. First, like secondary boycotting, it infringes the normal right of freedom of trade of third parties. Second, it is forcible in character and consequently violates article 2(4) of the U.N. Charter. In addition, blockade is expressly identified in the U.N. General Assembly's "Definition of Aggression" as an act of aggression.³² As will be seen presently, however, there may be room for blockade-like policies under the

29. For a cogent discussion of the question of diversion of ships into belligerent ports for visit and search, see TUCKER, *supra* note 1, at 338-44. For the leading British prize law case on the subject, see *The Falk*, [1921] 1 App. Cas. 787 (P.C. 1921) (appeal taken from P.) (upholding diversion). The leading French prize law case was *The Federico*, which also upheld diversion, concerning which see C.J. Colombos, *Some Notes on the Decisions of the French Prize Courts*, 16 J. SOC'Y COMP. LEGIS. 300, 303-04 (1916).

30. That was the objection vigorously made by the United States when its nationals and companies fell victim to the first sustained practice of blacklisting—by the Allied powers during the First World War. See James B. Scott, *The Black List of Great Britain and Her Allies*, 10 AM. J. INT'L L. 832 (1916); Thomas A. Bailey, *The United States and the Blacklist During the Great War*, 6 J. MOD. HIST. 14 (1934); TURLINGTON, *supra* note 15, at 80-86; ALICE M. MORRISSEY, *THE AMERICAN DEFENSE OF NEUTRAL RIGHTS 1914-1917*, at 141-47 (1939).

31. See, e.g., Stephen C. Neff, *Economic Warfare in Contemporary International Law: Three Schools of Thought, Evaluated According to an Historical Method*, 26 STAN. J. INT'L L. 67, 73-80 (1989). There is no doubt that this suggested ban on blacklisting would be difficult to enforce in practice. But there should be no mistaking the point of principle involved.

32. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

rubric of self-defense;³³ but blockade, like blacklisting, has no place among the hostility-related rights.

D. Consequences of Over-stepping the Ambit of the Hostility-related Rights

This matter poses little difficulty. Since hostility-related rights are to be governed by a fixed code of rules, the clear consequence is that if either hostile party strays outside the ambit of those rules, it violates the law and owes compensation to the affected third party. An obvious example is that if the hostile party interferes with a third state's general (*i.e.*, non-contraband) trade with its foe, then it is responsible for paying compensation for the damage done.

III. The Relation of the Law of Hostility to General International Law

It is not suggested that the proposed law of hostility should displace any part of modern international law, *except* the law relating to belligerent rights and to neutrality. Sometimes, the law of hostility allows clarifications in areas where there are presently doubts. In other cases, it entails some additional considerations. The following areas of law are of relevance in this regard.

A. Duty of Peaceful Settlement of Disputes

There is, of course, a general duty on the part of U.N. member-states to settle disputes peacefully.³⁴ However, there can be some uncertainty as to when or whether a "dispute" in the proper sense really exists.³⁵ The law relating to hostility will help deal with that problem by applying the principle referred to above—any attempted exercise of hostility-related rights will irrefutably remove any doubts as to the existence of a dispute. Violation of the duty to resolve disputes peacefully would constitute a legal wrong on the part of the intransigent party independent of the merits of any underlying dispute. The harmed party would receive appropriate compensation in due course.

B. The Prohibition Against the Use of Force

The main point here has been mentioned already. One of the most important advantages of recognition of the proposed legal status of hostility is that it enables us to conclude, without ambiguity, that article 2(4) of

33. See *infra* notes 46-52 and accompanying text.

34. See U.N. CHARTER art. 1, para. 1.

35. The mere holding by two parties of opposing attitudes towards a question does not necessarily mean that there is a "dispute" between them in the legal sense. See *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12, paras. 34-43 (Apr. 26) in which the Court confirmed that the existence of a "dispute" within the meaning of the treaty in question was "a matter for objective determination." *Id.* para. 35. More specifically, a dispute in the legal sense "presuppose[s] a claim arising out of the behavior of or a decision by one of the parties" *Id.* para. 42.

the U.N. Charter has abolished the legal institution of war. The ban on the use of force as stated in article 2(4) is an overriding principle of the highest importance.³⁶ There is no suggestion that the status of hostility or the content of any hostility-related right should constitute an exception to it.

At the same time, it must be appreciated that the article 2(4) prohibition does not purport to cover *all* uses of force by states. It applies to uses of force by states *against one another in their international relations*. It accordingly does not apply to mere precautionary measures, such as visit and search, or to any police or law-enforcement measures that states undertake. This is an important point because it removes doubts that might arise concerning visit and search and contraband.

Regarding visit and search, it might be argued that the capture and condemnation of ships resisting this prerogative would violate article 2(4). This would be incorrect, however, because the capture and adjudication would be in the nature of a police or law-enforcement activity against *individuals*. Therefore, it would not amount to a use of force by states "*in their international relations*" (*i.e.*, in state-to-state relations), as article 2(4) requires. Nor would it be a use of force "*against the territorial integrity or political independence*" of the resisters' home state.

The same considerations apply to contraband. The exercise of the right to interfere with contraband traffic, although admittedly forcible in character, should be seen as merely a police measure exercised against the contraband traders as individuals rather than against the traders' home state. This is a venerable principle of the law of neutrality, sometimes aptly termed the "commercial adventure" principle. According to this principle, contraband traders were seen to be involved in a private "commercial adventure" which was subject to disruption by belligerents, and the traders' action was *not* attributed to their home state, so no state responsibility arose on the part of the neutral country.³⁷ Force, therefore, was admittedly applied, but only as a police-like measure against individuals, not against other states.

This approach to the question clearly involves a somewhat restrictive reading of the article 2(4) prohibition against the use of force. Many lawyers will understandably see this as a dangerously crabbed or over-literal interpretation. Notice, however, that this restrictive interpretation *only* applies to relations between hostile states and third parties. The most important aspect of the ban on force is its effect on the hostile states themselves *inter se*—and international law remains as free as before to interpret

36. See *supra* note 9.

37. See *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), in which Justice Story characterized the carriage of contraband by nationals of a neutral state as "a commercial adventure which no [neutral] nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation." *Id.* at 340. For clear (and approving) expositions of the principle, see William C. Morey, *The Sale of Munitions of War*, 10 AM. J. INT'L L. 467, 472-80 (1916); Charles Noble Gregory, *Neutrality and the Sale of Arms*, 10 AM. J. INT'L L. 543 (1916).

article 2(4) strictly in that regard.³⁸

C. Traditional Belligerents' Rights

By virtue of the article 2(4) abolition of the legal concept of war, belligerents' rights can now be said, likewise without ambiguity, to have been abolished. Any unilateral use of force in violation of article 2(4) confers upon the user none of the traditional belligerents' rights, *either* against its foe or against third parties. The state has, *ex hypothesi*, violated the law.

It may be contended, however, that the proposed concept of hostility-related rights merely takes the former belligerents' rights and continues them under another name. After all, the principal rights of visit and search and interference with contraband trade are, for all intents and purposes, straightforward borrowings from the traditional belligerents' rights against neutrals.

This criticism has a superficial plausibility because the hostility-related rights of interference with contraband trade and of visit and search are clearly borrowed from the traditional law of neutrality. On inspection, however, this proposition may be readily seen to be invalid. Visit and search is the only erstwhile belligerent right which is carried over into the hostility field virtually without modification. The law of contraband, as noted above, is carried over only with some important modifications designed to promote the interests of the world community at large, not of the hostile parties themselves.

It should be recalled that a large portion of the catalogue of erstwhile belligerent rights will not be allowed. For example, the entire corpus of belligerents' rights against one another—such as the right to kill one's enemy, to capture prisoners of war, to occupy enemy territory, and so forth—is condemned to oblivion on the grounds of incompatibility with article 2(4) of the U.N. Charter. In addition, many of the traditional rights of belligerents against neutrals—such as the right to sink neutral ships in certain circumstances, the right of blockade, and the right to take forcible reprisals—are likewise rejected.

D. The Law of Neutrality

A major advantage of the concept of hostility is that it permits a ready resolution of the question of whether the traditional law of neutrality continues to exist. With the legal state of war unambiguously abolished, the answer is that traditional neutrality properly speaking is likewise abolished.

It is equally clear, though, that an analogue of neutrality must exist *vis-à-vis* the proposed state of hostility. This is unavoidable—when two countries find themselves in a state of hostility *vis-à-vis* one another, the other states in the world will be allowed to continue to have normal rela-

38. For a view opposing narrow readings of article 2(4), see BROWNLIE, *supra* note 1, at 265-68. For a view advocating a flexible reading of article 2(4), see W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984).

tions with each. The situation here, in fact, is so closely analogous to traditional neutrality that there seems little harm in continuing to use the term as long as it is understood that "neutrality" now refers not to a state of war but rather to a state of hostility. The relations between hostile states and neutral ones (in the now-proper sense of the term) will be regulated, as noted above, by rules of international law which will be analogous, but not identical, to the traditional rules of neutrality.³⁹

E. The Laws of the Conduct of Armed Conflict

The laws governing the conduct of armed conflict, including the corpus of humanitarian law, would be unaffected by this new body of law. These would neither be enlarged, reduced, nor altered in character by the law of hostility.

F. The Right of Self-defense

The relation of hostility-related rights to the right of self-defense raises some of the most interesting questions. It may be objected that these proposed hostility-related rights are unnecessary because modern international law has already recast the old belligerents' rights into adjuncts of self-defense.⁴⁰ There is certainly support in state practice for this proposition. The clearest example is the British government's position regarding Iran's policy of visiting and searching merchant vessels in the Persian Gulf during the Iran-Iraq War of the 1980s.⁴¹ The British government conceded the legality of the practice, carefully characterizing it as an incident of Iran's right of self-defense.⁴² Similarly, when the United States resorted to measures affecting third parties during the Vietnam War, most notably the Cambodian intervention of 1970 and the mining of Haiphong Harbor in 1972-73, it justified them on self-defense grounds, not as exercises of traditional belligerents' rights.⁴³ Israel did the same when it sent troops into Lebanon in 1982.⁴⁴

39. For similar views, see Fenwick, *supra* note 2.

40. See *supra* note 3 and accompanying text.

41. For Iran's formal announcement of the policy, see U.N. SCOR, 40th Sess., Supp. for July, Aug. & Sep. 1985, at 127, U.N. Doc. S/17496 (1985).

42. *United Kingdom Materials on International Law*, 1984 BRIT. Y.B. INT'L L. 405, 552-53; *United Kingdom Materials on International Law*, 1986 BRIT. Y.B. INT'L L. 487, 583-84. Note that this position implies a conclusion on the part of the United Kingdom that Iraq was the aggressor in the struggle and Iran the defender. The United States also conceded the legality of the Iranian practice although it was less forthcoming about the precise legal basis. See Richard W. Murphy, *Review of Developments in the Middle East*, DEP'T ST. BULL., Mar. 1986, at 39, 41. France at first objected to the Iranian practice but later acquiesced to it. A. Goioa & N. Ronzitti, *The Law of Neutrality: Third States' Commercial Rights and Duties*, in *THE GULF WAR OF 1980-1988*, *supra* note 3, at 221, 238.

43. On the Cambodian intervention, see John R. Stevenson, *Statement of the Legal Adviser*, 64 AM. J. INT'L L. 933 (1970). On the mining of Haiphong Harbor, see U.N. SCOR, 27th Sess., Supp. for Apr., May & June 1972, at 44, U.N. Doc. S/10631 (1972).

44. U.N. SCOR, 37th Sess., Supp. for July, Aug. & Sep. 1982, at 4, U.N. Doc. S/15271 (1982).

There is, however, a serious objection to this line of analysis. It seems illogical—if not dangerous—to hold that self-defense-related rights are exercisable against innocent third parties as well as against actual attackers. Admittedly, judicial authority on this point is not dispositive.⁴⁵ But if the overall policy of international law is to minimize the use of force, then it would seem at least *prima facie* inadvisable to allow self-defense measures, which of course include the use of force, against third parties. Hostility-related measures, in contrast, will be permitted to affect third parties—but with the important proviso that they cannot entail any use of force.

There are, accordingly, three fundamental distinctions between the right of self-defense on the one hand and the hostility-related rights on the other. The first is that hostility-related rights will have their primary sphere of operation *vis-à-vis* third parties, while self-defense rights have theirs *vis-à-vis* aggressors. The second is that self-defense may involve the use of force, whereas hostility-related action may not. The third is that hostility-related rights are to be governed by a fixed code of rules rather than by the more open-ended principles of necessity and proportionality that govern self-defense.

At this point, it is appropriate to comment on the specific question of blockade. The prohibition against blockade constitutes perhaps the most striking departure of the proposed law of hostility from the traditional law of war and neutrality. Although the law of hostility rejects blockade as a *general*, inherent right of states, it may permit blockade when used as a *bona fide* measure of self-defense. This approach to blockade admittedly poses some difficulties. The principal problem is that blockade seems to violate the proposition that self-defense measures be permitted only against attackers and not against third parties. The response is that, in particular cases of self-defense, the defeat of an armed attack will necessitate the halting of *all* trade between the attacking state (or a portion thereof) and the outside world. Because of this state of affairs, any persons attempting to conduct trade through a blockade would thereby, in legal terms, assimilate themselves to the rival state. Consequently, measures taken against them would *not* constitute measures against third parties.

This means that blockades, as a sub-category of self-defense measures, would be subject to the two key conditions governing self-defense action: necessity and proportionality.⁴⁶ This point has significant implications. According to the principle of necessity, blockades would only be permissible under certain restricted circumstances (*i.e.*, when necessity was actually present)—it would not be an *automatic* right of self-defenders. The princi-

45. In the *Nicaragua* case, the World Court confirmed that the right of self-defense arises *only* in response to an armed attack. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, para. 195 [hereinafter *Nicaragua v. U.S.*]. But it did not state whether the self-defense rights are exercisable only against the attacking party.

46. On the principle of necessity, see BROWNIE, *supra* note 1, at 41-44. On proportionality, see Jost Delbrück, *Proportionality*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 396, 396-98 (Rudolf Bernhardt ed., 1984).

ple of proportionality would imply that only certain types of trade could be stopped (*i.e.*, trade in goods that furthered the aggression). The principle of proportionality would furthermore imply that the self-defending state would only be entitled to divert neutral ships away from the blockaded area, not to capture and confiscate them. Blockades that failed to meet the necessity and proportionality tests would, of course, not be *bona fide* self-defense measures but rather mere acts of aggression, as provided by the U.N. General Assembly's "Definition of Aggression."⁴⁷

This proposed modification of traditional blockade law and practice is reminiscent of the rules governing pacific blockade.⁴⁸ As early as 1887, the Institute of International Law adopted a declaration to the effect that, in cases of pacific blockade, captured ships were merely to be sequestered and then returned to the target state at the conclusion of the dispute.⁴⁹ This modified policy has also been followed in cases of true war blockades (blockades enforced against third parties). An early example was the British-German blockade of Venezuela in 1902-03.⁵⁰ A more recent and pertinent illustration is the United States closure of Haiphong Harbor by means of mines in 1972-73,⁵¹ which it justified not as a belligerent right *per se* but rather as a self-defense measure.⁵² The United States made no attempt to capture or confiscate ships approaching the target area. Because it effected the closure by mines rather than by a blockading squadron, ships which had intended to enter the harbor were free to go elsewhere instead, as just proposed.

G. Reprisal

To a large extent, the considerations applying to self-defense apply also to reprisal. There have been doubts, extending back at least as far as the Napoleonic wars, as to whether reprisal measures ought to be permitted against parties other than the actual wrongdoer. British prize courts took the view that there was no absolute prohibition in international law against belligerent reprisals that had effects on neutrals as well as on the enemy.⁵³ Nor, however, was the wronged belligerent entitled to take reprisals without any heed whatever to the interests of neutrals. Instead, the lawfulness was to be decided in each particular case by a balancing exercise or proportionality test: the reprisals taken should not involve "greater hazard or prejudice to the neutral trade . . . than was commensurate with the gravity

47. See *supra* note 32 and accompanying text.

48. A pacific blockade is a blockade outside the framework of a war and enforced only against the vessels of the target country, not against those of third states.

49. INSTITUT DE DROIT INTERNATIONAL, TABLEAU GÉNERALE DES RÉOLUTIONS (1873-1956), at 170 (Hans Wehberg ed., 1957).

50. 2 OPPENHEIM, *supra* note 6, § 46, at 148.

51. There may be some doubt as to whether the term "blockade" is really an appropriate label for this effort. For the view that its overall effect was essentially that of a traditional blockade, see H. LEVIE, *MINE WARFARE AT SEA* 150-57 (1992).

52. U.N. SCOR, 27th Sess., Supp. for Apr., May & June 1972, at 44, U.N. Doc. S/10631 (1972).

53. The *Sigstad*, [1919] App. Cas. 279 (P.C. 1918) (appeal taken from P.).

of the enemy outrages and the common need for their repression."⁵⁴ It is not difficult to see that belligerents and neutrals, in the heat of battle, could easily arrive at different conclusions applying so general a test.

The proposed law of hostility deals with this question by a flat prohibition on reprisal measures against third parties. Reprisal action, like self-defense, is permissible only against actual wrongdoers. The law of hostility thus rejects the British prize court holdings. It is proposed that this principle would apply to *all* reprisals, whether forcible or not, although it should be recalled that according to the prevailing wisdom (with some support from the World Court), forcible reprisals are unlawful in any event.⁵⁵

IV. Illustrations from State Practice

It should not be thought that this proposed body of law relating to hostility is utopian in character. On the contrary, there are a host of examples in recent state practices which fruitfully illustrate the manner in which the law of hostility would operate in practice and of the advantages that it would afford. Sometimes, important dilemmas or uncertainties can be resolved using this new analysis. Sometimes different results will be reached. Sometimes the same results will be reached, but on different grounds. The following examples are illustrations.

A. The "Secondary" Arab Boycott Against Israel

The Arab boycott of Israel provides an excellent illustration of the conceptual advantages that an analysis based on the concept of hostility affords. The "primary" boycott by the Arab states against Israel itself is generally thought to be lawful. The "secondary" boycott, targeted against third parties who deal with Israel in such a way as to enhance its military strength, is of more doubtful legality.⁵⁶

Under conventional legal analysis, commentators have provided two legal justifications for the secondary Arab boycott. One is that like the

54. The *Leonora*, [1919] App. Cas. 974, 992 (P.C. 1919) (appeal taken from P.). See also The *Stigstad*, *supra* note 53, at 289, which stated that a reprisal measure affecting neutrals is permissible so long as it does not inflict "hardship excessive either in kind or in degree upon neutral commerce. . . ."

55. The World Court's treatment of the matter in *Nicaragua v. U.S.* was rather more tentative than might be supposed at first. Although the Court quoted the prohibition against forcible reprisals contained in the General Assembly's Declaration on Friendly Relations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970), it did so in the context of pointing out that some uses of force, such as forcible reprisals, are less grave than others. The Court also went no further than to say that it "can . . . draw on the formulations" in that resolution to determine the law in this area and that the adoption of this resolution "affords an indication" of the *opinio juris* of states as to customary international law on this point. It should also be noted that the question of the legality of forcible reprisals was not before the Court at the time. At the same time, there can be little doubt that the Court revealed an inclination to hold that forcible reprisals are unlawful. *Nicaragua v. U.S.*, 1986 I.C.J. 14, para. 191, at 101.

56. On the Arab boycott generally, see AARON J. SARNA, *BOYCOTT AND BLACKLIST: A HISTORY OF ARAB ECONOMIC WARFARE AGAINST ISRAEL* (1986).

primary boycott, it is a self-defense measure by the Arab states.⁵⁷ The other is that it is a sovereign-right measure, a mere exercise by the Arab states of their normal sovereign right to decide whether to permit trading with other countries or not, and if so, on what terms.⁵⁸ Both of these defenses are, in their present form, of doubtful persuasiveness.

The self-defense justification has several clear weaknesses. One is that self-defense measures are not legally permitted except in the face of an actual "armed attack."⁵⁹ It is also questionable whether self-defense measures are permitted against third parties as well as against attackers. The weakness of the sovereign-right justification lies in the fact that the exercise of this purported sovereign right involves an interference with the basic right of third states to trade freely.⁶⁰ In such a case as this, when rights or claimed rights clash with one another, some kind of balancing exercise is called for.⁶¹

Some have argued that the Arab boycott is unlawful because it is forcible in character, thereby amounting in its own right to a direct violation of article 2(4).⁶² This argument, however, is not persuasive because it seems doubtful that mere economic pressure can be considered, at least in the general case, to be a use of force. The majority of international lawyers hold this view.⁶³

57. Commissioner General Mahgoub, *Statement on the Arab Boycott, March 5, 1975*, in 2 CONFERENCE ON TRANSNATIONAL ECONOMIC BOYCOTTS AND COERCION: MATERIALS ON THE ARAB OIL-PRODUCING NATIONS BOYCOTT 114 (Roy M. Mersky ed., 1978).

58. See Ibrahim F.I. Shihata, *Arab Oil Policies and the New International Economic Order*, 16 VA. J. INT'L L. 261 (1976).

59. U.N. CHARTER art. 51.

60. The World Court, in *Nicaragua v. U.S.*, referred to the U.S. infringement of "the freedom of communications and of maritime commerce." *Nicaragua v. U.S.*, 1986 I.C.J. 14, para. 214, at 111-12. In that case, the interference was by the crude means of placing mines around the ports of the enemy state. In the case of the Arab boycott, the interference takes the more subtle form of using economic power to halt trading by third states with the enemy. But the basic right interfered with is the same in both cases.

61. See *supra* note 31 and accompanying text.

62. See, e.g., Comment, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983 (1974); Jordan J. Paust & Albert P. Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AM. J. INT'L L. 410 (1974).

63. See, e.g., LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 104 (2d ed. 1949); C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, 493-94 (1952-II); BOWETT, *supra* note 1, at 148-49; Max Sorensen, *Principes de Droit International Public*, 101 R.C.A.D.I. 1, 236-37 (1960-III); BROWNIE, *supra* note 1, at 361-62; Louis Dubouis, *L'Embargo dans la Pratique Contemporaine*, 1967 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (Centre National de a Recherche Scientifique) 99, 109-10; Richard B. Lillich, *The Status of Economic Coercion under International Law: United Nations Norms*, 12 TEX. INT'L L.J. 17, 18-19 (1977); Charles Leben, *Les Contre-Mesures Inter-étatiques et les Réactions à l'Illicéité dans la Société Internationale*, 1982 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (Centre National de la Recherche Scientifique) 9, 67; Michel Virally, *Article 2, Paragraphe 4*, in LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 113, 120-21 (Jean-Pierre Cot & Alain Pellet eds., 1985); Ignaz Seidl-Hohenveldern, *The United Nations and Economic Coercion*, 18 REVUE BELGE DE DROIT INTERNATIONAL 9, 10-11

Although the Arab boycott does not constitute a use of force, it is nevertheless an act of hostility directed ultimately against Israel though proximately against third parties trading with Israel. It therefore makes eminent good sense to deal with the boycott under the rubric of the law of hostility. This analysis readily shows the secondary component of the boycott to be unlawful. It cannot be an exercise of a belligerent right, because belligerent rights do not exist. Nor can it be a self-defense measure, because those may be directed only against attacking parties, not against neutrals. It also cannot be a lawful reprisal against the Western states for violations of the law of neutrality, because that law no longer exists. Nor can it be justified as a hostility-related right for the reason given above: it is a violation of the rights of third parties to maintain normal, non-contraband relations with the contending parties.

B. The Western Strategic Embargo Against the Socialist States

Similar considerations arise when examining the Western strategic embargo against the socialist countries. The embargo was, in effect, a contraband regime in that it was designed to prevent armaments from reaching the socialist countries from the West, together with other goods and technology that might enhance the war-making capacity of those countries. The embargo was not technically a contraband regime because there was no actual war in progress.

This case nicely illustrates one of the central dilemmas that this concept of hostility-related rights will pose for states. If the relationship is truly one of hostility, then states would have the right to use police powers to prevent third parties from delivering the designated contraband goods and technology to the other side. But a price must be paid for claiming and exercising such a right: under the law of hostility, the U.N. Security Council and *not* the contending parties themselves determines what to include in the contraband list. In other words, the enforcement rights available to the hostile parties will be broad, but the hostile parties must forfeit the crucial right to determine the contraband list.

An alternative for the parties concerned is to refrain from designating the relationship as hostile and to seek, instead, to halt the flow of key goods and services from their *own* territories by the use of their ordinary sovereign rights under general international law. If this option is chosen, the contending states retain the key right to decide what goods or technology to try to halt—they preserve the right to fix their own contraband list. However, they have a right only to halt the flow of goods and technology from their own territories *through* third states to the target countries. They may not interfere with the right of third countries to conduct their *own* trading with the target states. Here again, the analogy with the traditional law of neutrality is clear.

(1985); and Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405, 408-10 (1985).

This alternative strategy is the one that the Western states actually adopted in their strategic-embargo effort. They acted through COCOM to coordinate the exercise of their *ordinary* sovereign rights with a view to preventing the exporting, whether directly or indirectly, of designated goods and technology from their home territories to the socialist countries.⁶⁴ The contrast with the Arab boycott should be noted. The Arab states actually sought to stop economic contacts with Israel that originated from third countries, while the strategic embargo did not. It was instead confined to preventing the use of third countries as conduits between COCOM states and socialist countries. Referring again to the analogy with the traditional law of neutrality, the strategic embargo sought to apply an analogy of the continuous-voyage principle.⁶⁵

This continuous-voyage-style strategy has sometimes proved difficult to implement. On several occasions, most notably in the Siberian pipeline crisis of 1982, it involved the Western alliance states in serious disputes as to how far the embargoing states could go in regulating the flow of goods and technology that originated within their territories.⁶⁶ The law of hostility could hardly be guaranteed to eliminate such difficulties entirely, but it would posit several clear points of principle that would govern them. One principle is that if hostility-related rights are claimed, then all of the constraints associated with those rights must be observed. If, in the alternative, only ordinary sovereign rights are utilized, the guiding principle is that the embargoing states are only entitled to control goods and technology originating in their own territories. They are not entitled to impede the flow of foreign-origin goods to the target states—neutral trade must be left free. Finally, if this sovereign-right alternative is adopted, only the ordinary prerogatives of states under the general international law of jurisdiction may be utilized.

Adopting these standards, it seems likely that the United States went beyond its legal limits in the Siberian pipeline affair of 1982 to the extent

64. For a discussion of the history, operations, and future of COCOM, see UNITED STATES OFFICE OF TECHNOLOGY ASSESSMENT, *TECHNOLOGY AND EAST-WEST TRADE* 153-70 (1979); John P. Hardt & Kate S. Tomlinson, *The Potential Role of Western Policy Toward Eastern Europe in East-West Trade*, in *ECONOMIC RELATIONS WITH THE U.S.S.R.: ISSUES FOR THE WESTERN ALLIANCE* 79 app. 5A at 111-27 (Abraham S. Becker ed., 1983); Cecil Hunt, *Multilateral Coordination in Export Controls—The Role of CoCom*, 14 U. TOL. L. REV. 1285 (1983). See also *CONTROLLING EAST-WEST TRADE AND TECHNOLOGY TRANSFER: POWER, POLITICS, AND POLICIES* (Gary K. Bertsch ed., 1988) (discussing Western efforts to control strategic trade and technological relations with communist economies).

65. The continuous-voyage principle was designed to stop the use of neutral states as conduits to enemy countries. The ordinary rule was that a belligerent had no right to interfere with *any* trade to a neutral country. If, however, the neutral country was merely a way-station en route to the enemy, the continuous-voyage principle held that contraband trade to a neutral state could be halted by a belligerent if the contraband goods were intended merely to be taken *through* the neutral state to the enemy and not to be used *in* the neutral country itself. On the continuous-voyage principle, see generally HERBERT W. BRIGGS, *THE DOCTRINE OF CONTINUOUS VOYAGE* (1926).

66. For a discussion of this crisis, see ANTHONY J. BLINKEN, *ALLY VS. ALLY: AMERICA, EUROPE, AND THE SIBERIAN PIPELINE CRISIS* (1987) (focussing on the discord between the United States and its Western European allies on the question of East-West trade).

that it sought to control the flow of goods originating in foreign countries. Even if the goods were produced by an American subsidiary, and even if all punitive measures were imposed wholly in U.S. territory, the breach of this basic principle put the U.S. action outside the law.

C. The Cuban "Quarantine" of 1962 by the United States

The Cuban "quarantine" also lends itself well to analysis under the proposed law of hostility. The United States justified its quarantine action during the Cuban Missile Crisis of 1962 as a regional enforcement measure under article 53 of the U.N. Charter.⁶⁷ This defense, however, is doubtful, because article 53 requires the authorization of the Security Council for a lawful regional enforcement measure and there was no such authorization in this case. It is therefore hardly surprising that some defenders of the legality of the quarantine adopted other justifications instead, such as self-defense.⁶⁸ But self-defense is not very convincing either, since there was no armed attack on the United States either by Cuba or by any country supplying weapons to Cuba.⁶⁹

The Cuban "quarantine" is better analyzed in terms of the proposed concept of hostility. It then becomes clear that the quarantine was lawful, if at all, as an exercise of the hostility-related right of contraband. Both Cuba and the Soviet Union denounced the measure as a blockade,⁷⁰ but that view was misconceived. The stated purpose of the quarantine was not to halt *all* trade between Cuba and the outside world, as a blockade is designed to do, but only to "interdict . . . the delivery of offensive weapons and associated materiel [sic] to Cuba"—a classic contraband formula.⁷¹ Consistent with contraband practice, the proclamation duly specified the types of weapons and related materials whose delivery would be halted. The United States was to enforce the measure by visiting and searching third-party vessels on the high seas—another obvious element of classic contraband law. Ships failing to comply with the visit and search process would be taken into custody.

67. Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515 (1963); ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* (1974).

68. For a defense of this view, see remarks by Dr. Charles G. Fenwick in *Cuban Quarantine: Implications for the Future*, 57 AM. SOC. INT'L L. PROC. 1, 17 (1963).

69. Some commentators, such as Professor Myres S. McDougal, took a broader view of self-defense, contending that it was applicable in situations other than those of an actual armed attack. *Id.* at 15-16. In *Nicaragua v. U.S.*, however, the World Court rejected this broad view of self-defense. *Nicaragua v. U.S.*, 1986 I.C.J. 14, para. 195. The Court was quite explicit on the subject of supplying weapons to a country: such a supply does *not* amount to an armed attack although it *can* constitute a use of force contrary to article 2(4) of the Charter. *Id.* para. 195, at 104.

70. U.N. SCOR, 17th Sess., Supp. for Oct., Nov. & Dec. 1962, at 148, U.N. Doc. S/5183 (1962); U.N. SCOR, 17th Sess., Supp. for Oct., Nov. & Dec. 1962, at 149, U.N. Doc. S/5186 (1962). See also W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid under International Law*, 31 GEO. WASH. L. REV. 335 (1962).

71. Proclamation No. 3504, 27 Fed. Reg. 10401 (1962), reprinted in 47 DEP'T ST. BULL. 717 (1962).

The Cuban quarantine policy foreshadowed the proposed law relating to hostility in its provision for third-party ships found to be carrying offending goods. There were to be no prize proceedings. Instead, any such vessel was to be "directed to proceed to another destination of its own choice."⁷² This is precisely the policy proposed above as a general rule of the law relating to hostility.

Some scholars condemned the quarantine policy as an unlawful threat or use of force contrary to article 2(4) of the U.N. Charter.⁷³ Even its defenders conceded that it was forcible in character.⁷⁴ Such criticisms miss the point, however, by seeing the quarantine as a use of force against *Cuba*. Forcible action *was* involved in the quarantine, but it was against third parties attempting to supply the specified types of weaponry to Cuba rather than against Cuba itself.⁷⁵

A more valid criticism of the quarantine policy, which several states (e.g., Sweden and Poland) made, was that it was an unlawful interference of their normal right to trade with Cuba.⁷⁶ The quarantine obviously did interfere with third-party trade with Cuba—that was its explicit purpose. Using the present analysis, however, one would probably be able to justify the policy. A genuine crisis had occurred, and a halting of an influx of weaponry was a sensible policy pending attempts at a peaceful resolution (which, in this case, succeeded). Nevertheless, the application of the proposed law of hostility would have made some difference. It would have imposed a firm duty of third-party dispute settlement on the two parties. It would also have charged the U.N., rather than the United States, with the responsibility of defining the types of weapons to be interdicted.⁷⁷

D. The Iraqi "Tanker War" of the 1980s

This is perhaps the most instructive illustration of all. When Iraq instituted its "tanker war" against vessels loading oil at the Iranian port of Kharg Island, it might have resorted to several justifications with varying degrees of persuasiveness. Iraq might have justified it as an exercise of the traditional belligerent right of blockade. Alternatively, it might have con-

72. *Id.* Only if a contraband-carrying ship refused to avail itself of this opportunity would it be taken to an American port for "appropriate disposition." The occasion did not arise for the United States to expand on this delphic expression.

73. Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 556-57 (1963).

74. See, e.g., Abram Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEP'T ST. BULL. 763, 764 (1962); Meeker, *supra* note 67, at 523.

75. Admittedly, it may be argued that the *real* foe of the United States was not Cuba but the Soviet Union, because it was the Soviet Union which maintained exclusive control over the weaponry and so presented the real threat to the United States. That may have been so. But for present purposes, it is more important that the matter was not treated on that footing. In the quarantine policy, no distinction was made between Soviet vessels and those of any other state—the Soviet Union was treated as a third-party supplier of weapons to Cuba.

76. NICHOLAS TRACY, *ATTACK ON MARITIME TRADE* 216-18 (1991).

77. These differences would probably have mattered little in the end. Genuine efforts at peaceful settlement were made successfully in a relatively short period of time. In addition, the American contraband list was very short. It seems unlikely that a U.N.-compiled list would have differed significantly.

tended that its actions were an exercise of the right of self-defense. Stretching matters a bit, it might even have claimed that the policy was a contraband measure—Iraq was preventing the inflow of foreign exchange for war prosecution into Iran by preventing the exporting of oil which earned that exchange.⁷⁸ In fact, Iraq adopted none of these, but instead resorted to a fourth justification: reprisal. The measures against the tankers were said to be a retaliation for various allegedly unlawful measures taken by Iran.⁷⁹

Using conventional legal analysis, the reprisal issue poses some difficulty. For one thing, the status of belligerent reprisals is still somewhat unclear. The prevailing view, as noted above, is that forcible reprisals in peacetime are unlawful. However, there is room for uncertainty as to the legitimacy of reprisals during an armed conflict, even if the conflict is not a formally declared war. The Geneva Conventions of 1949 and Protocol I of 1977 thereto both clearly envisage that reprisals will take place during armed conflicts and seek to regulate them.⁸⁰

The proposed concept of hostility simplifies and clarifies the analysis. Iraq's reprisal justification would be summarily rejected on two grounds: first, forcible reprisals are in principle unlawful; and second, reprisal measures are in principle disallowed against third parties.

A possible justification on the ground of contraband would be resolved with ease by consulting the U.N. contraband list. The matter

78. As early as the seventeenth and eighteenth centuries, the general practice of states was to regard money and precious metals as non-contraband. WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 769 (A. Pearce Higgins ed., 1924). Hall conceded that, in theory, money could constitute conditional contraband, but only in the event, highly unlikely in practice, that it was destined directly to the armed forces of the enemy. *Id.* at 790.

79. U.N. SCOR, 39th Sess., Supp. for Apr., May & June 1984, at 106, U.N. Doc. S/16590 (1984). See also Maxwell Jenkins, *Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals*, 8 B.C. INT'L & COMP. L. REV. 517 (1985) (examining the legality of attacks by Persian Gulf belligerents against neutral commercial ventures).

80. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, 75 U.N.T.S. 135 (prohibiting reprisals against prisoners of war); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 33, 6 U.S.T. 3516, 75 U.N.T.S. 287 (prohibiting reprisals against protected persons and their property); Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 240 (prohibiting reprisals against cultural property). The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3, contains a host of prohibitions against reprisals: against wounded, sick, and shipwrecked persons, and against medical personnel tending to them (art. 20); against civilian populations (art. 51, § 6); against "civilian objects" (art. 53); against "objects indispensable to the survival of the civilian population" (art. 54, § 4); against "the natural environment" (art. 55, § 2); and against "works and installations containing dangerous forces" (art. 56, § 4). The implication of these provisions would seem to be that reprisals are not altogether unlawful in principle. See generally FRITS KALSHOVEN, *BELLIGERENT REPRISALS* (1971) (concluding that belligerent reprisals, though not totally prohibited, are an unfortunate symptom of an anachronistic world order).

would *not* be subject to Iraq's unilateral proclamation.⁸¹ Even if foreign exchange were on the U.N. contraband list, Iraq would have no right to mount unprovoked armed attacks on oil exporters or even to confiscate the oil itself. It would only be allowed to capture and sequester the oil cargoes. An alternative would be to place the proceeds of the oil sales into some kind of escrow account for the duration of the conflict.⁸²

A blockade justification would also clearly fail, as that traditional right no longer exists. A claim that this was a blockade-like self-defense measure would require a closer look, but on the facts of the particular case, this argument fails to convince. Even conceding for the sake of argument that Iraq's action met the necessity test, the "tanker war" clearly violated the proportionality principle. The waging of outright armed attacks on neutral shipping, or "large naval targets" in the convoluted Iraqi parlance, seems a gravely excessive way of dealing with the threat at hand (the replenishment of the enemy's treasury with foreign exchange).

Conclusion: The Utility of the Concept of Hostility

The advantages of recognizing the legal category of hostility are manifold and may be set out very briefly. One crucial advantage is that it enables us to maintain the U.N. Charter's prohibition against the use of force with the fullest possible consistency. We can now say unambiguously that the concept of a state of war is abolished. Consistency requires us to go on to hold equally unambiguously that, if the institution of war is abolished, then so is the set of belligerents' rights which arose out of it.

Finally, it is also now clear beyond a peradventure that the traditional law of neutrality—the alter ego of war—is likewise obsolete. In place of the erstwhile code of rights and duties of belligerents and neutrals, there is the code of rules relating to hostility as outlined above. There is, to be sure, a family resemblance, and sometimes a close one, between this new law and the older one. But the law of hostility is a distinct and manifest improvement upon the now-discarded law of neutrality. Perhaps the most notable advantage is that the legal prerogatives of hostile states are not, under this proposed analysis, inherent rights of states, but rather are the creation and gift of the world community at large.

Indeed, the entire law of hostility is oriented towards the pursuit of community goals rather than the national interests of the rival hostile parties themselves. Hostility-related rights, accordingly, are required to remain strictly within the ambit of the U.N. Charter's ban on the use of force. Furthermore, the scope of these rights is subject to constant adjustment by the community at large in the interest of the broad goal of furthering international peace and security. This feature appears most vividly

81. It is suggested, incidentally, that the U.N. contraband list should not contain foreign exchange, but that will be a decision for the United Nations to reach on its own.

82. Another possibility would be to allow Iraq to capture and destroy the oil cargoes. It seems unreasonable on economic grounds, however, to allow the wanton destruction of a non-renewable energy source.

in the close association between the claiming of hostility-related rights and the duty to submit to third-party dispute settlement.

The principal hostility-related right which is analogous to the former rights of belligerents *vis-à-vis* neutrals—contraband—is reduced in severity. There is only a right to prevent delivery, not a right to confiscate and convert to one's own use. In addition, the hostile states themselves will not have the right to fix the contents of contraband lists. That right belongs to the United Nations.

In addition, certain normal sovereign rights of states will be limited when they are exercised in a hostility setting. For example, blacklisting (secondary boycotting) will be prohibited, as will the taking of reprisal action against third parties.

This new analysis also allows an important clarification, and limitation, of the right of self-defense. Nations may mount forcible self-defense measures *only* against actual armed attackers, not against third parties. Blockade measures may be permitted on the thesis that they are measures against persons who have affiliated themselves voluntarily with the opposing side. This rationale, however, allows blockades only if they meet the strict twin tests of necessity and proportionality which govern self-defense actions generally.

The above proposal is not utopian. On the contrary, there have been foreshadowings of it in various crises which have actually occurred since World War II, most notably, perhaps, in the Cuban Missile Crisis of 1962.

Some will inevitably be unhappy at embarking upon an elaboration of law relating to hostile relations between states. There is, apparently, a certain fear that, in so doing, international law would undermine its own longer-term goal of promoting international peace and security. This fear may have some basis if one is concerned with a law of *armed* conflict. The present proposal, however, is resolutely concerned with devising a new corpus of law governing *unarmed* conflict. Harmony between states is, undeniably, a finer state of affairs than hostility. However, it must be remembered that this proposed law of hostility is designed to contain hostile actions within carefully delimited and peaceful channels. Its overriding ethos, for the hostile parties, is constraint rather than license. As such, the law of hostility is designed most emphatically to be a contribution towards peace rather than a mere analogue of the traditional law of war.