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# THE STATUS OF THE OUTER SPACE TREATY AT INTERNATIONAL LAW DURING “WAR” AND “THOSE MEASURES SHORT OF WAR”

*LaToya Tate\**

## I. INTRODUCTION

Almost forty years after the creation of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies<sup>1</sup> and despite many technological advances in outer space, the evolution of outer space has still been carried forth in accordance with the principles of the Outer Space Treaty.<sup>2</sup> Outer space has remained a weapons-free, peaceful, legal, and operational environment.<sup>3</sup> “Nonetheless, given the increasing global reliance on space systems, and increasing militarization of space, its weaponization and evolution into a distinct theater of military operations seems likely.”<sup>4</sup>

Because of the possibility that hostilities may occur in or through outer space, this paper examines the effect of “war” or “those measures short of war” on the execution of the obligations contained in the Outer Space Treaty in both of those instances. This paper consists of five sections. The first section includes this introduction. The second section demonstrates the “validity of international law in outer space.”<sup>5</sup> The third section

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<sup>1</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

<sup>2</sup> Major Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space* 48 A.F. L. REV. 1, 18 (2000).

<sup>3</sup> Joanne Irene Gabrynowicz, *Space Power and Law Power*, SPACE NEWS, July 26, 1999, at 13.

<sup>4</sup> Major Robert A. Ramey, *supra* note 2, at 18.

<sup>5</sup> GYULA GAL, SPACE LAW 129 (1969).

examines the legal consequences of "war" and "those measures short of war" on the operation of treaties. The fourth section, evaluates the status of the Outer Space Treaty during "war" and "those measures short of war." The last section, the conclusion, offers closing remarks and comments.

## II. INTERNATIONAL LAW GOVERNS OUTER SPACE

"Space law is a part of international law, and as such subject to the rules set by international law."<sup>6</sup> The Outer Space Treaty explicitly provides that States' use and exploration of outer space shall be conducted in accordance with international law.<sup>7</sup> However, during the earlier development of the law of outer space, much controversy existed among legal scholars regarding whether or not the rules of international law govern the law of outer space.<sup>8</sup> As outer space developed, legal scholars realized the importance of creating legal standards to govern space activities.<sup>9</sup> This section of the paper demonstrates that the history surrounding the codification of outer space law also establishes that international law governs the use and exploration of outer space.

In the Cold War era, scientists began to research and investigate outer space.<sup>10</sup> To maintain the balance of power in the world, States developed and stock-piled nuclear weapons and weapons of mass destruction.<sup>11</sup> As States continued to create and develop nuclear weapons and weapons of mass destruction, scientists' recognized that outer space was the ultimate high ground on the battlefield and that extending weapons within outer space would change the modern definition of war.<sup>12</sup> Although war in space was a growing concern, States did not realize the magnitude of harm that nuclear weapons and weapons

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<sup>6</sup> MARIETTA BENKOE, WILLEM DE GRAAFF, & GIJSBERTHA C.M. REIJEN, *SPACE LAW IN THE UNITED NATIONS*, 178 (1985).

<sup>7</sup> Outer Space Treaty, *supra* note 1, at art. III.

<sup>8</sup> GYULA, *supra* note 5, at 130. *See also*, WALTER A. MCDOUGALL, *THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE 187-88* (1985).

<sup>9</sup> *Id.*

<sup>10</sup> BENKOE ET AL., *supra* note 6, at 147.

<sup>11</sup> MCDOUGALL, *supra* note 8, at 177.

<sup>12</sup> *Id.*

of mass destruction could have until after the first atomic bomb was released on Hiroshima and Nagasaki.<sup>13</sup> This fear intensified after the Soviet Union successfully launched *Sputnik* into outer space.<sup>14</sup> Most States saw *Sputnik* as an indication of the Soviet Union's capability in the near future to launch weapons into space.<sup>15</sup> Remembering the magnitude of the human suffering and lost property that resulted from the atomic bombing of the two Japanese cities and recognizing that outer space was the ultimate high ground,<sup>16</sup> States accepted that, "the lack of norms [in outer space] was threatening the peace and security of all mankind."<sup>17</sup>

The fear of war extending into space led States to recognize the importance of the adaptability of international law to outer space.<sup>18</sup> Applying international law to outer space would create the necessary legal order that was needed to control States use and exploration of outer space.<sup>19</sup> Because of the rapid development of nuclear weapons, weapons of mass destruction, and other technology advances, the application of international law to space law could not wait until the formal codification of outer space law.<sup>20</sup> Thus, even before the creation of United Nations resolutions and the Outer Space Treaty, legal observers asserted that the general principles of international law were already applicable in regard to States' use and exploration of outer space.<sup>21</sup> In contrast, other legal scholars asserted that only certain "moral norms" of international law were applicable to outer space.<sup>22</sup> These authors argued that "outer space law was a new and distinct area of law that the general principles of in-

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<sup>13</sup> BENKOE ET AL., *supra* note 6, at 147.

<sup>14</sup> *Id.* See also, MCDOUGALL, *supra* note 8, at 178.

<sup>15</sup> MCDOUGALL, *supra* note 8, at 178.

<sup>16</sup> BENKOE ET AL., *supra* note 6, at 147.

<sup>17</sup> GYULA, *supra* note 5, at 130 (citing C. WARD, *Space Law as Way to World Peace*, in LEGAL PROBLEMS *Id.*, at 130 (1961)).

<sup>18</sup> *Id.* at 130 (citing UN Ad Hoc Comm. Rep. III/I.B.7 Legal Problems 1961, p.128).

<sup>19</sup> *Id.* at 130 (referring to GA Res. No. 1962/XVIII).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (recognizing "the overwhelming majority of the authors had advocated even before GA. Res. XVI the validity of the fundamental principles of international law.") See also, MCDOUGALL, *supra* note 8, at 187-88.

<sup>22</sup> GYULA, *supra* note 5, at 130 (quoting, Lipson & Katzenbach, LEGAL PROBLEMS, *supra* note 17, at 858 (point 333)). See also MCDOUGALL, *supra* note 8, at 188.

ternational law could not be automatically comprehended to outer space, although some analogies may prove helpful."<sup>23</sup>

After the codification of outer space law, this debate became moot because the law of outer space, in particular two of the earlier resolutions adopted by the General Assembly of the United Nations and the Outer Space Treaty, established that international law applies to outer space. Resolution 1721 (XVI), the third resolution adopted by the General Assembly specifically provides that, "international law, including the Charter of the United Nations, applies to outer space and celestial bodies."<sup>24</sup> The adoption of this Resolution, should have removed any doubt that legal scholars had about whether outer space was a part of international law. However, if legal scholars had any remaining doubt about the validity of international law as it applies to outer space, their uncertainty were resolved by the General Assembly's adoption of Resolution 1962 (XVII), the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.<sup>25</sup>

The Declaration of Legal Principles specifically states that, "the activities of States in the exploration and use of outer space shall be carried on in accordance with international law, including the Charter of the United Nations..."<sup>26</sup> Similar to the provisions of Resolution 1721 (XVI) and the Declaration of Legal Principles, the Outer Space Treaty also provides that, "State Parties to the Treaty shall carry on activities in the exploration and use of outer ...in accordance with international law."<sup>27</sup>

These resolutions and the Outer Space Treaty clearly establish that outer space law is a part of international law. The most important difference between the two bodies of law is that international law is premised upon the principle of national sov-

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<sup>23</sup> *Id.*

<sup>24</sup> G.A. Res. 1721 (XVI) (Dec. 20, 1961), U.N. GAOR, 16<sup>th</sup> Sess., at 6, (1961), available at <http://www.oosa.unvienna.org/SpaceLaw/gares/index.html> (last visited June 27, 2006).

<sup>25</sup> Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962 (XVII), U.N. GAOR, 18<sup>th</sup> Sess., at 16, (1962) [hereinafter Declaration of Legal Principles], available at <http://www.oosa.unvienna.org/SpaceLaw/gares/index.html>.

<sup>26</sup> *Id.* at ¶ 4.

<sup>27</sup> Outer Space Treaty, *supra* note 7, at art III.

ereignty; whereas, there is no sovereign appropriation of outer space.<sup>28</sup> Despite the absence of sovereignty within outer space, outer space is still a part of international law. Even though sovereignty does not extend to outer space, States control their use and exploration of outer space and are still responsible for ensuring that their space activities comply with international law.<sup>29</sup>

### III. THE LEGAL CONSEQUENCES OF "WAR" AND "THOSE MEASURES SHORT OF WAR" ON THE OPERATION OF TREATIES

This section of the paper consists of two parts that considers the effect of "war" and "those measures short of war" on the operation of treaties.<sup>30</sup> The first part discusses the evolution of the traditional notions of war. Traditionally, a state of war was commenced with a formal declaration.<sup>31</sup> The trend is for States to no longer formally declare war.<sup>32</sup> Rather, they engage in other lesser forms of conflict.<sup>33</sup> The effect of war on the operation of treaties is one of the most important legal consequences that flow from a formal state of war.<sup>34</sup> As such, the second part examines the legal theory and States' practices regarding the effect of "war" and "those measures short of war" on the operation of treaties.

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<sup>28</sup> GYULA, *supra* note 5, at 132.

<sup>29</sup> *Id.* at 133.

<sup>30</sup> The phrase "measures short of war" has various different meanings. However, Professor Layton's definition is the most helpful for the purpose of this paper. Thus, for these purposes, the phrase "measures short of war" includes, "that category of international processes whereby states, in order to settle their national differences, use varying degrees of coercion, ranging from withdrawal of diplomatic relations, retortion or retaliation, and the display of force, to war like acts such as reprisals, blockades, embargoes, suspensions of commercial intercourse and, finally, the extensive use of armed forces without a formal declaration of war." Robert Layton, *The Effect Of Measures Short of War On Treaties*, 30 U. CHI. L. REV. 96, 98 (1963).

<sup>31</sup> Clyde Eagleton, *The Form and Function of the Declaration of War*, 32 AM. J. INT'L. L. 19 (1938).

<sup>32</sup> *Id.* at 20.

<sup>33</sup> *Id.*

<sup>34</sup> John Alan Cohan, *Legal War: When Does it Exist, and When Does It End*, 27 HASTINGS INT'L & COMP. L. REV. 221, 222 (Winter 2004).

### A. *Evolution of the Traditional Notions of War*

Although the term "war" has come to have many meanings, legal scholars recognize the importance in differentiating between "war" as a figure of speech... and "war" as a legal term of art.<sup>35</sup> It is essential to establish whether a state of war exists because certain legal rights and consequences flow from the existence of a formal state of war.<sup>36</sup> Despite the importance of ascertaining whether or not a formal war exists,<sup>37</sup> no binding definition of "war" exists at international law.<sup>38</sup> Consequently, how States make the distinction as to whether a legal state of war exists varies from situation to situation and can be difficult to ascertain.<sup>39</sup> Because of the confusion regarding the definition of "war" a few scholars have attempted to define "war" based upon the practice of States.<sup>40</sup> Even those few scholars that have attempted to define "war" have struggled with the problem of creating a definition that considers all of the intrinsic concerns that has made defining "war" at international law a complex concept.<sup>41</sup>

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<sup>35</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF – DEFENCE* 3 (3rd ed. 2001).

<sup>36</sup> John Alan Cohan, *supra* note 34, at 221-22.

<sup>37</sup> *Id.*

<sup>38</sup> DINSTEIN, *supra* note 35, at 4.

<sup>39</sup> Clyde Eagleton, *The Attempt to Define War*, 15 INT'L CONCILIATION 233, 273 (1933)

<sup>40</sup> *Id.* at 237. See also, DINSTEIN, *supra* note 35, at 4 (recognizing the difficulty in defining "war" as a legal term of art).

<sup>41</sup> Clyde Eagleton, *supra* note 39, at 260 (citing various writers definitions of war),

Hall: "When differences between states reach a point at which both parties resort to force or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant."

Lawrence: "War may be defined as a contest carried on by public force between States, or between States and communities having with regard to the contest the rights of States, the parties to it having the intention to of ending peaceful relations and substituting for them those of hostility with all the legal incidents thereof."

Oppenheim: "War is a contention, which means a violent struggle through the application of armed force. For a war to be in existence, two or more States must actually have their armed forces fighting against each other, although the commencement of war may date back to its declaration or some other unilateral initiative act."

1. The requirements needed to establish a legal state of war

A formal declaration of war creates certain legal consequences even in the absence of the use of force.<sup>42</sup> "A declaration of war is usually a formal proclamation issued on behalf of a State."<sup>43</sup> While a state of war may often occur with a declaration, "war" may also happen without a declaration.<sup>44</sup> In those instances where States engage in hostilities without a formal declaration or deny the existence of a legal state of "war," "[legal scholars] have argued that intent to make "war" must be proven."<sup>45</sup> Intent can be inferred by examining the hostile acts of States.<sup>46</sup> To determine whether the hostile acts satisfy the query as to whether a state of war exists, "one must inquire as to the nature, purpose, range, and such characteristics of these acts."<sup>47</sup> Although an inquiry into a State's acts is necessary, no precise answer exists at international law regarding what acts establish a legal state of war.<sup>48</sup>

2. States are hesitant to engage in a formal declaration of war

A formal declaration of war has not occurred in more than a half of a century.<sup>49</sup> Various reasons explain why States avoid declaring war and admitting that a state of war exists.<sup>50</sup> First, States are reluctant to declare "war" because of the "efforts of the international community to outlaw 'war' as an acceptable means of resolving conflicts among States."<sup>51</sup> Second, it is easier to negotiate a temporary or permanent plan for peaceful rela-

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<sup>42</sup> Eagleton, *The Form and Function of the Declaration of War*, *supra* note 31, at 21 (asserting that the declaration of war creates the legal status war). *See also*, Eagleton, *The Attempt to Define War*, *supra* note 40, at 273 (recognizing that the use of force is not a required characteristic of war).

<sup>43</sup> Eagleton, *The Form and Function of the Declaration of War*, *supra* note 31, at 22.

<sup>44</sup> *Id.* at 21.

<sup>45</sup> Eagleton, *The Attempt to Define War*, *supra* note 40, at 273.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 273-74.

<sup>49</sup> Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L.Q. 283, 283 (1987).

<sup>50</sup> John Alan Cohan, *supra* note 34, at 228.

<sup>51</sup> *Id.*



tions rather than a formal treaty of peace.<sup>52</sup> Last and most importantly for purposes of this paper, States are hesitant to declare war because they do not wish to interrupt the operation of treaty arrangements which may possibly suspend or terminate during a formal state of war.<sup>53</sup> These reasons have all had a substantial impact upon the act of making a declaration of war and raise doubt as to whether States will, as a matter of law, ever formally declare war again.<sup>54</sup>

### 3. International law governs "those measures that fall short of war"

As States began to move away from the practice of formally declaring war, international law governing a State's right to engage in hostilities also evolved. In both the United Nations Charter<sup>55</sup> and the law of armed conflict,<sup>56</sup> the term "armed conflict" or "other forms of lesser conflict" emerged to characterize "those measures that fell short of war".<sup>57</sup> Moreover, the U.N. Charter and the law of armed conflict both specifically provide that these sources of international law are also applicable to "those measures that fall short of war".<sup>58</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Eagleton, *The Form and Function of the Declaration of War*, *supra* note 31, at 19.

<sup>55</sup> U.N. Charter art. 2, para. 4.

<sup>56</sup> Four conventions establish the "law of war" and they are also known collectively as the "law of armed conflict": Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention No. I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention No. II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention No. III.]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention No. IV].

<sup>57</sup> U.N. Charter art. 2, para. 4; Geneva Convention No. IV. at art. 2.

<sup>58</sup> U.N. Charter art. 2, para. 4; Geneva Convention No. IV. at art. 2.

*i. The U.N. Charter*

After World War II, the U.N. Charter was signed on June 26, 1945 and entered into force on October 24, 1945.<sup>59</sup> The U.N. Charter provides that a State may only use force lawfully in individual and collective self-defense.<sup>60</sup> Article 2(4) declares that, "[A]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."<sup>61</sup> Article 2(4) of the Charter is regarded as a binding customary international law.<sup>62</sup> The Charter uses the word "force" instead of "war."<sup>63</sup> The use of the word "force" ensures that the Charter includes hostilities between and among States that "fall short of the technical requirements needed to establish a legal state of war."<sup>64</sup>

Article 51 of the Charter is just as important as Article 2(4) because Article 51 recognizes the distinction between the aggressive use of force and the defensive use of force, which is an inherent right of all States.<sup>65</sup> Article 51 declares that, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations..."<sup>66</sup> Since Article 51 references the use of self-defense only if an armed attack occurs, much debate exists regarding the extent of State's inherent or collective right to self-defense.<sup>67</sup>

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<sup>59</sup> Charter of the United Nations- Introductory Note, <http://www.un.org/aboutun/charter/> (last visited Jun. 28, 2006).

<sup>60</sup> U.N. Charter art. 2, para. 4.

<sup>61</sup> *Id.*

<sup>62</sup> MALCOLM N. SHAW, INTERNATIONAL LAW 544 (2nd ed. 1986).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> U.N. Charter art.2, para art. 51.

<sup>66</sup> *Id.* at art. 51

<sup>67</sup> SHAW, *supra* note 62, at 550. A lot of controversy exists among legal scholars regarding the scope of the inherent right of self-defense; however, this paper only provides a general summary of the different views. For a more in-depth discussion regarding the scope of the inherent rights of self-defense, See generally, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 701, 702 (6th ed. 2003) (discussing the views for and against anticipatory self defense); DINSTEIN, *supra* note 35, at 165-69.

Two schools of thought exist regarding the scope of the right of self defense.<sup>68</sup> Some scholars assert that "Article 51 in conjunction with Article 2(4) specifies the scope and limitations" in which a State can lawfully resort to the use of force.<sup>69</sup> Phrased more precisely, these scholars believe that States may only act in self-defense after another State has waged an armed attack.<sup>70</sup> They are against any notions of anticipatory self-defense.<sup>71</sup>

In contrast, other scholars argue that the phrase within Article 51 specifying, "that nothing in the present Charter shall impair the inherent right of ..... self-defense," is an indication that there exists at customary international law a right to self defense besides the specific Article 51 provisions, "which refer only to situations where an armed attack has occurred."<sup>72</sup> Regardless of the disagreement about whether States have the authority to engage in anticipatory self-defense, it is indisputable that the U.N. Charter governs the right of States to engage in "war" or "those measures short of war".<sup>73</sup>

### *ii. Law of war or armed conflict*

As with the U.N. Charter, the law of war, also referred to as the law of armed conflict, also recognizes a distinction between a legal state of "war" and "those measures that fall short of war and is applicable in both types of conflict."<sup>74</sup> The law of war consists of two regimes: "The Hague Regulations that govern the means and the methods of warfare and the Geneva conventions that govern the protection of victims of war."<sup>75</sup> The four Geneva Conventions of 1949 apply during international armed conflict<sup>76</sup> and are considered customary binding international law.<sup>77</sup> Ac-

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<sup>68</sup> SHAW, *supra* note 62, at 550.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> U. N. Charter at art. 2(4).

<sup>74</sup> *Id.* at art. 2(4); 1949 Geneva Convention No. IV. at art. 2.

<sup>75</sup> WALTER GARY SHARP, SR. CYBERSPACE AND THE USE OF FORCE 55 (1999).

<sup>76</sup> ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 195-96 (3<sup>rd</sup> ed. 2000).

<sup>77</sup> *Id.*

cording to the law of war, "an international conflict exists upon the declaration of war, the occurrence of 'any other armed conflict' between two or more contracting parties even if the state of war is not recognized by them, and in all cases of partial or total occupation even if met with no armed resistance."<sup>78</sup> Similar to the U.N. Charter, the law of war uses the words "any other armed conflict" in addition to "the declaration of war," as such the international source of law governs both war and "those measures short of war."<sup>79</sup>

*B. Effect of "War" and "Those Measures Short of War" on the Operation of Treaties*

The legal consequence of "war" on existing treaties between belligerents and third States is "one of the unsettled problems of the law."<sup>80</sup> As the concepts of war evolve and States move away from the traditional notions of commencing a formal state of "war," the concern also arises regarding the effect of "those measures short of war" on the operation of treaties.<sup>81</sup> International law does not resolve the problem regarding the effect of war on treaties.<sup>82</sup> The Vienna Convention on Treaties<sup>83</sup> focuses on the invalidity, termination, and suspension of treaties.<sup>84</sup> Article 74 provides that "provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty... from the outbreak of hostilities between states."<sup>85</sup> Since international law does not address the effect of "war" and "those measures short of war" on the operation of treaties, the problem must be resolved based on today's legal theory and States' practices.<sup>86</sup>

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<sup>78</sup> 1949 Geneva Convention No. IV at art 2.

<sup>79</sup> ROBERTS & GUELFF, *supra* note 76, at 2.

<sup>80</sup> *Techt v. Hughes*, 229 N.Y. 222, 240 (N.Y. 1920).

<sup>81</sup> J. Delbruck, *War, Effect on Treaties*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 310 (Bernhardt, ed., 1982).

<sup>82</sup> *Id.* at 310, 312.

<sup>83</sup> Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 25 I.L.M. 543 (May 1986) [hereinafter *Convention on Treaties*].

<sup>84</sup> Delbruck, *supra* note 81, at 312.

<sup>85</sup> *Convention on Treaties*, *supra* note 83, at 582-584.

<sup>86</sup> Delbruck, *supra* note 81, at 312.

### 1. Legal theories regarding the effect of war on the operation of treaties

Currently three legal theories exist that attempt to explain and determine the effect of war on the operation of treaties.<sup>87</sup> The oldest theory is the "theory of treaty termination by war".<sup>88</sup> According to this theory, a state of war does not sever all legal relations but all treaties are considered *ipso facto* terminated.<sup>89</sup> This theory is based on the assumption that the success of international treaties depends on the ability of States to maintain working relations with belligerents.<sup>90</sup> Since States cannot maintain peacefully legal relations during hostilities, the outbreak of war terminates all treaty relations.<sup>91</sup> Two exceptions to this theory are recognized; (1) treaties which regulate the relations between belligerents and third party neutral states, (2) treaties that are not related to the cause of war between belligerents.<sup>92</sup>

In contrast to the treaty termination theory, the second theory, the no treaty termination theory, denies any disruptive effect of war on the operation of treaties.<sup>93</sup> This theory is based on the presumption of preserving international order by enforcing treaties between belligerents in times of war.<sup>94</sup> However, this theory recognizes an exception for treaties that are incompatible with a state of war.<sup>95</sup>

Lastly, the third theory, a combination of the first two theories, recognizes the difficulty of trying to ascertain a precise legal rule regarding the effect of war on the operation of treaties.<sup>96</sup> Instead, the purpose of this theory is to minimize the disruptive effects of war without ignoring the fact that some treaties, in

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<sup>87</sup> *Id.* at 311.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* See also, Layton, *supra* note 30, at 98.

<sup>95</sup> Delbruck, *supra* note 81, at 311.

<sup>96</sup> *Id.*

particular those that require the existence of a social and political relations, are incompatible with a state of war.<sup>97</sup>

2. State practices regarding the effect of war on the operation of treaties

Although no precise legal rule exists regarding the effect of war on the operation of treaties, scholars recognize three categories of treaties: (i) treaties not affected by war and therefore continuing in force in time of war; (ii) treaties remaining in force but whose execution is suspended or terminated during war; and (iii) treaties terminated by war.<sup>98</sup>

*i. Treaties not affected by war*

Treaties not affected by war continue in force.<sup>99</sup> Under this category, two major subgroups exist.<sup>100</sup> The first includes those treaties that are related to the conduct of war itself.<sup>101</sup> Treaties that are created with the intention of remaining in force during war continue in operation or become effective between or among belligerents.<sup>102</sup> The Hague Convention IV on the Laws and Customs of Law Warfare of 1907 is an example of a treaty related to the conduct of war.<sup>103</sup>

The second group of treaties that remain in force during war include treaties that establish a permanent condition in which belligerents alone are parties and<sup>104</sup> "law making" treaties among a multitude of states that establish a rule or system of rules that govern the conduct of States in a particular area of

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<sup>97</sup> *Id.* at 311-12. *See also*, *Techt*, 229 N.Y. at 240, 241.

<sup>98</sup> LORD MCNAIR, *THE LAW OF TREATIES* 697 (2nd ed. 1986). *See also*, Delbruck, *supra* note 81, at 312-13.

<sup>99</sup> *See also*, Delbruck, *supra* note 81, at 312.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE, VOLUME II DISPUTES, WAR AND NEUTRALITY* 303-04 (H. Lauterpacht ed. 303-04) (1952).

international law.<sup>105</sup> Bilateral treaties between two belligerents are more similar to a contractual agreement in which the parties agree to certain obligations.<sup>106</sup> The States' obligations within the treaty do not establish law beyond the States-Parties to the bilateral agreement because it does not provide a system of rules that guides the actions of a multitude of States.<sup>107</sup> In contrast, treaties that establish law do create a rule or system of rules that governs the conduct of States in a particular area of international law.<sup>108</sup> Therefore, belligerents and third-party States are considered bound by multilateral treaties that make law even in a time of war.<sup>109</sup> Illustrations of law making treaties include treaties that establish international organizations, general principles, or provide for demilitarization or neutralization of zones or international waterways.<sup>110</sup>

The principle that treaties which establish a permanent condition or law should not be terminated or suspended during war is based on the view "that the outbreak of war should not affect the legal [relations] created in the interest of the international community unless it is inevitable."<sup>111</sup> However, treaties that establish a permanent condition or law continue in force but their execution is suspended during "war" if the condition extends within the boundaries of the belligerent's territory.<sup>112</sup>

## *ii. Treaties suspended by war*

Scholars agree that some treaties, in particular, those treaties not intended to set up a permanent condition, such as treaties of commerce, may suspend during war without actually being terminated.<sup>113</sup> This is mainly relevant to multilateral trea-

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<sup>105</sup> MCNAIR, *supra* note 98, at 723. See also, OPPENHEIM, *supra* note 104, at 304; DELBRUCK, *supra* note 81, at 312; *Gospel v. New Haven* (1823) 8 Wheat. (U.S) 464, 5 L. ed. 662.

<sup>106</sup> MCNAIR, *supra* note 98, at 724.

<sup>107</sup> *Id.* at 723. See also, Delbruck, *supra* note 81, at 312.

<sup>108</sup> MCNAIR, *supra* note 98, at 723.

<sup>109</sup> *Id.* See also, OPPENHEIM, *supra* note 104, at 304.

<sup>110</sup> Delbruck, *supra* note 81, at 312. See also, ED., LOUIS HENKIN, RICHARD PUGH, ET AL., INTERNATIONAL LAW CASES AND MATERIALS 77 (2nd ed. 1987).

<sup>111</sup> Delbruck, *supra* note 81, at 312.

<sup>112</sup> *Id.*

<sup>113</sup> OPPENHEIM, *supra* note 104, at 304.

ties but is also possible for bilateral treaties in which States are unable to comply with treaty obligations while engaged in a state of war.<sup>114</sup> The suspension is only applicable to belligerents, the treaty remains in operation for neutral third party States.<sup>115</sup>

*iii. Treaties terminated by war*

Treaties that are not included in the two categories of treaties that continue in force or that are suspended are normally considered to be terminated during a "war" and "those measures short of war."<sup>116</sup> Treaties that are terminated during war include those that require the existence of political and social relations and that have not been created for the purpose of setting up a permanent condition.<sup>117</sup> These treaties are inconsistent with a state of war.<sup>118</sup> Examples of such treaties are peace treaties, treaties of friendship or commerce, treaties of alliance or non aggression.<sup>119</sup> However, in certain instances States Parties may intend that such treaties do not terminate completely but only suspend through the duration of the war.<sup>120</sup>

3. Effect of "those measures short of war" on the operation of treaties

Legal consequences resulting from "measures short of war" are proportionately less than those caused by a legal state of war.<sup>121</sup> Legal scholars generally accept that "measures short of war" will never terminate a treaty but may suspend its execution between or among the belligerents if the treaty obligations are incompatible with a state of "war."<sup>122</sup> Therefore, if a treaty is suspended during "war" between or among the belligerents then the treaty will also probably suspend during "those measures

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<sup>114</sup> Delbruck, *supra* note 81, at 312, 313.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> OPPENHEIM, *supra* note 104, at 303. *See also*, DELBRUCK, *supra* note 81, at 313.

<sup>118</sup> *Id.*

<sup>119</sup> Delbruck, *supra* note 81, at 313.

<sup>120</sup> *Id.*

<sup>121</sup> Layton, *supra* note 30, at 118.

<sup>122</sup> *Id.*



short of war.”<sup>123</sup> “After cessation of hostilities, the treaty, or its obligations, would once more be binding either automatically, or upon announced revival” by State Parties.<sup>124</sup>

#### IV. THE STATUS OF THE OUTER SPACE TREATY DURING WAR AND “THOSE MEASURES SHORT OF WAR”

Scholars have yet to address the effect, if any, of the outbreak of war on the Outer Space Treaty. Similar to the concern regarding the status of the Outer Space Treaty during war, “there is considerable controversy [as to] whether the state of war has any effect on treaties [in general] and, if so, which type of treaties are affected.”<sup>125</sup> Despite the controversy, scholars agree that the effect of the outbreak of war on treaties varies depending upon the different categories of treaties.<sup>126</sup> Of all the different categories of treaties, legal scholars accept that law-making treaties survive the outbreak of war.<sup>127</sup> It is beyond dispute that the Outer Space Treaty is a law-making treaty.<sup>128</sup> Therefore, because of its law-making function, the Outer Space Treaty is not *ipso facto* terminated by the outbreak of war and it remains in force.

Despite the Outer Space Treaty’s status as a law-making treaty, legal scholars may potentially argue that the outbreak of war suspends the execution of the obligations it contains between or among belligerents because the Outer Space Treaty’s provisions are incompatible with a state of war.<sup>129</sup> However, this argument is without merit. As the traditional notions of “war”

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> INGRID DETTER, *THE LAW OF WAR* 346 (2nd ed. 2000).

<sup>126</sup> MCNAIR, *supra* note 98, at 703.

<sup>127</sup> *Id.* at 703, 723. See also OPPENHEIM, *supra* note 104, at 304.

<sup>128</sup> GEORGE S. ROBINSON & HAROLD M. WHITE, JR., *ENVOYS OF MANKIND: A DECLARATION OF FIRST PRINCIPLES FOR THE GOVERNANCE OF SPACE SOCIETIES* 181 (1986) See also, Sergio Marchisio, *The Evolutionary Stages of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS)*, 31 J. SPACE L. 219, 226 (2005).

<sup>129</sup> At least one scholar already asserts that the principle of noninterference incorporated throughout the Outer Space Treaty may possibly be inconsistent with the state of war. PHILLIP A. JOHNSON, U.S. DEPT OF DEFENSE, *AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS* 28 (1999).

evolve and the legal significance of "war" lessens, a general presumption has emerged that the outbreak of "war" does not terminate or suspend treaty relations.<sup>130</sup> Moreover, the obligations contained in the Outer Space Treaty do not impose additional restrictions on the belligerents that are not already imposed by the law of war. Since the general consensus is to maintain international order and belligerents can comply with the obligations contained within the Outer Space Treaty while some of its signatories are engaged in hostilities, the execution of the treaty obligations are not suspended between or among belligerents during "war" or "those measures short of war".

*A. The Outer Space Treaty is not Ipso Facto Terminated by the Outbreak of "War" or "those Measures Short of War"*

Because of the Outer Space Treaty's law-making status, it is not *ipso facto* terminated by the outbreak of hostilities. The Outer Space Treaty is "one of the outstanding law-making treaties of contemporary international law as a whole."<sup>131</sup> The Outer Space Treaty is a quasi-constitution which was created to establish a set of fundamental principles to guide States' use and exploration of outer space.<sup>132</sup> Although the Outer Space Treaty's law making status is beyond controversy,<sup>133</sup> three reasons further support the fact that it establishes space law. First, the Outer Space Treaty and the Declaration of Legal Principles were promulgated during the "law making phase" of the Legal Subcommittee of the United Nations Committee on Peaceful Uses of Outer Space (UNCOPUOS).<sup>134</sup> Second, of all the resolutions regarding activities in space, the Declaration of Legal Principles is the only resolution that is legally binding.<sup>135</sup> Since

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<sup>130</sup> MCNAIR, *supra* note 98, at 697. See also, OPPENHEIM, *supra* note 104, at 302-03. Delbruck, *supra* note 81, at 310, 311; *Techt*, 229 N.Y. at 240; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 243 (2000); Institut de Droit International, Resolution, Effects of Armed Conflict on Treaties (Session of Helsinki-1985), [http://www.idi-il.org/idiE/resolutionsE/1985\\_hel\\_03\\_en.PDF](http://www.idi-il.org/idiE/resolutionsE/1985_hel_03_en.PDF) (last visited Jun. 29, 2006).

<sup>131</sup> Marchisio, *supra* note 128, at 226.

<sup>132</sup> ROBINSON & WHITE, *supra* note 128, at 181.

<sup>133</sup> Marchisio, *supra* note 128, at 226.

<sup>134</sup> *Id.* at 225.

<sup>135</sup> *Id.* at 225, 226.

the Outer Space Treaty incorporates and recalls the Declaration of Legal Principles,<sup>136</sup> the Outer Space Treaty establishes law.<sup>137</sup> Finally, States on-going acceptance of, and adherence to the treaty obligations since its inception illustrates consensus in the international community that the Outer Space Treaty establishes law.

1. The Declaration of Legal Principles and the Outer Space Treaty were promulgated during the UNCOPUOS Legal Subcommittee's "law-making phase"

In response to the rapid exploration and use of outer space, the General Assembly of the United Nations established the ad hoc UNCOPUOS "to strength[en] international cooperation among spacefaring Nations with their national space programmes..."<sup>138</sup> However, the General Assembly later made UNCOPUOS a permanent body.<sup>139</sup> UNCOPUOS consists of two subcommittees: the Scientific and Technical Subcommittee (STS) and the Legal Subcommittee (LSC).<sup>140</sup> The LSC is responsible for assessing the legal issues and problems that arise from the use and exploration of outer space.<sup>141</sup> The accomplishments of the LSC in the area of international space law occurred in three evolutionary phases.<sup>142</sup> The first phase is the 'law-making era' and it is the most important for purposes of this paper and began with the inception of the LSC and ended around 1980.<sup>143</sup> "The second phase is the 'soft law phase,' and was signed by the adoption of the five sets of principles and ended in the middle half of the 1990s."<sup>144</sup> The goal of the third and current phase is to "broaden acceptance of the U.N. space treaties and to assess their implications."<sup>145</sup>

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<sup>136</sup> Declaration of Legal Principles, *supra* note 25.

<sup>137</sup> Outer Space Treaty, *supra* note 1, at preamble.

<sup>138</sup> Marchisio, *supra* note 128, at 221.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 223.

<sup>141</sup> *Id.* 224.

<sup>142</sup> *Id.* 224.

<sup>143</sup> *Id.* at 224.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

Both the Declaration of Legal Principles and the Outer Space Treaty were promulgated during the LSC's "law-making phase."<sup>146</sup> At the beginning of the LSC's law-making phase, "no binding instrument was in force" regulating the use and exploration of outer space.<sup>147</sup> As a result of the fear of war extending into space and to "avoid the development of practices dictated exclusively by national interests" the General Assembly felt necessary to provide some guidance regarding the use and exploration of outer space.<sup>148</sup>

The LSC's promulgation, and General Assembly's adoption of, the Declaration of Legal Principles was the "first step towards the legal regime for outer space."<sup>149</sup> After the adoption of the Declaration of Legal Principles, the General Assembly later realized the importance of a multilateral treaty to clarify and to develop the law of outer space.<sup>150</sup> The LSC was the most appropriate forum to resolve the complex legal issues facing the outer space community.<sup>151</sup> Therefore, the LSC also promulgated the Outer Space Treaty which was later adopted by the General Assembly.<sup>152</sup> Although there were no binding international space law instruments at the beginning of the LSC's 'law-making phase,' the General Assembly desired to regulate the use and exploration of outer space.<sup>153</sup> Therefore, the LSC promulgated the Declaration of Legal Principles and the Outer Space Treaty before its law making phase ended in the 1970s.<sup>154</sup>

2. The Declaration of Legal Principles is legally binding, thus the incorporation of its principles and specific reference in the Outer Space Treaty establishes space law

Of the approximately 72 resolutions regarding space adopted by the General Assembly of the United Nations since

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<sup>146</sup> *Id.* at 225.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 226.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 225-26, 231.

1958,<sup>155</sup> the Declaration of Legal Principles is the one unambiguous lawmaking declaration on space.<sup>156</sup> The Declaration of Legal Principles was promulgated by the LSC of UNCOPUOS, which was established as a subsidiary organ of the United Nations.<sup>157</sup> Unlike other General Assembly resolutions, those specifically addressed to subsidiary organs, such as UNCOPUOS, are legally binding.<sup>158</sup> Since the Declaration of Legal Principles was specifically addressed to UNCOPUOS, a subsidiary organ of the general assembly,<sup>159</sup> the resolution is legally binding and establishes law. In fact, it is generally accepted and undisputed that the Declaration of Legal Principles is not only legally binding but its principles are considered customary international law.<sup>160</sup> This view is premised on the belief that States have consistently adhered to the general principles set forth in the Declaration of Legal Principles.<sup>161</sup>

The Declaration of Legal Principles was the first binding international space law instrument and the principles they contain are the basis of the Outer Space Treaty. The incorporation of the legally binding principles within the Outer Space Treaty illustrates the State Parties intent to establish the treaty as a law-making treaty. Recalling the Declaration of Legal Principles in the Preamble of the Outer Space Treaty is additional evidence that the State Parties intended for the Outer Space Treaty to establish space law.

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<sup>155</sup> U.N. Office of Outer Space Affairs, *Index of Online General Assembly Resolutions Relating to Outer Space*, <http://www.oosa.unvienna.org/SpaceLaw/gares/index.html> (last visited Jun. 28, 2006).

<sup>156</sup> Marchisio, *supra* note 128, at 225-26.

<sup>157</sup> *Id.* at 223.

<sup>158</sup> Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 4 (1976).

<sup>159</sup> Marchisio, *supra* note 128, at 223.

<sup>160</sup> *Id.* at 225-26. See also, Bin Cheng, *United Nations Resolutions on Outer Space: Instant International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965).

<sup>161</sup> *Id.*

3. The practice of States to adhere to the obligations in the Declaration of Legal Principles and the Outer Space Treaty confirms States' acceptance of the legal regime they contain

The examination of the legal validity of a resolution or declaration adopted by the General Assembly calls for the consideration of States responses before and after its adoption.<sup>162</sup> "The most important evidentiary value of... [the legal authority of a resolution] is not what is said at the international forum but what is done in the "real world."<sup>163</sup> The General Assembly's unanimous approval is not the most persuasive evidence of the legal validity of a resolution.<sup>164</sup> "A resolution may be so contrary to real world practice that its adoption may be regarded as a pious hope rather than as evidence of an accepted legal obligation."<sup>165</sup> Therefore, the "real world practice" must be examined regarding the Outer Space Treaty and the legal regime it contains.

The Outer Space Treaty embodies law that originated in a General Assembly declaration and the consideration of "real world" evidence regarding the acceptance of that law is necessary and relevant. As of January 1, 2006, a 65% majority of all of the world's Nations have ratified or signed the Outer Space Treaty.<sup>166</sup> Some important observers are even of the opinion that because of the large number of States that have accepted the Outer Space Treaty, it is "generally regarded as constituting binding customary international law, even for non-parties..."<sup>167</sup> Moreover, treaties that "provide for neutralization or demilitari-

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<sup>162</sup> LOUIS HENKIN ET AL., *supra* note 110, at 107.

<sup>163</sup> Oscar Schachter, *Towards A Theory of International Obligation*, 8 VA. J. INT'L L. 300, 311-19 (1968), in *THE EFFECTIVENESS OF INTERNATIONAL DECISION* 9-31 (S. Schwebel ed. 1971).

<sup>164</sup> LOUIS HENKIN ET AL., *supra* note 110, at 107.

<sup>165</sup> *Id.*

<sup>166</sup> There are 192 member States of the United Nations. United Nations, List of Member States, <http://www.un.org/Overview/unmember.html> (last visited Jun. 30, 2006). Of those, 98 have ratified the Outer Space Treaty and 27 have signed it. United Nations Office for Outer Space Affairs, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, <http://www.unoosa.org/oosa/SpaceLaw/outerspt.html> (last visited Jun. 30, 2006).

<sup>167</sup> PHILLIP A. JOHNSON ET AL., *supra* note 129, at 27.

sation of a territory or area, such as ...outer space"<sup>168</sup> "have been held to create a status or regime valid *erga omnes* (for all the world)."<sup>169</sup> To date, no State Party has been known to breach the treaty obligations. Together, these facts and informed opinion provide evidence that clearly demonstrates that the practice of States has established a consensus that the Outer Space Treaty establishes a binding legal regime.

*B. The Outer Space Treaty does not Suspend During "War" or "those Measures Short of War"*

Two persuasive reasons explain why the outbreak of "war" or "those measures short of war" does not suspend the treaty obligations contained in the Outer Space Treaty. First, the modern theory regarding the legal effect of war on treaties, establishes a general presumption that war does *not ipso facto* terminate or suspend treaty obligations.<sup>170</sup> Moreover, as a result of the effort to maintain international order it is expected that there will be fewer factual circumstances in which belligerents are unable to comply with treaty obligations while engaging in hostilities.<sup>171</sup> In order to continue to build and foster diplomatic relations between State Parties there is even more of a greater desire to preserve treaty relations during hostilities. In fact, during hostilities State Parties most need treaty obligations to maintain international stability. If the general presumption is that treaty obligations are preserved and that they continue in force during hostilities, then the execution of the treaty obligations contained in the Outer Space Treaty do not suspend during "war" or "those measures short of war". Secondly, the treaty obligations contained in the Outer Space Treaty do not suspend because they are not incompatible with a state of war. Belligerents can comply with the treaty obligations while engaging in

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<sup>168</sup> AUST, *supra* note 130, at 208.

<sup>169</sup> *Id.* at 208 (citing MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* 24-7 (1997)).

<sup>170</sup> MCNAIR, *supra* note 98, at 697. See also, OPPENHEIM, *supra* note 104, at 302-03. Delbruck, *supra* note 81, at 310; *Techt*, 229 N.Y. at 240; AUST, *supra* note 130, at 243; Institut De Droit International, Resolution entitled the Effects of Armed Conflict on Treaties (Session of Helsinki-1985).

<sup>171</sup> AUST, *supra* note 130, at 243.

hostilities because they do not impose additional obligations other than those already established by the law of war.

1. There is an emerging presumption that treaties remain in force during "war" or "those measures short of war"

Scholars have long realized that the outbreak of war does not *ipso facto* terminate or suspend treaty relations.<sup>172</sup> Nevertheless, a general consensus exists that States may suspend treaty obligations if belligerents are unable to comply with them.<sup>173</sup> As the traditional notions of "war" evolve, and States move away from formally declaring "war" to engaging in conflicts characterized as "measures short of war", scholars recognize fewer instances in which belligerents may potentially assert that the treaty obligations are incompatible with a state of war.<sup>174</sup> This argument is based on the presumption that the legal significance of a formal of state of war is no longer as important as perceived in past years.<sup>175</sup>

Modern scholars have begun to realize that few legal consequences arise from a formal declaration of war. Scholars have adopted this view based upon States' practice. Over the years, States have begun to realize the importance of maintaining and preserving international order. This is evident by the fact that States no longer formally declare a state of war. Before the evolution of the traditional notions of war, the formal declaration of war triggered certain legal consequences such as the termination of diplomatic relations. To avoid this legal consequence, States began to engage in lesser forms of conflict which at the time were perceived to have a less dramatic effect on diplomatic relations.

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<sup>172</sup> MCNAIR, *supra* note 98, at 697. See also, OPPENHEIM, *supra* note 109, at 302-03. Delbruck, *supra* note 81, at 310; *Techt*, 229 N.Y. at 240; AUST, *supra* note 130, at 243; Institut de Droit International, Resolution entitled the Effects of Armed Conflict on Treaties (Session of Helsinki-1985).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* See also, Greenwood, *supra* note 49, at 297, 303, 304.

<sup>175</sup> *Id.*



Considering States' practice many scholars<sup>176</sup> and the world renowned Institut de Droit International,<sup>177</sup> has adopted the view that the outbreak of war does not *ipso facto* terminate treaty obligations nor does it suspend them.<sup>178</sup> The Institut does recognize an exception to the general rule of preserving treaty obligations, in those instances of self defense which are in accordance with the U.N charter. Applying the modern trend to the issue of whether or not the outbreak of "war" or "those measures short of war" terminates or suspends the Outer Space Treaty, the most logical inference is that the treaty obligations continue in force during hostilities. In fact, there have been two "wars" in which space assets were used, the 1991 Persian Gulf War and the 2003 War in Iraq and the Outer Space Treaty was not suspended during either of them.

2. The Outer Space Treaty does not impose additional obligations on belligerents other than those already imposed by the law of war

The outbreak of "war" or "those measures short of war" does not suspend the execution of the obligations contained in the Outer Space Treaty between or among belligerents because both the Outer Space Treaty and the law of war declare that belligerents may not interfere with the rights of neutral States. Article

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<sup>176</sup> MCNAIR, *supra* note 98, at 697. See also, OPPENHEIM, *supra* note 104, at 302-03. Delbruck, *supra* note 81, at 310; *Techt*, 229 N.Y. at 240; AUST, *supra* note 130, at 243; Institut de Droit International, Resolution entitled the Effects of Armed Conflict on Treaties (Session of Helsinki-1985).

<sup>177</sup> The Institut de Droit International is committed to the study and development of international law. "A non-official body, the Institut de Droit International, established in 1873, is composed of about 120 members and associate members elected by the Institut on the basis of individual merit and published works. Its resolutions setting forth principles and rules of existing law and, on occasion, proposed rules, have often been cited by tribunals, states and writers." LORI F. DAMROACH, LOUIS HENKIN, RICHARD PUCH, ET AL., INTERNATIONAL LAW AND CASE MATERIALS 141 (4th ed. 2001). See also Institut de Droit International, *History*, [http://www.idi-iiil.org/idiE/navig\\_history.html](http://www.idi-iiil.org/idiE/navig_history.html) (last visited Jun. 30, 2006).

<sup>178</sup> MCNAIR, *supra* note 98, at 697. See also, OPPENHEIM, *supra* note 104, at 302-03. Delbruck, *supra* note 81, at 310; *Techt*, 229 N.Y. at 240; AUST, *supra* note 130, at 243; Institut de Droit International, Resolution entitled the Effects of Armed Conflict on Treaties (Session of Helsinki-1985).

I of the Outer Space Treaty states, "that outer space shall be free for exploration and use by all States without discrimination of any kind."<sup>179</sup> This provision gives all States, including neutral States, the freedom to use and explore outer space without interference from any other State, including belligerents. Similar to the principle of noninterference, the law of war through the Hague Convention of 1907 also protects the rights of non-belligerents.<sup>180</sup> According to the principle of neutrality, "non-belligerents are entitled to have their territory and doings respected and unaffected by [hostilities]."<sup>181</sup>

Both noninterference in the Outer Space Treaty and neutrality in the law of war are, in essence, the same: they are both concerned with protecting the peaceful activities—"use" and "doings"—in an area or region by non-belligerents. Therefore, even if belligerents want to suspend the execution of the obligations in the Outer Space Treaty, they are still obligated to comply with the principle of neutrality under the law of war. And, because the Outer Space Treaty does not impose additional obligations on belligerents other than those already established by the law of war, its obligations are not suspended by "war" or "those measures short of war"

## V. CONCLUSION

The outbreak of "war" or "those measures short of war" does not *ipso facto* terminate or suspend the execution of the Outer Space Treaty. To avoid the legal consequences that flow from a formal state of war, States no longer declare war. The evolution of the traditional notions of "war" has completely changed the beliefs of legal scholars regarding the effect of "war" or "those measures short of war" on the operation of treaties. States rec-

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<sup>179</sup> Outer Space Treaty, *supra* note 1, at art I.

<sup>180</sup> ROBERTS & GUELFF, *supra* note 76, at 86.

<sup>181</sup> LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 258 (1993). See also, Georgios C. Petrochilos, *The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality*, 31 VAND. J. TRANSNAT'L L. 575 (1998) (arguing that "state practice has established that the laws of war and neutrality are now conditioned on the existence of armed conflict rather than official declarations of war."); DETTER, *supra* note 125, at 346 (arguing that the law of war and neutrality are activated by armed conflict instead of a formal declaration of war).

ognize the importance of preserving and maintaining international legal order, so they are reluctant to terminate or cancel treaty obligations during hostilities.