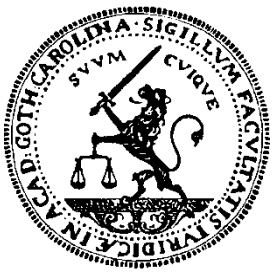

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The Law of Neutrality-
Obstruction or Completion to the System of Collective Security?

LAGF03 Rättsvetenskaplig uppsats

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Summary (Swedish)

Neutralitetskonceptet växte fram under en tid då konflikter mellan länder fortfarande var en regional angelägenhet. Idag har kollektiva säkerhetssystemet i FN-stadgan konverterat dessa konflikter till en global angelägenhet.

Syftet med uppsatsen är att undersöka korrelationen mellan neutralitetslagstiftningen och FN-stadgan och hur detta påverkar neutrala stater inom FN. Frågeställningen är i vilken utsträckning neutralitet är kompatibelt med kollektiva säkerhetssystemet inom FN. Svaret är ämnat att klargöra huruvida neutrala medlemsstater intar en särskild roll inom FN och, om så är fallet, vad denna roll innebär.

De metoder som har använts är en traditionell rättsdogmatisk metod gällande rättsutredningen av de separata artiklarna och juridiska systemen, en komparativ metod gällande jämförelsen mellan neutralitetslagstiftningen och FN-stadgan samt en historisk metod för att belysa bakgrunden till frågeställningen.

Min slutsats är att neutralitetskonceptet är kompatibelt med FN-stadgan, men endast gällande permanent neutrala stater. Dessa intar en särskild roll inom FN som undantar dem från skyldigheter att assistera angripna stater samt delta i icke-militära sanktioner. Medlemsstater som för en neutralitetspolitik, t.ex. Sverige, kan tvingas överge sin neutralitet för att bistå angripna stater samt delta i icke-militära sanktioner. Icke-permanent neutralitet är följaktligen ej kompatibel med kollektiva säkerhetssystemet.

Summary (English)

The concept of neutrality emerged at a time when conflicts between states were still regional matters. Today the system of collective security within the UN Charter has converted these conflicts into a global issue.

The purpose of this essay is to examine the correlation between the law of neutrality and the Charter of the United Nations and how this affects the neutral member states of the United Nations. The question I will try to answer in this essay is to what extent a state's neutrality is compatible with the concept of collective security within the United Nations. The answer will clarify if neutral states hold a special position within the UN, and if so, what this position entails.

The methods that have been used are a legal dogmatic method regarding the analysis of separate articles and legal systems, a comparative method regarding the comparison of the law of neutrality and the UN Charter and a historical method for the background to the question at issue.

My conclusion is that the law of neutrality is compatible with the Charter of the United Nations, but only regarding permanent neutral states. These hold a special position within the United Nations that renders them exempt from obligations under the UN Charter that would jeopardise their status as permanent neutral states. Member states, pursuing a policy of neutrality, e.g. Sweden, can be forced to abandon their position to assist a victim state or to partake in non-military sanctions. Consequently, non-permanent neutrality is not compatible with the system of collective security.

Table of Contents

Summary (Swedish abstract)
Summary (English)
List of Abbreviations 1
Introduction 2
Chapter 1. Orientation 5

Chapter 2. Neutrality 8
2.1 General 8
2.2 The Obligations of Neutral States: Abstention and Impartiality 8
2.3 War or Armed Conflict 9
2.4 The Rights of Neutral States 10
2.5 Collective Purpose of Neutrality and Permanent Neutrality 10
2.6 Influence of Neutral States on the World Stage 11
2.7 Summary 11

Chapter 3. The Charter of the United Nations and the Security Council 12
3.1 General Prohibition of the Use of Force 12
3.2 The First Exception: Self-defence 12
3.3 The Second Exception: Collective Security 13
3.4 Communitarian Goals 14
3.5 Summary 14

Chapter 4. Correlation Between the Systems 15
4.1 General 15
4.2 No Position from the UN 15
4.3 Non-military Sanctions 16
4.4 Authorisation of Force 16
4.5 Communitarian Goals 17
4.6 Summary 17

Chapter 5. The Doctrinal View 18
5.1 General 18
5.2 Neutrality is Obsolete 18
5.3 Coexisting Systems 18
5.4 Survival due to Flaws in the UN Charter 19
5.5 Summary 19

Chapter 6. Conclusion and Analysis 20
6.1 General Conclusions 20
6.2 The Permissive and the Restrictive View 21
6.2.1 The Permissive View 21
6.2.2 The Restrictive View 21
6.2.3 Which View is the Prevailing One? 22
6.3 Conclusion in Regard to the Question at Issue 22

Bibliography 24

List of Abbreviations

UN	United Nations
UN Charter	The Charter of the United Nations (1945)
FN	Förenta nationerna (Swedish)
ICCR	International Review of the Red Cross
Hague V	The Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907)

Introduction

General

There has been some controversy regarding the rights and duties of neutral states, such as Switzerland and Sweden, which are members of the United Nations, under the Charter of the United Nations. The concept of neutrality and the system of collective security are two legal systems with different backgrounds, although both can be said to have the same objective; to promote peace and security in the world.

Purpose

The general purpose of this essay is, to shed light on the correlation between the law of neutrality and the Charter of the United Nations and how this affects the neutral member states of the United Nations.

Question at Issue

The question I will try to answer in this essay is to what extent a state's neutrality is compatible with the concept of collective security within the United Nations; or in other words: do neutral states hold a special position within the UN, and if so, what does this position entail?

Demarcation

Regarding the Law of Neutrality, I have limited myself to the general rules in the legal system. The special rules, e.g. neutrality at sea and aerial neutrality, do not fall within the scope of this paper. Concerning the Charter of the United Nations, the main part of the relevant rules can be found in Chapter XII of the Charter. Apart from those rules, art. 2(4), 25, 55, 56 and 103 are relevant as well. The remaining regulation of the Charter will not be examined, however.

The comparison between the law of neutrality and the UN Charter will touch several controversial definitions and ambiguous articles. These will only be examined in-depth to the extent that it clarifies the correlation between the legal systems. The essay is limited to the comparison between the UN Charter and the Law of Neutrality, other organisations influencing neutral states such as, e.g. the influence of the European Union on Sweden and to some extent Switzerland, are not included.

Method

I have used the traditional legal dogmatic method. By first identifying the problem and the legal area, then looking at the legal sources and finally reaching a conclusion by analysing what has been discovered and applying it to the particular issue. I have also used a comparative method in order to investigate the correlation between the law of neutrality and the Charter of the United Nations. In the introduction and some parts of the treatise a historical method will try to explain the evolution of the legal systems.

Research situation

The issue at hand concerns only a few states within the United Nations. Therefore, there is no excessive interest in the subject. The question of how the systems function in relation to each other is as old as the concept of collective security. Already at the beginning of the 20th century, Switzerland negotiated with the League of Nations regarding its neutrality status. The debate increased again after the Second World War when a modified concept of collective security was introduced within the United Nations. After the end of the Cold War the discussions died out again but have been reheated by single events like Switzerland's admission to the United Nations in 2002.[1]

Material

I have used primary as well as secondary sources. The primary sources mainly consist of the Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and the Charter of the United Nations. Due to the special character of international law and the large amount of terms not yet clearly defined, secondary sources take up a considerate amount of space in this article.

In connection with the law of neutrality, I have relied on P. Wrange, *Impartial or Uninvolved? The Anatomy of 20th Century Doctrine on the Law of Neutrality*. Wrange summarises the standpoint of different legal authors during the 20th century which has given some very useful perspectives to my essay.

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[1] Wrange, Pål, *Impartial or uninvolved? The Anatomy of 20th Century Doctrine on the Law of Neutrality,* Stockholm 2007 (hereinafter: Wrange 2007), p. 31, 231, 581.

Concerning the Charter of the United Nations and the Collective Security concept, B. Simma (ed.), *Charta der Vereinten Nationen - Kommentar* has been a frequently used reference book for the general understanding of the functions of the Charter and a springboard for more in-depth research.

Disposition

The essay focuses on two legal systems, the law of neutrality and the system of collective security under the UN Charter. I will start with giving a brief introduction on the history of these systems and give a background to my question formulation in Chapter 1. Thereupon, in Chapter 2 I shall examine the basics of the law of neutrality and how it has been adapted due to changes in other legal areas. In Chapter 3 I will study the functions of the use of force and collective security within the Charter of the United Nations. Chapter 4 will examine how these systems correlate and cover the general view on the effects of the Charter of the United Nations on the Law of Neutrality for members of the United Nations. In Chapter 5, the different doctrinal views on the question at issue will be presented. Finally, in Chapter 6, I will try to analyse the correlation, its effects on neutral states and answer my initial problem formulation.

1. Orientation

The basic idea of the concept of neutrality is for a state not directly involved in a conflict to stay uninvolved. By declaring the position as a neutral state officially, each of the conflicting parties know that neither they nor the opposite side can get an advantage by winning over the neutral state to their side. Neutrality can be very effective, not only in a humanitarian perspective, but also economical. Wars often drain a belligerents economy, consequently, the neutral state gains an advantage after the conflict, at least over the loosing side.

The concept of neutrality probably dates back to the formation of the first tribal territories. Though the first preserved reference is thought to be from an account of the Peloponnesian War around 400 B.C by Thucydides.[2] At this time there was a fierce rivalry between the two city states Athens and Sparta. In order to intimidate Sparta, Athens conquered the strategically unimportant island of Melos off the Greek coast. The Melians argued they were neither friend nor enemy, de facto neutral, and that the invasion of Melos would sway the other uninvolved states to join the side of the Spartans. On the other hand, the Athenians thought that the conquest would deter the other states from joining the opposite side out of fear, consequently they invaded Melos anyway.[3] Since then, a position as neutral in a conflict has been taken many times. Often, when the neutral state lacked the military power to back up its claim, the neutrality was disregarded, as the claim of the Melians was.[4] However, over time, with an increasing amount of state practise and cooperation between nations, a law of neutrality was formed and some states have managed to uphold their neutrality for a long period of time.

Switzerland holds an exceptional position in the context of the neutrality of states. The state was officially recognised at the Peace of Westphalia in 1648, although it had in fact been acting independently within the ”Eidgenossenschaft” since 1291.[5] Only 26 years later, the official neutrality of the state was proclaimed.[6] After an interruption in the policy of neutrality during the

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[2] Wrange 2007, *p. 31.*

[3] Bauslaugh, Robert A., *The Concept of Neutrality in Classical Greece*, Berkeley, Los Angeles, Oxford 1991, p. 25.

[4] E.g. Germany’s conquest of Belgium in WWI, (ed.) Ahlgren, Lena, Bonniers Lexikon no. 13, Stockholm 1996 s. 271.

[5] Dürenmatt, Peter, *Schweizer Geschichte Band 1* (hereinafter: Dürenmatt 1976), Zürich 1976, p. 368.

[6] Dürenmatt 1976, p. 395.

Napoleonic Wars, Switzerland received the international acknowledgement of the status as a permanent neutral state at the Peace of Versailles in 1815 and has been officially neutral ever since.[7]

Sweden has, as Switzerland, maintained their neutrality since the end of the Napoleonic Wars in 1815, when Sweden forced Denmark to give up Norway.[8] However, the Swedish neutrality is not officially recognised. Instead, Sweden is pursuing a neutrality policy, which is to be separated from permanent neutrality because there are vital differences between the two, as we shall see further on.

The neutrality of these countries has been tested several times over the years, most notoriously during the Second World War. Sweden supplied Nazi Germany with iron ore crucial for the war industry and allowed Germany to send troops through Sweden into Finland.[9] Switzerland also permitted transports; between Italy and Germany.[10] Furthermore, the Swiss had extensive economic transactions with both the Allies as well as the Axis powers.[11] Consequently, both states acted quite ”un-neutral” during this period, why and how they justified these actions is not within the scope of this writing.

Up until the 20th century there was no serious striving for international peace. Historically, the Pax Romana within the Roman Empire, the Mongolian realm under the Khans and several other nations managed to create periods of regional peace, sometimes stretching over continents, but never on a global scale. The concept of international peace had already been aired with the assembling of the League of Nations, and after two world wars within 40 years, the stage was set for a new world order.

The United Nations was formed at the end of World War II. The League of Nations, which did not manage to prevent the war and was considered outdated, was dissolved and the UN was put in its place.[12] The Charter of the United Nations came into force in 1945. Mirroring the time of its

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[7] Dürenmatt 1976, p. 557.

[8] Andersson, Ingvar, *Sveriges historia* (hereinafter: Andersson 1975), Stockholm 1975, p. 332.

[9] Andersson 1975, p. 457-460

[10] von Castelmur, Linus et. al., *Switzerland, National Socialism and the Second World War* (hereinafter: von Castelmur et. al. 2002), Zürich 2002 p. 226

[11] von Castelmur et. al. 2002, p. 503-507

[12] Wrange 2007, p. 529.

creation, the UN Charter is very much a reaction to the conditions before and during the war. Therefore, its prime objective is to maintain peace and security.[13] The previous methods of using a system of intricate alliances as a way of balancing power was meant to be absolved but the concept of collective security was kept and developed.[14] The UN Charter contained an complete prohibition of force, with the only exceptions being the right of self-defence and collective actions authorised by the Security Council.[15]

To sum up, neutrality is a remnant from an age prior to the collective security system, where war did not need to be justified or authorised. Neutrality can be said to be a way of self-preservation, while collective security is, as it sounds, targeting a community of nations. If and how the concept of neutrality can survive in correlation with the collective security system is what I will try to find out in this article.

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[13] Wrange 2007, p. 529; art. 1 the Charter of the United Nations.

[14] Wrange 2007, p. 530.

[15] Wrange 2007, p. 533.

2. Neutrality

2.1 General

Throughout history, states have generally had two choices of action in regard to a conflict between states, to get involved on one side or to avoid the conflict.[16] If the state was not in the area of conflict and otherwise unaffected by the conflict the state could stay out of the conflict by simply not taking any action. However, if the state had interests affected by the conflict, e.g. a trade route leading through one of the states partaking in the conflict, or if it was approached by one of those states, the situation often required an official standpoint on the issue.

The purpose of declaring neutrality depends on from which side you choose to see the declaration. From the point of view of the neutral state, the purpose is to be as unaffected as possible of the ongoing conflict. From the perspective of the belligerents the purpose of provoking such a declaration is to ensure that the opposite side does not get any support from the neutral state either. To ensure that these purposes were fulfilled certain obligations and rights have developed over time.

2.2 The Obligations of Neutral States: Abstention and Impartiality

The two classical duties of a state claiming neutrality are to remain uninvolved (abstention) and to treat the conflicting parties equally (impartiality). [17] These are to a certain extent two ways of defining the same obligation. If the neutral state is not taking part in the conflict it is hard for it to be partial towards one of the belligerents. On the other hand, if a state treats the parties of the conflict equally it can still be involved in the conflict, e.g. by supplying military equipment, which is why there has been a greater interest for the latter term.[18] The relation between these two terms is unclear. It has been argued that neutrality consists only of abstention. However, as we shall see in 2.4, the Hague Conventions allow trade with the conflicting parties and this view is held by several authors.[19] In 4.4, we shall discover that the UN Charter has restricted the possibilities to trade with aggressors and consequently changed the balance between impartiality and abstention in favour of the latter.

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[16] Wrange 2007, p. 136.

[17] Wrange 2007, p. 183.

[18] Wrange 2007, s. 184.

[19] Wrange 2007, s. 999-1000.

2.3 War or Armed Conflict

The framework of the Law of Neutrality was developed between the 17th and 19th century.[20] At the time there were only two different interstate relations, war or peace.[21] At present, declarations of war are seldom made and the line between war and peace has been blurred by a second form of conflict, the armed conflict.[22]

There are, legally speaking, two kinds of armed conflicts, international and non-international armed conflicts.[23] In general terms, an international armed conflict is a conflict between two states. A non-international armed conflict is a conflict within one state.[24] However, non-international armed conflicts can be internationalised, e.g. in an uprising when a foreign states gets involved in the conflict on the side of the rebels.[25] The Tadić test is the most commonly used method to separate international and non-international armed conflicts, using parameters of intensity and organisation in dubious cases.[26] There has been points of criticism towards this method of separating international and non-international armed conflicts due to its susceptibility to manipulation by the state or states involved in the conflict.[27]

The reason for separating international and non-international armed conflicts, in a neutrality context, is that the Law of Neutrality would not apply to non-international armed conflicts. In these conflicts, the principle of non-intervention applies between states.[28]

The question that arises is if the law of neutrality is applicable only to war in its traditional meaning or also in armed conflicts. There is no certain answer to that question at this time.[29]

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[20] (ed.) Crawford, James, Byers, Michael, *International Law Association Reports of Conferences* Vol. 67 (hereinafter: (ed.) Crawford, Byers 1996), London 1996, p. 368.

[21] Wrange 2007, p. 182.

[22] (ed.) Crawford, Byers 1996, p. 369.

[23] Linderfalk, Ulf, *Folkrätten i ett nötskal* (hereinafter: Linderfalk 2012), Lund 2012, p. 218.

[24] Evans, Malcolm, *International Law*, 3rd edition (hereinafter: Evans 2011), New York 2011, p. 821.

[25] Evans 2011, p. 820-821.

[26] Linderfalk 2012 p. 218-219.

[27] Stewart, James G., *Towards a Single Definition of Armed Conflict in International Humanitarian Law: a Critique of Internationalised Armed Conflict*, International Review of the Red Cross (IRRC) vol. 85, n. 850, Cambridge University Press 2003, p. 349.

[28] (ed.) Crawford, Byers 1996, p. 369.

[29] (ed.) Crawford, Byers 1996, p. 370; Wrange, Pål, Impartial or uninvolved? p. 998

2.4 The Rights of Neutral States

The first general principle put forth in the Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land 1907 (henceforth: Hague V), is the inviolability of the territory of neutral powers, art. 1 Hague V. No party of the conflict may enter the aerial, naval or land territory of a neutral state in order to gain an advantage. The permission from the neutral state is irrelevant. In fact, the neutral state is under an obligation to make sure that such activities do not take place within its territory, art 5 Hague V.

The actions forbidden on neutral ground include movement of troops and supplies, but also establishment of communication stations and troop recruitment, art. 2-4 Hague V. The neutral state is not under an obligation to cease its trade with the belligerents, not even of ammunition and arms, as long as the restriction or non-restriction applies equally to all parties of the conflict, art. 7-9 Hague V. However, the right to trade with belligerents has been altered by the correlation with the UN Charter, as we shall se in Chapter 4.5.

If a neutral state takes action to defend its territory in response to violations of the neutrality of the state, these actions are not to be regarded as hostile acts, art. 10 Hague V.

2.5 Collective Purpose of Neutrality and Permanent Neutrality

Neutrality is often viewed as a self-serving method of staying out of a conflict. However, at least permanent neutrality can be seen as a principal standpoint for global peace and security. Permanent neutrals take on themselves to be neutral in conflicts to come, for a limited period of time or indefinitely and against certain states or all states.[30] For permanent neutral states the obligations under the law of neutrality also govern the peacetime relations with other states. This entails avoiding to start conflicts and actively take measures to prevent to be entangled in a conflict.[31]

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[30] Bindschedler, Rudolf, *Die Neutralität im modernen Völkerrecht* (hereinafter: Bindschedler 1956), Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Kohlhammer 1956, p. 3.

[31] Bindschedler 1956, p. 4.

Permanent neutrals also provide a buffer zone where conflicting parties can meet under the good offices or mediation of the neutral state.[32] It can therefore be said, that permanent neutrals actively act towards global peace and security and not only their own survival.

2.6 Influence of Neutral States on the World Stage

Historically, neutral states are smaller states wedged in between larger conflicting powers. Switzerland was situated between Germany, France, Austria et. al. (former Habsburg empire) and Italy. Sweden experienced a similar situation during the Cold War, stuck between the United States and Russia (former Soviet Union).

The evolution of the European Union to comprise a common foreign policy has meant that the neutrality of states like Sweden is again in doubt. To what extent this is true falls outside the scope of this essay.

Generally, the few states that retain their status of neutrality play a relatively small role in the international community. One should not forget that the obligation of abstention also means that the neutral state is more or less obliged not to influence international issues.

2.7 Summary

The purpose of a declaration of neutrality is to stay uninvolved in a conflict. The two main obligations of a neutral state is to maintain abstention and impartiality to the conflicting parties. Declarations of war are no longer common state practise, a controversial question is weather the law of neutrality can be applied on armed conflicts as well. The territory of the neutral state is inviolable and it has the right to maintain its trade with the conflicting parties and other states. At least permanent neutrality also has a communitarian objective. Under the obligation to avoid conflicts these states are de facto promoting peace beyond their own borders. The obligation of abstention has the effect that neutral states do not exercise extensive influence in the international community.

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[32] Wrange 2007, p. 1034.

3 The Charter of the United Nations and the Security Council

3.1 General Prohibition of the Use of Force

As previously mentioned, the Charter of the United Nations contains a total prohibition of the use of force, art. 2(4) the UN Charter. However, the vague terms ”the threat or use of force against the territorial integrity or political independence” and ”manner inconsistent with the Purposes of the United Nations” imply that the use of force which is aimed neither on the territorial integrity nor on the political independence or in a manner inconsistent with the purposes of the UN is perfectly legal, art. 2(4) e contrario. This argument was used by, among others, NATO to legitimise the bombings on Serbia.[33] With this said, the view of the majority is still that art. 2(4) in the UN Charter is absolute apart from the exceptions in the Charter itself.[34]

The prohibition concerns only the use of force, economic and political threats do not fall within the scope of the article.[35] The definition of force comprises indirect force, such as state A allowing state B to fire at state C from state A’s territory.[36]

3.2 The First Exception: Self-defence

Under art. 51 of the Charter of the United Nations, the prohibition on the use of force does not restrict the right of self-defence if an armed attack occurs. The right is individual but also collective, a state may ask for assistance if two conditions are met; the state subject to the attack must declare itself exposed to an armed attack and expressly ask for the assistance of a foreign state.[37] The use of force for self-defence can only be used until the Security Council takes action and has to be necessary, immediate and proportional to the threat.[38]

The english version of the UN Charter art. 51 states that self-defence arises only ”if an armed attack occurs”. On the other hand, the french version ”dans le cas où un Membre des Nations Unies est

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[33] Dixon, Martin, *Textbook on International Law* (hereinafter: Dixon 2007), sixth edition, Oxford 2007, p. 313.

[34] Dixon 2007, p. 315.

[35] Linderfalk 2012, p. 203.

[36] (ed.) Simma, Bruno, *Charta der Vereinten Nationen, Kommentar* (hereinafter: (ed.) Simma 1991), München 1991, p. 74-75

[37] International Court of Justice, Nicaragua vs. United States of America, June 27 1986, p. 84-85

[38] Linderfalk 2012, p. 210-211.

l'objet d'une agression armée" indicates that it suffices if the state is the *target* of an armed attack.[39] Furthermore, customary law existing prior to the Charter also allowed preventive self-defence as well as self-defence against propaganda, economic hostilities and in order to protect national interests.[40] The defining of self-defence as an "inherent right" can be interpreted as if the wider customary law that existed before the UN Charter came into force still is applicable, wether this is the current legal position or not remains controversial.[41]

3.3 The Second Exception: Collective Security

The member states have the right to use force in self-defence "until the Security Council has taken measures necessary to restore peace and security", art. 51 of the Charter of the United Nations. The Security Council identifies threats to the international peace and decides "what measures shall be taken [...] to maintain or restore international peace and security", art. 39 of the UN Charter. These threats are not only international conflicts but also civil wars and other internal conflicts that affect regions beyond the border of the conflicting nation.[42]

Against identified threats under art. 39 of the Charter, the Security Council may order member states to deploy non-military sanctions, art. 41 the UN Charter. These decisions are binding[43] and stretch from limited sanctions by a few states to complete disruption of economic diplomatic relations.[44]

If non-military sanctions render no success or are deemed useless from the beginning due to the seriousness of the conflict, the Security Council may take military action under art. 42 the UN Charter. This is where the writers of the Charter made a serious miscalculation. The plan was for the Security Council to have a military force at its own disposal, with troops supplied from different member states in accordance with special agreements between the UN and the supplying states, art. 43 of the UN Charter. Not a single agreement was struck, which is why the Security Council at

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[39] Linderfalk 2012, p. 208.

[40] Dixon 2007, p. 316.

[41] Dixon 2007, p. 315-317.

[42] Dixon 2007, p. 329.

[43] Art. 25, 103 the UN Charter.

[44] Dixon 2007, p. 329.

present relies on authorising member states to use force against a malefactor. These authorisations *permit* the use of force, and are therefore not binding on member states.[45]

3.4 Communitarian Goals

The UN shall work towards creating conditions for peace and security, art. 55 of the UN Charter. All members bind themselves to work towards creating these conditions, art. 56 of the UN Charter. These articles are very general in their descriptions of the duties of the member states. There is an obligation for member states to work, individually and collectively, towards the principal goals set forth in art. 55 of the UN Charter. Obstruction with these principles is consequently illegal.[46]

3.5 Summary

The prohibition of force in art. 2(4) of the UN Charter has only two exceptions; self-defence and collective security. It is unclear if the frame of self-defence is defined by the older customary law or if a new narrower interpretation is now in force. Self-defence can be collective or individual. Collective self-defence requires the victim state to declare itself under attack and an express appeal for assistance to the foreign state. The Security Council identifies threats to the international peace. It can deploy non-military sanctions, which are binding to member states. If non-military sanctions do not have any effect, the Security Council may authorise member states to use force against the malefactor, however, these authorisations are not binding. The main purpose of the UN is to work towards international peace and security.

[45] Dixon 2007, p. 330-331

[46] (ed.) Simma 1991, p. 738

4 Correlation between the systems

4.1 General

If a conflict arises between an obligation of the UN Charter and an obligation following ”any other international agreement”, the obligation under the UN Charter takes precedence, art. 103 the UN Charter. When Switzerland for a second time was going to vote about entering the UN, the Swiss people feared that their neutrality was at stake (this was one of the cornerstones in the debate in the first vote in 1986 as well). To ensure that this was not the fact, the UN declared the permanent neutrality of a member state to be compatible with its obligations under the system of collective security.[47] The exact interaction between the legal systems will be studied in this chapter.

4.2 No Position from the UN

If the UN has not taken a position in an ongoing conflict, each state is free to exercise its sovereignty in regard to the conflicting parties. As long as the Security Council has not taken any decision there are no direct obligations, art. 25 the UN Charter e contrario.

Individual self-defence under the UN Charter is, naturally, entirely optional. The law of neutrality does not regard self-defence as a hostile act, the two systems seem to be concurrent on this point. As mentioned above in Chapter 3.2**,** collective self-defence does not depend on a decision of the Security Council. The state subject to an armed attack must declare itself under attack and expressly ask the intervening state for support in the conflict in order to make the intervention legitimate.[48] This request is not binding in a way that the foreign state is forced to intervene. Consequently, a neutral state can turn down the request of a state under attack *until* the Security Council has made a decision.

This means that permanent neutrals as well as all other members of the UN, are free to declare themselves neutral in the conflict in situations where one can not be sure which state is the malefactor in the conflict.

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[47] Loeffel, Urs, *Swiss Neutrality and Collective Security: the League of Nations and the United Nations*, California 2010, p. 92, 96

[48] International Court of Justice, Nicaragua vs. United States of America, June 27 1986, p. 84-85

4.3 Non-military Sanctions

As mentioned in chapter 3.3, non-military sanctions are binding to all member states. However, the Security Council may exempt certain states from their obligations, art. 48 the UN Charter. There has been some controversy surrounding the position of permanent neutrals in this context. It can be argued that by accepting permanently neutral states into the UN with knowledge of their neutrality a duty arises not to force these countries to abandon their neutrality. If that is the case, Switzerland (and Austria) would be automatically exempt from the decisions of the Security Council. The application of exemption goes beyond permanent neutral states, and has been used by the UN to ”appoint” neutral states in a particular conflict, e.g. Sweden in the Korean War in the early 1950s.[49]

Even if the Security Council chooses not make an exemption, a state can remain neutral in a conflict were it is under obligation to deploy sanctions, due to the fact that all forms of non-military sanctions do not constitute a breach of the law of neutrality. The exact definition of which sanctions do and do not constitute a breach of the law of neutrality does not fall within the scope of this writing.

To sum up, one can argue that the UN has made a permanent exemption for the permanently neutral member states. Other states on the other hand, are bound to partake in the sanctions unless the Security Council makes an explicit exemption for them.

4.4 Authorisation of Force

The decision to use military force by the Security Council is not binding on member states, see 3.3 above. If a state wishes to remain neutral in a conflict where the Security Council has authorised it to use force under art. 42, the state can simply choose not to adhere this authorisation.

Theoretically speaking, permanent as well as all member states can remain neutral although an authorisation of the use of force has been granted to them by the security council. On the other hand, ordinary member states might have greater pressure on them to act in order to fulfil the communitarian goals.

[49] Wrange 2007, p. 731.

4.5 Communitarian Goals

Member states are always bound to take action towards the communitarian goals of the United Nations, art. 55-56 of the UN Charter. If the Security Council has not decided who is ”right or wrong” of the conflicting parties it can be precarious for states outside the conflict to identify which state is the aggressor. But if it is clear which state is the victim, non-permanent neutral states have a duty to assist this state.[50]

Trading arms and supplies with an attacking state, which was perfectly legal under the original law of neutrality, art. 7-9 Hague V, is in conflict with art. 55-56 of the UN Charter. All member states bind themselves to work towards realising the purposes presented in art. 55 of the Charter. By supplying arms and contributing to the belligerents military power a neutral state will therefore be regarded as braking against the Charter by undermining the common goals of the UN. These rules can, consequently, no longer be regarded as part of the law of neutrality for member states.[51]

4.6 Summary

Art. 103 of the UN Charter gives the obligations under the Charter precedence over obligations under other international agreements. In a conflict where there is not a clear aggressor and the Security Council has not yet taken action, all states are free to declare themselves neutral in the conflict. If it is clear which state is the aggressor, member states are under an obligation to assist the victim state. Permanent neutral states, on the other hand, can not be forced out of their obligation to remain neutral in these situations, as we shall see in Chapter 6.2.

Orders to partake in non-military sanctions are binding, unless the Security Council makes explicit exemptions. However, it can be argued that permanent neutral states are automatically exempt from participating in these sanctions. Authorisation of force is not binding on member states. Consequently, all states are free to remain neutral even though the Security Council has authorised the use of force.

The communitarian goals are in conflict with the right of free trade for neutral states with belligerents. The law of neutrality has therefore been altered and no longer comprises this right.

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[50] Wrange 2007, p. 1006.

[51] Wrange 2007, p. 1005.

5. The Doctrinal View

5.1 General

The first concrete treatment of the subject of neutrality was made during the 18th century. After 200 years the outlines of the debate were set at the turn of the 19th century.[52] Regarding the debate itself there are several positions taken by different authors over the years.

5.2 Neutrality is Obsolete

On one side there are those who claim neutrality to be extinct. The cornerstone of their argument is that the new world order of collective security does not allow for some states to stay outside the system as neutral states. As the collective security system of the United Nations was put into force the old system of neutrality and the League of Nations was replaced, and consequently obsolete.

Nicolas Politis saw the concept of neutrality as the predecessor of collective security. Both strived towards abolishing war and the collective security system had now replaced the law of neutrality. Politis states that neutrality no longer has a place in international law. The reason why the law of neutrality is still applied depends on lingering habits of states. He compares this with the light of extinct stars still reaching us today.[53]

5.3 Coexisting Systems

On the other side, some authors regard the systems of collective security and neutrality as two different concepts, not to be applied in the same situations or pointing in the same direction. If they are not applied in the same situations or point in the same direction, there can be no conflict between the systems.[54]

George Politakis finds that the core of neutrality and the UN Charter point in the same direction. By restricting the law of neutrality, most importantly by prohibiting the arms trade with belligerents, the law of neutrality takes a subdued place by the side of the Charter.[55]

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[52] Wrange 2007, *p. 241.*

[53] Wrange 2007, p. 355.

[54] Wrange 2007, p. 925

[55] Wrange 2007, *p. 923-925.*

5.4 Survival due to Flaws in the UN Charter

Somewhere in between, a group of authors take the position that neutrality was meant to become obsolete with the new concept of collective security.[56] However, since the system was not fully realised and there are loopholes that have been used by the member states, the Law of Neutrality has survived, but in a different form.

Karl Zemanek finds that the collective security system, theoretically, does not tolerate neutrality.[57] However, the inability of the Security Council to take action, e.g. in conflicts where one of the members is involved has meant that the law of neutrality has survived.[58]

5.5 Summary

There are three main doctrinal views on the issue. On one side, there are those who claim that neutrality is obsolete. Neutrality is part of an old system that was replaced by the UN Charter. On the other side, some argue that the law of neutrality and the UN Charter are two different legal systems applied in different situations. Somewhere in between, others take the position that neutrality has survived, although it was meant to become obsolete, because of the flaws in the UN Charter.

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[56] Maurice Torelli, Wrange, Pål, *Impartial or uninvolved?* p. 989; Christine Chinkin, Wrange, Pål, *Impartial or uninvolved?* p. 953; Dietrich Schindler, Wrange, Pål, *Impartial or uninvolved?* p. 892; Rudolf Bindschedler, *Die Neutralität im modernen Völkerrecht*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 1956, p. 11

[57] Zemanek, Karl, *Neutral Austria in the United Nations,* International Organisation, Vol. 15, Issue 03, p. 410

[58] Zemanek, Karl, *Neutral Austria in the United Nations, p.411*

6. Conclusion and Analysis

6.1 General Conclusions

This far, we have seen that the concept of neutrality has been an evolving part of international law for a long time. The core of neutrality is built around impartiality and abstention. The law of neutrality presents certain rights and obligations for neutrals and belligerents in a conflict. Permanent neutral states bind themselves to be neutral in future conflicts, their neutrality has therefore extended to be applicable in peacetime as well.

The UN Charter was formed as a reaction to two global wars within 40 years and the large alliances of states that enabled these, of which neutrality also was a part. The main purpose of the UN Charter is to maintain global peace and security. The Charter contains a general prohibition of force. The only exceptions from the prohibition are individual or collective self defence and actions authorised by the Security Council.

There is no direct legal obligation to assist a state under attack by an aggressor before the Security Council has taken action. On the other hand, the obligation to act according to the communitarian goals can force non-permanent neutral states to aid a victim state if it is clear which state is the aggressor. Non-military sanctions are binding on all member states, if the Security Council does not exempt certain states or only orders a limited number of states to apply the sanctions. However, it can be argued that the UN has made a permanent exemption for permanent neutral states on this point, by accepting their admission with the knowledge of their position as permanent neutrals. Authorisation of force by the Security Council is not binding on member states.

Three main doctrinal views can be identified. On one side are those who claim that the system of collective security has superseded the old system of power balance including the law of neutrality. The law of neutrality is therefore obsolete. Another view is that the collective security system and the law of neutrality do not interact at all. They are two different legal systems that are applied in different situations. Finally, a group of authors in between argue that the law of neutrality was meant to become obsolete with the introduction of the collective security system. However, the flaws of the new system and the fact that it was not fully realised has meant that the law of neutrality survived.

6.2 The Permissive and the Restrictive View

Wether the law of neutrality is compatible with the system of collective security or not depends on how you choose to interpret the legal rules.

6.2.1 The Permissive View

With a permissive (pro-neutral) view you will find that there is no duty for permanent neutrals to assist a victim state against an aggressor. For other states an obligation to assist may arise only in cases where it is clear which state is the aggressor.

The UN has accepted that permanent neutrals are exempt from partaking in non-military sanctions that would otherwise be binding on member states, because they had knowledge of the position of these countries (Switzerland and Austria) when accepting their applications to the UN.

The authorisation of force is not binding on member states, as a result of the UN Charter not being fully realised.

The communitarian goals laid forth in art. 55-56 are binding. However, the articles do not state specific actions to be taken, Consequently, each state should contribute and work towards the communitarian goals after their own ability. Permanently neutral states can retain their status, because their obligations emanate from their status as permanently neutral.

6.2.2 The Restrictive View

On the other hand, with a restrictive (anti-neutral) view, the rules can be interpreted differently. The communitarian obligations bind all states to take action against an aggressor. Your position as a permanent neutral does not matter, because, like an ordinary agreement, you have accepted the binding provisions of the UN Charter by applying for a membership in the UN. Art. 103 states that this ”agreement” has precedence over other international agreements of the member state, including neutrality.

The knowledge of the UN of your position as a permanent neutral prior to the admission is irrelevant, the obligations under the UN Charter have precedence over all other obligations emanating from international agreements, again art. 103 of the UN Charter. This means that there is no automatic exemption for permanent neutral states in non-military sanctions. Only when the

Security Council expressly exempts a state from partaking in the sanctions, it is possible to avoid getting involved.

Under the permissive view, the law of neutrality is compatible with the UN Charter, at least for permanent neutral states. Non-permanent neutral states will have to abandon their status as a neutral state if an obligation to assist a victim state arises or if non-military sanctions are issued and these sanctions constitute a breach of the law of neutrality.

Under the restrictive view, the law of neutrality is not compatible with the UN Charter, not even for permanent neutral states. The only procedure within the UN Charter that leaves room for neutrality is the authorisation of force.

6.2.3 Which view is the prevailing one?

The states claiming to be neutral will of course argue for the permissive view. The other UN members in general and the members of the Security Council in particular would argue for the restrictive view, on the grounds that the concept of neutrality obstructs the system of collective security. However, the number of states claiming to be neutral is not substantial, especially not the number of permanent neutral states. Consequently, they do not hold influence crucial to the system of collective security. As long as the positive aspects of neutrality, such as the possibility of good offices and mediation on neutral ground, outweigh the negative ones the international community will probably tolerate this relatively small contingent of deviationists.

6.3 Conclusion in Regard to the Question at Issue

Finally, I will try to answer the question at issue: to what extent a state's neutrality is compatible with the concept of collective security within the United Nations; or in other words: do neutral states hold a special position within the UN, and if so, what does this position entail.

In the light of the permissive view, which should be the prevailing view at this moment, the concept of neutrality can be regarded as compatible with the UN Charter. This statement is, however, only entirely true regarding permanent neutral states, such as Switzerland and Austria. For non-permanent neutral states non-military sanctions and communitarian obligations of collective self-defence can force them to abandon their position as neutral states.

Permanent neutral states hold a special position within the UN, they are neither under an obligation to assist a victim state nor take part in non-military sanctions as well as the use of force authorised by the Security Council. States pursuing a policy of neutrality, such as Sweden, do not, legally speaking, hold a special position within the UN. However, Sweden has managed to, at least on the surface, maintain its status as a neutral state although it has taken part in UN operations, such as the intervention in Libya in 2011. But for how much longer the law of neutrality, a remnant of the past, can survive in the new world order of collective security, remains to be seen.

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